

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY  
(DIVISION OF STATE POLICE),

Petitioner,

-and-

STATE TROOPERS NON-COMMISSIONED  
OFFICERS ASSOCIATION,

Docket Nos. SN-2008-011  
SN-2008-012  
SN-2008-013  
SN-2008-014  
SN-2008-015

Respondent.

SYNOPSIS

\_\_\_\_\_The Public Employment Relations Commission grants the request of the State of New Jersey (Division of State Police) for a restraint of binding arbitration of grievances filed by the State Troopers Non-Commissioned Officers Association. The grievances contest various decisions to assign, transfer, or promote officers other than the grievants to vacant positions and seek retroactive assignments, transfers, or promotions for the grievants. The Commission holds that the substantive decision to transfer or assign a police officer or trooper is a non-negotiable policy decision. The Commission further holds that the substantive decision to promote one employee rather than another based on the subjective and/or objective criteria the employer has unilaterally chosen to use and apply is non-negotiable. No specific procedural claims were raised.

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.

P.E.R.C. NO. 2008-37

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Appearances:

For the Petitioner, Anne Milgram, Attorney General of New Jersey (Sally Ann Fields, Senior Deputy Attorney General, on the brief)

For the Respondent, Loccke, Correia, Schlager, Limsky & Bukosky, attorneys (Marcia J. Tapia, on the brief)

DECISION

On September 17, 2007, the State of New Jersey (Division of State Police) petitioned for five scope of negotiations determinations. The employer seeks restraints of binding arbitration of several grievances filed by officers represented by the State Troopers Non-Commissioned Officers Association ("STNCOA"). The grievances contest various decisions to assign, transfer, or promote officers other than the grievants to vacant positions and seek retroactive assignments, transfers, or promotions for the grievants. We restrain arbitration over these assignment and promotion decisions and over any challenges to the

employer's right to select, weigh, or apply its promotional criteria.

The parties have filed briefs describing the different facts concerning each petition, but making identical legal arguments in each case. We thus consolidate the petitions. We will set forth the facts common to every petition and then describe the facts specific to each petition.

#### All petitions

The STNCOA represents sergeants, detective sergeants, sergeants first class, and detective sergeants first class. The parties' collective negotiations agreement is effective from July 1, 2004 through June 30, 2008. The grievance procedure ends in binding arbitration.

Article VIII is entitled Out-of-Title Work. It sets the compensation officers are to receive when serving in an acting capacity, but provides:

Any decision to initiate or terminate any acting assignment shall be within the sole discretion of the Superintendent and shall not be subject to any grievance procedure contained in this Agreement. Time served in an acting assignment in a higher rank shall not be given consideration toward any promotional decision. . . .

Article XV is entitled Promotions. Sections A and B provide:

Promotions to the rank of Sergeant First Class, Detective Sergeant First Class and Lieutenant shall be made based upon the application of relevant and reasonable criteria and sub-criteria to be established by the Division as to each vacancy to be filled by promotion.

When such vacancies for promotion occur, the Division shall announce the criteria and sub-criteria and such constituent part of the criteria and sub-criteria to be met by the candidates and the particular weight to be assigned to each criteria and sub-criteria announced which will constitute the only and exclusive basis for promotion in accordance with the provisions of this article.

Section G provides:

In order to provide the employee with that information necessary in order to prepare for and otherwise be guided in the attainment of career goals, the Division shall:

1. Provide the Association and unit membership with notice of any changes in criteria in advance of announcements for vacancies.
2. The Division shall make reasonable attempts to develop a text or list of approved source material for the guidance and information necessary to meet the criteria for specific positions to which employees can aspire and apply for promotion.

Section I provides:

There shall be no discrimination practiced against any NCO with respect to any provisions of this Article nor shall there be any inequitable or non-uniform application of any of the provisions and requirements of this Article as to any NCO unit member.

This article calls for the Division to score each candidate on each criterion it has chosen, total the scores for each candidate, rank the candidates accordingly, and promote the candidates in order of their rank.

Article XX is entitled Non-Discrimination. It provides that contractual provisions shall apply equally to all unit employees and that there shall be no illegal discrimination based on specified characteristics.

Article XXIX is entitled Complete Agreement. It provides that the agreement incorporates the parties' entire understanding on all negotiable issues, whether or not discussed.

SN-2008-011

On June 19, 2006, personnel order #06-267 announced certain transfers and reassignments. Sergeant Richard Finneran was assigned as an acting Sergeant First Class, Call Center Unit, Operations Management Bureau, Emergency Management Section.

