

P.E.R.C. NO. 2024-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-2023-045

JERSEY CITY PSOA,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the City's request for a restraint of binding arbitration of the PSOA's grievance. The grievance asserts that the City violated the parties' collective negotiations agreement when failing to request a promotional examination from the Civil Service Commission (CSC) for the rank of Lieutenant. The Commission finds that the City's decision not to request a promotional examination from the CSC is not mandatorily negotiable as such a requirement would significantly interfere with its governmental policymaking powers in deciding whether to initiate a promotional process. The Commission further finds that the PSOA's allegations that the City failed to abide by the CSC's rules and regulations regarding promotional procedures should be raised with the CSC.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Arthur R. Thibault, of counsel; Christopher M. Kurek, on the brief)

For the Respondent, Sciarra & Catrambone, LLC, attorneys (Christopher A. Gray, of counsel)

DECISION

On June 26, 2023, the City of Jersey City (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Jersey City Police Superior Officers Association (PSOA). The grievance alleges that the City violated Article 40, Sections 1 and 2 of the parties' collective negotiations agreement (CNA) by failing to request a promotional examination from the Civil Service Commission (CSC) for the rank of Lieutenant.

The City filed briefs, exhibits, and the certifications of the Deputy Director of the Division of Human Resources and its counsel. The PSOA filed a brief, exhibits, and the

certifications of its President and its counsel.^{1/} These facts appear.

The PSOA represents all superior officers employed by the City's police department from the rank of sergeant through inspectors. Pursuant to the parties' Memorandum of Agreement (MOA), the City and PSOA are parties to a CNA with a term of January 1, 2020 through December 31, 2024. The grievance procedure ends in binding arbitration.

Article 40 of the parties' CNA, entitled "Department of Personnel Classification and Promotion," provides as follows:

Section 1. Promotional examinations for the next highest rank above Sergeant will be requested to the Department of Personnel every three (3) years.

Section 2. A promotional list to the next highest rank will be maintained at all times.

The PSOA's President certifies that by letter dated April 11, 2023, the PSOA requested that the City request from the CSC a promotional examination for eligible sergeants to test in 2023 for the rank of lieutenant. He further certifies that Lieutenant G.V. was promoted to lieutenant on April 21, 2023. As a result of this promotion, the promotional list for the rank of Lieutenant had been completely exhausted. Due to the promotional

^{1/} On August 3, 2023, the Jersey City PSOA filed a supplemental brief without seeking leave from the Commission. As such, the brief was not made part of the record. N.J.A.C. 19:13-3.6(d).

list being exhausted, the PSOA again requested, in its April 26 letter, that the City initiate a promotional examination from the CSC, to which the City did not respond.

The PSOA President certifies that he had multiple discussions with the police department's administration and they continually indicated that they wanted a promotional list. He also certifies that, on two occasions, the City's Police Director stated that the promotional examination would take place and that at no time did the City indicate that they had too many lieutenants and would not be seeking promotions. He further certifies that the PSOA has not been advised of any rationale, including financial reasons or any police department restructuring, for why there has not been promotions.

The PSOA President certifies that the City has 66 police lieutenants, and of those 66, 19 are eligible for immediate retirement. He certifies that the CSC indicates that there are currently 44 provisional appointments since November 2022. There are an additional 8 officers who will be eligible for retirement within the next 12 months. There are 80 lieutenants allocated under Jersey City Ordinance §3-85; thus, there are currently 14 lieutenant vacancies. The PSOA President certifies that there are seventy three sergeants eligible to take the promotional examination for lieutenant.

The PSOA President certifies that, on May 4, the PSOA

submitted another letter to the City seeking that a promotional examination be ordered. On May 12, 22, and 30 the PSOA submitted Step A, B, and C grievances, respectively, which requested that the City order a promotional examination pursuant to the CNA. He further certifies that the City did not provide a response to any of the grievances.

The PSOA President certifies that, on July 5, the CSC posted a promotional announcement which the City provided to PSOA members; however, it was subsequently withdrawn. He further certifies that the CSC reposted the promotional announcement on July 14 through approximately July 20. He also certifies that during the brief period the promotional announcement was active approximately 64 sergeants applied for the examination. The PSOA President certifies that 53 of those sergeants took promotional review courses and cleared their summer schedules to prepare for the examination.

On June 13, the PSOA filed a Request for Submission of a Panel of Arbitrators with the Commission.^{2/} This petition

2/ On June 21, 2023, the PSOA also filed an Unfair Practice Charge, docketed as CO-2023-214, based on the same underlying facts. Along with charge, the PSOA filed an Order to Show Cause and request for Interim Relief with the Commission seeking an order compelling the City to request a promotional examination from CSC for the rank of lieutenant. On June 23, 2023, the Director of Unfair Practices denied the PSOA's request for interim relief. On June 26, the Deputy Director of Unfair Practices dismissed the PSOA's UPC, pursuant to N.J.A.C. 19:14-1.5(d), because the PSOA
(continued...)

ensued.

