

P.E.R.C. NO. 2007-31

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SEA BRIGHT,

Petitioner,

-and-

Docket No. SN-2007-009

P.B.A. LOCAL NO. 48,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Borough of Sea Bright for a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 48. The grievance requested the outcome of a promotion recommendation made by the police chief and information about who made the decision not to promote the grievant to corporal and why. The Commission restrains arbitration to the extent, if any, the grievance challenges the decision not to promote. The Commission denies a restraint of arbitration to the extent the grievance seeks a further explanation about who made the decision not to promote and why. The Commission holds that a request for an explanation as to what specific factors the employer relied on in deciding not to promote an employee is an arbitrable procedural issue. Also, whether the contract requires the Borough to provide such an explanation is for an arbitrator to decide.

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, Scarinci & Hollenbeck, LLC,  
attorneys (Matthew J. Giacobbe, of counsel and on the  
brief; Bruce W. Padula, on the brief)

For the Respondent, Matt Chesek, President

DECISION

On August 18, 2006, the Borough of Sea Bright petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 48. The grievance requested the outcome of a promotion recommendation made by the police chief and information about who made the decision not to promote the grievant to corporal and why.

The Borough has filed a brief and exhibits and the Borough Clerk's certification.<sup>1/</sup> These facts appear.

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<sup>1/</sup> The PBA did not file a brief. However, on October 19, in response to a 7-day letter, the PBA submitted documents that it filed with its demand for arbitration. These documents,  
(continued...)

The PBA represents patrol officers, sergeants, corporals, lieutenants and captains, excluding the chief of police. The parties' collective negotiations agreement is effective from January 1, 2006 through December 31, 2009. The grievance procedure ends in binding arbitration.

The Borough employs Kevin Lovgren as a patrol officer. On March 20, 2003, the police chief recommended to the Borough Council that Lovgren be promoted to corporal.

On January 25, 2005, Lovgren wrote to the chief concerning the status of his promotion. He referred to the letter as "grievance on promotion," and requested information "as to the outcome of the recommendation letter, who made the decision and why."

On January 27, 2005, the chief responded. He stated that he had told Lovgren on at least six occasions that the promotion recommendation was not moved forward and that there was currently no promotional recommendation pending before the Mayor and Council.

On January 31, 2005, Lovgren wrote to the public safety committee about the chief's promotion recommendation. He requested an answer with regard to "why my recommended promotion was not moved forward."

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1/ (...continued)  
however, do not set forth any legal arguments about the arbitrability of the grievance.

On March 28, 2005, Councilwoman Dina Long responded. She first stated that the Borough would not be treating Lovgren's letter as a grievance and would not consider its decision not to act on the chief's two-year old letter as a grievable event. She stated that at the time the chief's letter was presented, a decision was made that "justification for filling the position of Corporal had not been articulated" and that when a valid reason for filling the corporal position was made, the public safety committee would review the request and weigh the chief's suggestions as to what member would be promoted. She also stated that candidates for promotion would be selected based on their performance evaluations as set forth by the chief in the September 2004 standard operating procedures.<sup>2/</sup>

On March 14, 2005, the PBA moved the grievance to step three. On May 6, the Borough notified the PBA that it would be "taking no further action in this matter." On January 17, 2006, the PBA demanded arbitration. The demand describes the grievance to be arbitrated as:

Put in for promotion to corporal to supervise  
midnight shift.

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<sup>2/</sup> On August 31, 2004, the chief notified all patrol officers that effective September 1, 2004, they would be evaluated every month, that the evaluation would be standard operating procedure, and that if and when a promotion became available and was to be filled, the evaluations would be used to select an officer for the promotion.

Never told promotion was denied. Promotions have been delayed, but never denied (in the past).

Was moved to midnight shift despite not getting rank, and on several shifts I am the supervisor without the pay.

When I was put up for promotion there were no job evaluations. There were prior to my recommendation for promotion, and after. Not consistent.

Employer advised that since the recommended promotion was in March of 2003 that this incident would not be considered a grievance. I only learned that the promotion was denied in the first week of January 2005. I have taken all the appropriate steps within the time line for a grievance, but since she did not see this as a grievance she did not respond back in the proper time limits stated in the grievance procedure.

This petition ensued. Arbitration has been postponed.

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 might have. We specifically decline to consider whether the grievance was timely filed.

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]

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.

The Borough argues that it has a managerial prerogative to determine whether or not promotions are necessary. It urges that arbitration be restrained.

The Borough has a managerial prerogative to determine who will be promoted to corporal and whether a promotional position will be filled. State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978); Paterson. We will therefore restrain arbitration to the extent, if any, the grievance challenges the decision not to promote. We will not restrain arbitration to the extent the grievance seeks a further explanation about who made the decision not to promote and why. A request for an explanation as to what specific factors the employer relied on in deciding not to promote an employee is a procedural arbitrable issue. See Franklin Tp. Bd. of Ed., P.E.R.C. No. 90-82, 16 NJPER 181 (¶21077 1990); see also State v. State Troopers NCO Ass'n, 179 N.J. Super. 137 (App. Div. 1981), certif. den. 89 N.J. 433 (1982). Whether the contract requires that the Borough provide such an explanation and whether its responses to date have done so are issues for arbitration.

ORDER

The request of the Borough of Sea Bright for a restraint of binding arbitration is granted to the extent, if any, the grievance challenges the decision not to promote Kevin Lovgren. The request is denied to the extent the grievance seeks a further explanation about who made the decision not to promote Lovgren and why.

BY ORDER OF THE COMMISSION

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

ISSUED: November 21, 2006

Trenton, New Jersey