Sergeants Samuel Davis, Robert Sugrue and Edward Wagner filed grievances. Each grievance stated:

PROMOTION: "Grieve denial of promotional vacancy of "Acting Sergeant First Class, Call Center Unit, Operations Management Bureau, Emergency Management Section" in reference to Division Personnel Order #06-267, dated June 19, 2006 as arbitrary, capricious, discriminatory and violative of existing

agreement Article XXV "Complete Agreement" and Article XXVI "Non-Discrimination."<sup>1/</sup>

RELIEF SOUGHT: Retroactive promotion of the grievant to the rank of Acting Sergeant First Class with all terms, conditions and benefits retroactive to (date). The establishment of a defined, transparent, objective, promotional system with the intent of preventing the endemic corruption and favoritism contained in the current system.

State Police Colonel Joseph R. Fuentes denied the grievances. He concluded that pursuant to Article VIII, the decision to give Finneran the acting assignment was within the Superintendent's sole discretion and was not subject to the grievance procedure. The STNCOA then demanded arbitration and described the grievances as involving the promotion process.

SN-2008-012

On September 22, 2006, personnel order #06-391 announced certain promotions, including Finneran's promotion to the permanent position in which he had been serving in an acting capacity.

Sergeants Robert Sugrue, Edward Wagner, and Robert Walker filed grievances. Each grievance stated:

PROMOTION: "Grieve denial of promotional vacancy of "Sergeant First Class, Call Center Unit, Operations Management Bureau, Emergency Management Section" in reference to Division

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<sup>1/</sup> The Complete Agreement article is XXIX, not XXV, and the Non-Discrimination article is XX, not XXVI.

Personnel Order #06-391, dated September 22, 2006 as arbitrary, capricious, discriminatory and violative of existing agreement Article XXV "Complete Agreement" and Article XXVI "Non-Discrimination."

RELIEF SOUGHT: Retroactive promotion of the grievant to the rank of Sergeant First Class with all terms, conditions and benefits retroactive to (date). The establishment of a defined, transparent, objective, promotional system with the intent of preventing the endemic corruption and favoritism contained in the current system.

Colonel Fuentes denied the grievances. He determined not to conduct a hearing and stated that the promotional process was conducted in accordance with the contract. He added that promotion decisions are an inherent management prerogative and that N.J.S.A. 53:1-5.2 empowers the superintendent to change the rank and grade of any member of the State Police. The STNCOA then demanded arbitration and described the grievances as involving the promotion process.

SN-2008-013

The same personnel order as in SN-2008-012 also announced the promotion of Detective Sergeant Vincent Castellani to Detective Sergeant First Class, Assistant Unit Head, Strategic Investigations Unit North, Region 3, Troop B, Field Operations Section. Castellani had been serving in that position in an acting capacity.

Detective Sergeants Albert Rivera and Joseph Shell filed grievances. Shell and Rivera are assigned to the same unit as Castellani. Each grievance stated:

The undersigned grieves the evaluation method, which includes the scoring, ranking, or rating system used to determine the "rank order list" of those members eligible for the position of Detective Sergeant First Class in which the promotional rank of Detective Sergeant First Class was assigned on September 22, 2006 (effective date of 09/16/06). Same is arbitrary and capricious and in violation of the contract between the State of New Jersey and the State Troopers Non-Commissioned Officers Association. More specifically, Article XV, Article XX and Article XXIX, of the Agreement.

Relief sought: The immediate reassignment of the grievant to the position of Detective Sergeant First Class retroactive to the date of the original promotion, dated September 16, 2006.

Colonel Fuentes denied the grievances for the same reasons he denied the grievances in SN-2008-012. The STNCOA then demanded arbitration and described the grievances as involving the evaluation method.

SN-2008-014

The same personnel order as in SN-2008-012 also announced the promotion of Sergeant First Class Janet Chirico to Lieutenant, Traffic Officer, Troop B, Field Operations Section. Chirico had been serving in that position as an acting lieutenant.



Sergeant First Class Kenneth Argiro filed a grievance. The grievance stated:

The undersigned grieves the evaluation method, which includes the scoring, ranking, or rating system used to determine the "rank order list" of those members eligible for the position of Lieutenant in which the promotional rank of Lieutenant was assigned on September 16, 2006. Specifically, the position of Traffic Officer, Troop "B" Field Operations Section. Same is arbitrary and capricious and in violation of the contract between the State of New Jersey and the State Troopers Non-Commissioned Officers Association. More specifically, Article XV, Article XX and Article XXIX, of the Agreement.

Relief sought: The immediate reassignment of the grievant to the position of Lieutenant retroactive to the date of the original promotion, dated September 16, 2006.

