

P.E.R.C. NO. 2007-4

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY INSTITUTE  
OF TECHNOLOGY,

Petitioner,

-and-

Docket No. SN-2006-083

FOP LODGE NO. 93,

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the New Jersey Institute of Technology for a restraint of binding arbitration of a grievance filed by FOP Lodge No. 93. The grievance asserts that NJIT violated the parties' collective negotiations agreement, promotion policies, employee handbook, and affirmative action policies by denying a police officer the opportunity to participate in a promotional process for a vacant sergeant's position. The Commission grants a restraint of arbitration over the claims challenging the decision to deny the grievant a promotion and asserting that the employer discriminated in its criteria or selection. Should the FOP seek to arbitrate any allegedly procedural issue that the employer believes is not legally arbitrable, the employer may re-file its petition.

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, Holly C. Stern, General Counsel, on  
the brief

For the Respondent, Fusco & Macaluso, P.A., attorneys  
(Anthony J. Fusco, Jr., on the brief)

DECISION

On May 1, 2006, the New Jersey Institute of Technology (NJIT) petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by FOP Lodge No. 93. The grievance asserts that NJIT violated the parties' collective negotiations agreement, promotion policies, employee handbook, and affirmative action policies by denying a police officer the opportunity to participate in a promotional process for a vacant sergeant's position.

The parties have filed briefs and exhibits. These facts appear.

The FOP represents all police officers below the rank of sergeant. The parties' collective negotiations agreement is effective from July 1, 2004 through June 30, 2007. The grievance procedure ends in binding arbitration.

Article XI is entitled Posting, Hiring and Promotion.

Section A provides:

In keeping with NJIT's commitment to affirmative action and equal employment opportunities, all recruitment efforts will conform with the application sections of NJIT Personnel Policies and Procedures Manual and its Equal Opportunity/Affirmative Action policies. Accordingly, a permanent job opening which represents a promotional opportunity shall be posted in accordance with applicable University policies. Copies of such posting shall be furnished to FOP.

In the Fall of 2005, NJIT posted a notice for the position of sergeant. An NJIT police officer applied. The chief and deputy chief interviewed him. The deputy chief advised him that he would not be granted a second interview due to his disciplinary record and civilian complaints against him.

On December 15, 2005, the officer filed a grievance: It states:

It is the grievant's position in this matter that the university did violate the following articles & sections of the labor contract by refusing to allow the grievant the opportunity to participate in the promotional process for the position of NJIT Police Dept. Sgt. The university's actions are political and discriminatory, based upon my political affiliation, age, disability, race and gender, ART 1 RECOGNITION, ART 2 MANAGEMENT

RIGHTS, section 2, ART VIII NON-DISCRIMINATION, SECTIONS A&C, ART XI POSTING, HIRING & PROMOTION SECTION A & ART XXXIII DURATION. In addition, the university also violated their own Promotion Policy, Affirm. Action Policy & the NJIT Employee Handbook.

The grievance requests as relief:

Prior to the promotion to the position of Police Sgt. the grievant will be provided with the same opportunity to be considered for promotion as other eligibles for the position.

On January 4, 2006, the chief denied the grievance. He asserted that both he and the deputy chief advised the officer that he was not recommended by his supervisors for the position due to his disciplinary record and civilian complaints. The chief stated that the decision was based solely on his work record and that there was no violation of the contract or University policies.

The FOP demanded arbitration. The demand alleges violations of:

- Article 1 Recognition;
- Article 3 Management Rights, Section 2 & 3;
- Article 7 Investigation, Due Process, Discipline and Challenge Sections D & E;
- Article 8 Non-Discrimination, Sections A & C;
- Article 9 Application of Seniority, Section B;
- Article 11 Posting, Hiring and Promotion, Section A;
- Article 33 Duration.

This petition ensued.<sup>1/</sup>

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1/ Prior to filing the petition, NJIT's counsel sent three  
(continued...)

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

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

In Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police officers and firefighters. The Court stated:

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

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1/ (...continued)  
letters to the FOP's counsel requesting clarification of the alleged violations of promotional procedures and suggesting that the two attorneys discuss the case to attempt to resolve it and/or to formulate a statement of the issues the FOP wished to submit to arbitration.

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]

Arbitration will be permitted if the subject of the dispute 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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers. No preemption issue is presented.

NJIT argues that criteria for promotion are not mandatorily negotiable and the grievance does not set forth any negotiable and arbitrable procedural issues.

The FOP concedes that NJIT has the right to determine the candidates who possess the necessary qualifications for a promotion. However, the FOP argues that the petitioner may not

discriminate in its procedures, criteria, or selection. It maintains that a third party neutral may determine if the grievant's contractual rights were violated.

The FOP cannot challenge the substantive decision not to promote this police officer. See NJIT, P.E.R.C. No. 97-65, 23 NJPER 26 (¶28019 1996); see also State of New Jersey (Div. of State Police), P.E.R.C. No. 2000-61, 26 NJPER 98 (¶31040 2000), recon. den. P.E.R.C. No. 2000-80, 26 NJPER 206 (¶31083 2000) (employer had prerogative to delay or deny officer's promotion pending disciplinary investigation). In addition, arbitration is not the appropriate forum for claims that a promotion was denied for discriminatory reasons. See Teaneck Bd. of Ed. and Teaneck Teachers Ass'n, 94 N.J. 9 (1983) (claims of discrimination in promotion decisions not legally arbitrable); City of Newark, P.E.R.C. No. 2005-2, 30 NJPER 294 (¶102 2004), aff'd 31 NJPER 287 (¶112 App. Div. 2005) (barring arbitration of claim that transfers and reassignments were racially discriminatory). Accordingly, we will restrain arbitration over the claims challenging the decision to deny the grievant a promotion and asserting that there was discrimination in criteria or selection. Should the FOP seek to arbitrate any allegedly procedural issue that the employer believes is not legally arbitrable, the employer may re-file its petition.

ORDER

The request of the New Jersey Institute of Technology for a restraint of arbitration is granted over the claims challenging the decision to deny the grievant a promotion and asserting that the employer discriminated in its criteria or selection.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners DiNardo, Fuller, Katz and Watkins voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

ISSUED: August 10, 2006

Trenton, New Jersey