

P.E.R.C. NO. 2004-72

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PISCATAWAY,

Petitioner,

-and-

Docket No. SN-2004-12

PISCATAWAY TOWNSHIP PBA
LOCAL 93,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of certain provisions of a promotional testing process affecting police officers employed by the Township of Piscataway and represented by the Piscataway Township PBA Local 93. The Commission concludes that the order in which the Township will administer the components of the promotional process, and the whether to have the results of the written examination withheld until all other aspects of the process are completed are mandatorily negotiable.

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, DeCotiis, Fitzpatrick, Cole &
Wisler, LLP, attorneys (Stacey D. Adams, on the brief)

For the Respondent, Abramson & Liebeskind Associates,
(Marc D. Abramson, on the brief)

DECISION

On August 27, 2003, the Township of Piscataway petitioned for a scope of negotiations determination. The Township seeks a negotiability determination concerning certain provisions of a promotional testing process affecting police officers represented by Piscataway Township PBA Local 93.

The parties have filed briefs and exhibits.^{1/} These facts appear.

The PBA represents police officers below the rank of sergeant. The parties' collective negotiations agreement is

^{1/} On December 1, 2003, the PBA request to file a sur-reply brief was denied.

effective from July 1, 2002 through December 31, 2006. Article XX provides that promotional testing procedures for the rank of sergeant shall be agreed upon by the parties and attached to the contract as an appendix.

In 1988, the Township sought a negotiability determination on a promotion article in an expired agreement with the PBA. We issued a decision finding certain aspects of the article to be mandatorily negotiable and others not. Piscataway Tp., P.E.R.C. No. 89-32, 14 NJPER 644 (¶19270 1988). The Township then revised its promotional process. The new procedures were followed for promotions in 1989 and 1994. In 1999, the parties discussed, but did not reach agreement on revised procedures.

Beginning in 2002, the parties again met on several occasions to negotiate the process for promotions to sergeant. After the parties were unable to reach agreement, the Township promulgated a revised promotion policy. The parties reached a tentative settlement agreement at a Commission exploratory conference on an unrelated unfair practice charge. The settlement resulted in additional modifications to the procedure.

On May 7, 2003, the parties met again to go over the procedure and were again unable to reach an agreement. The Township withdrew from the proposed settlement agreement. On June 3, the Township implemented a revised policy. On June 25,

the PBA filed an unfair practice charge over the Township's implementation of the promotional policy. This petition ensued.

Our 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." We do not consider the wisdom of the clauses in question, only their negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

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 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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, 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 fire fighters, 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. [Id. at 92-93; citations omitted]

We consider only whether a proposal is mandatorily negotiable. It is our policy not to decide whether proposals, as opposed to grievances, concerning police and fire department employees are permissively negotiable since the employer has no obligation to negotiate over such proposals or to consent to their submission to interest arbitration. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

There is no preemption argument in this case. Application of the balancing test in Court and Commission case law has resulted in a general distinction between promotional criteria, which are not mandatorily negotiable, and promotional procedures, which are mandatorily negotiable. Bethlehem Tp. Ed. Ass'n. v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982); State Supervisory at 90; Rutgers, The State Univ. and Rutgers, Council of AAUP Chapters, 256 N.J. Super. 104 (App. Div. 1991), aff'd 131 N.J. 118 (1993); State v. State Troopers NCO Ass'n, 179 N.J. Super. 80, 93 (App. Div. 1981); Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554, 558 (App. Div. 1980).

The promotion policy implemented by the Township has four components: a written examination, an oral examination, a review of the candidate's personnel file, and credit for seniority. In

its reply brief, the Township states that three issues remain in dispute.

The primary issue is whether the Township must negotiate over the order in which it will administer the components of the promotional process. This issue was decided in our earlier decision. P.E.R.C. No. 89-32. We held that the Township had a prerogative to determine the components of the promotional testing procedure, but that the order in which the components would be administered was mandatorily negotiable. The Township did not appeal that ruling.

The Township now argues that the order of the various components of the promotion process is non-negotiable because a passing score on the written examination is one of the criteria to be eligible to move forward in the promotion process. We disagree.

Our earlier Piscataway decision applied the distinction between the subjective and procedural aspects of the promotion policy and held that the order of components was mandatorily negotiable. However, the simple labeling of a proposal as a procedure or a criterion does not end the analysis: what is required is a careful balancing of the parties' interests. See Rutgers at 120. Assessing the parties' asserted interests, we hold that the balance of those interests in this case continues to favor requiring negotiations over the order of the components.

As asserted by the union, the officers have an interest in being assured that a promotional process is fair and free of favoritism or potential improprieties. Snitow v. Rutgers, 103 N.J. 116 (1986). The order in which elements are administered may enhance or reduce those dangers; the parties can present their perspectives on the issues through negotiations. It is not for us to assess whether a particular order is better or worse in that regard.

As asserted by the employer, it must retain the prerogative to determine promotional criteria - in this case, specifically to promote only those officers who pass the written examination. However, this proposal does not interfere with that prerogative since the employer retains ultimate control of who will be promoted at the end of the process. See State Supervisory at 91 (absent a preemptive statute or regulation, union could seek to negotiate over which employees would be eligible to take a promotional examination, but not over the criteria to be applied in determining who ultimately gets promoted).^{2/} The employer's other asserted interest is that there would be unnecessary costs associated with having the oral examination precede the written examination. However, the PBA has offered to pay the cost of oral examinations for employees who fail the written examination

^{2/} Unlike the employer in State Supervisory, Piscataway is not a civil service jurisdiction so there is no preemption issue.

and, in any event, additional cost does not make this issue non-negotiable. See, e.g., Borough of Rutherford, P.E.R.C. No. 97-12, 22 NJPER 322 (¶27163 1996), recon. den. P.E.R.C. No. 97-95, 23 NJPER 163 (¶28080 1997) (cost of overtime does not make vacation scheduling not negotiable).

A second issue was whether the Township must negotiate over establishing a pass/fail score for the written examination. The PBA did not dispute that the Township has a prerogative to require a candidate to pass a written examination in order to be promoted. Instead, the PBA modified its proposal as follows: If the Township decides that a minimum score requirement is necessary, the PBA will be notified ninety days prior to the written examination. The Township then conceded that it must negotiate over providing such notice (Reply brief at 7). Accordingly, we need not address this issue further.

The final issue is whether the Township must negotiate over a proposal to have the results of the written examination withheld until all other aspects of the promotion process are completed. The PBA has not directly addressed this issue, but it is related to its desire to have employees be able to complete the entire promotion process before the Township makes a final promotion decision. This issue is essentially procedural. The employer has not stated a managerial interest, beyond its financial interest, in cutting off the promotion process after

the written examination.^{3/} Our holding protects the employer's undisputed prerogative to set promotional criteria and apply those criteria to its final promotion decisions.

ORDER

The Township of Piscataway must negotiate over the order of the components of the promotional process and over the issue of when results of the written examination will be disclosed.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo and Katz voted in favor of this decision. Commissioners Mastriani and Sandman abstained from consideration. None opposed.

DATED: April 29, 2004
Trenton, New Jersey
ISSUED: April 30, 2004

^{3/} As noted above, the employer's financial interest does not make this issue non-negotiable.