Colonel Fuentes denied the grievance for the same reasons he denied the grievances in SN-2008-012. The STNCOA then demanded arbitration and described the grievance as involving the promotion process.

#### SN-2008-015

On January 24, 2007, personnel order #07-057 announced the transfer of Sergeant Roger Rochinski from the Operational Dispatch Unit ("ODU")-Turnpike/Parkway, Communications Bureau, Emergency Management Section ("EMS"), Squad Leader position to the ODU Central Communications Bureau, EMS, Assistant Unit Head position. The Assistant Unit Head holds the rank of sergeant.

Sergeants Robert Sugrue and Edward Wagner filed grievances.

Each grievance stated:

Grieve denial of vacancy of Assistant Unit Head, Operational Dispatch Unit Central, Communications Bureau, in reference to Division Personnel Order #07-057 dated 1-24-07, as arbitrary, capricious and violative of the existing agreement Article XXV "Complete Agreement" and XXVI "Non-Discrimination."

RELIEF SOUGHT: Retroactive assignment of the grievant to the position of Assistant Unit Head, Operational Dispatch Unit Central, Communications Bureau with all the terms, conditions and benefits retroactive to (date). The establishment of a defined, transparent, objective, promotional system with the intent of preventing the endemic corruption and favoritism contained in the current system.

Colonel Fuentes denied the grievances. He stated that there were no contractual violations relating to this assignment, the assignment was administered consistent with the statutory authority delegated to the superintendent, and transfers and assignments are a managerial prerogative. The STNCOA then demanded arbitration and described the grievances as involving a denial of a vacancy.

### Analysis

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.

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 cannot consider the merits of the grievances or any contractual defenses the employer may have.

The scope of negotiations is broader for police officers and firefighters than for other public employees. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981). Because this dispute arises from a grievance, arbitration is 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 (¶1111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged to have been violated would substantially limit government's policymaking powers or would be preempted by a statute or regulation fixing the employment condition in dispute. No statute or regulation is asserted to preempt arbitration.

The State accurately describes the claims set forth in the grievances as centering on its substantive decisions to assign, promote, and transfer certain employees rather than the grievants. The substantive decision to transfer or assign a police officer or

trooper is fundamentally a non-negotiable policy decision. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 571-573 (1998); State of New Jersey (Div. of State Police), P.E.R.C. No. 2003-16, 28 NJPER 410 (¶33148 2002); State of New Jersey (Div. of State Police), P.E.R.C. 2000-60, 26 NJPER 97, 98 (¶31039 2000). So too is the substantive decision to promote one employee rather than another based on the subjective and/or objective criteria the employer has unilaterally chosen to use and has unilaterally applied. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90-92 (1978); Rutgers, the State Univ. v. Rutgers Council of AAUP Chapters, 256 N.J. Super. 104, 116 (App. Div. 1992), *aff'd o.b.* 131 N.J. 118 (1993).

Promotional procedures, however, are generally negotiable. Id. Such procedures may include the requirements contained in Article XV and held to be negotiable in State v. State Troopers NCO Ass'n, 179 N.J. Super. 80 (App. Div. 1981) -- this employer may thus legally agree to announce the promotional criteria it has chosen and the weight to be given each criterion, total the scores it has deemed fit to give each candidate for each criterion, and promote candidates in accordance with their resulting rank. But after considering all the candidates, the employer retains its prerogative not to fill a promotional vacancy at all. Id.

All these grievances involve challenges to the employer's substantive decisions to transfer, assign, or promote certain

officers rather than the grievants. None of the grievances claim that the employer has violated Article XV by promoting officers out of the order generated by the promotional list required by that article. Contrast Wall Tp., P.E.R.C. No. 2002-22, 28 NJPER 19 (¶33005 2001). We will accordingly restrain arbitration over these personnel decisions.

The grievances in SN-2008-13 and SN-2008-14 allege a violation of Article XV and contest the evaluation method -- including the scoring, ranking or rating system -- used to compile the rank order list from which promotions were made. State v. State Troopers NCO, however, recognizes the employer's non-negotiable right to select, weigh, and apply promotional criteria as it deems fit and claims of discrimination or favoritism in such determinations are not arbitrable. State of New Jersey (Div. of State Police), P.E.R.C. No. 2002-35, 28 NJPER 265 (¶33102 2002). We will thus restrain arbitration over any challenges to those determinations as well. Absent any specific procedural claims appearing in the grievances or the STNCOA's briefs, we do not consider any other issues.

ORDER

The requests of the State of New Jersey for restraints of binding arbitration are granted.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller and Watkins voted in favor of this decision. None opposed.

ISSUED: December 20, 2007

Trenton, New Jersey