In a scope of negotiations determination, the Commission's jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978) states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State

2/ (...continued)
failed to correct deficiencies in its filing.

Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See *Middletown Tp.*, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), *aff'd*, NJPER Supp.2d 130 (¶111 App. Div. 1983). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it speaks in the imperative and fixes a term and condition of employment expressly, specifically and comprehensively. *Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed.*, 91 N.J. 38, 44 (1982); *State v. State Supervisory Employees Ass'n*, 78 N.J.

54, 80-82 (1978). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers. We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The City argues that arbitration of the PSOA's grievance must be restrained because it is well-settled law that a public employer's decision to initiate a promotional process is a managerial prerogative, and that the subject of whether to request a promotional list and/or initiate a promotional examination is preempted by CSC statutes. The City argues that there can be no negotiable promotional procedures if the public employer never exercises its managerial prerogative to initiate a promotional process in the first instance.

The PSOA argues that arbitration of its grievance should not be restrained because the CNA's requirement that the City maintain a promotional list, which has been part of the CNA for over 40 years, is part of the permissively negotiable promotion procedures. The PSOA asserts, citing various disputes with the City before the CSC, that the City's record of compliance with CSC rules is abysmal and that the CSC has issued written admonishments to the City. Further, the PSOA further asserts that either, due to incompetence or deceitfulness, the City has

withheld information from the CSC. The PSOA maintains that there would not be any harm or cost to the City for initiating a testing process because the PSOA acknowledges that there is no requirement that the City make promotions as a result of the testing. The PSOA argues that the Commission precedent that the City principally relies upon was decided 30 years ago and is inconsistent with a prior CSC decision.

Public employers have a non-negotiable right to fill vacancies and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs. Plainsboro Tp., P.E.R.C. No. 2023-38, 49 NJPER 450 (§109 2023). This prerogative is part of a public employer's managerial prerogative to determine staffing levels. Montclair Tp., P.E.R.C. No. 98-36, 23 NJPER 546 (§28272 1997) (finding that a public employer can determine whether or not to fill a vacant lieutenant's position and that it "may leave a position vacant after its former holder has retired, resigned, or otherwise been promoted to another position.") Further, the Commission has found that the subject of whether to request a promotional list and/or initiate a promotional examination is preempted by CSC statutes. City of Hoboken, P.E.R.C. No. 90-124, 16 NJPER 400 (§21166 1990).

Based on the well established precedent cited above, we find that the City's decision not to request a promotional examination

from the CSC is not mandatorily negotiable. Requiring the City to request a promotional examination with the CSC would significantly interfere with its governmental policymaking powers in deciding whether to initiate a promotional process. In Hoboken, we held:

An appointing authority may request an examination, N.J.S.A. 11A:4-5,^{3/} but the statute contemplates that a request for an examination will be made only if there is a vacancy that the employer intends to fill. In fact, if a municipality does not use a complete list produced by the examination to fill a vacancy, it may be required to reimburse the [CSC] for the cost of the selection process. This statutory scheme means that an employer must be committed to filling a vacancy before it requests an examination. Thus a contractual commitment to request an examination^{4/} even if the employer does not intend to fill current vacancies, or have any vacancies, contravenes the statutory scheme.

We disagree with the PSOA that In the Matter of Promotional List for Public Safety Titles, DOP Docket No. 2004-3187, is

^{3/} N.J.S.A. 11A:4-5 provides: "Once the examination process has been initiated due to the appointment of a provisional or an appointing authority's request for a list to fill a vacancy, the affected appointing authority shall be required to make appointments from the list if there is a complete certification, unless otherwise permitted by the commission for valid reason such as fiscal constraints. If the commission permits an appointing authority to leave a position vacant in the face of a complete list, the commission may order the appointing authority to reimburse the commission for the costs of the selection process."

^{4/} The parties in Hoboken had a comparable CNA provision to Article 40 here, which stated, "The City agrees to maintain a promotional eligibility list at all times for all ranks."

inconsistent with our holding in Hoboken. That decision of the Merit System Board (MSB) (now the CSC) extended certain promotional lists for one year, not to exceed four years, and articulated a policy preference for promotion through examination rather than provisional appointment. There is nothing in that decision which alters an employer's non-negotiable, managerial prerogative to initiate a promotional process.

We note that the PSOA has already filed an appeal with the CSC regarding the withdrawal of the July 2023 promotional announcement. See PSOA brief at 6-8. Any other allegations from the PSOA regarding the City's failure to abide by CSC rules and regulations should also be raised with the CSC.

For all the foregoing reasons, we conclude that arbitration of the PSOA's grievance is preempted and would significantly interfere with the City's policymaking powers in deciding whether to initiate the promotional process, and therefore, we grant the City's request for a restraint of binding arbitration.

ORDER

The City of Jersey City's request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Higgins and Papero
voted in favor of this decision. None opposed. Commissioner
Voos was not present.

ISSUED: September 28, 2023

Trenton, New Jersey