P.E.R.C. NO. 2014-80

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (STATE POLICE),

Petitioner,

-and-

Docket No. SN-2014-006

STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY and STATE TROOPERS NON-COMMISSIONED OFFICERS ASSOCIATION OF NEW JERSEY,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the State of New Jersey (State Police) for a restraint of binding arbitration of a grievance filed by the State Troopers Fraternal Association of New Jersey (STFA) and the State Troopers Non-Commissioned Officers Association of New Jersey (NCOA). The grievance asserts the State violated the parties' collective negotiations agreement and past practice regarding promotional procedures when it removed several officers from acting assignments. The Commission holds that the grievance primarily concerns the substantive decision to reassign an employee, which is preeminently a policy decision. The Commission finds that the grievances did not invoke promotional provisions of the contract because there is no evidence in the record that promotional procedures were applied to the grievants.

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, John J. Hoffman, Acting Attorney General (Sally Ann Fields, Senior Deputy Attorney General)

For the Respondent, Loccke, Correia, Limsky & Bukosky, attorneys (Marcia J. Tapia, of counsel)

DECISION

On August 2, 2013, the State of New Jersey (State Police) filed a scope of negotiations petition. The State seeks a restraint of binding arbitration of grievances filed by the State Troopers Fraternal Association of New Jersey (STFA) and State Troopers Non-Commissioned Officers Association of New Jersey (NCOA). The grievances assert that the State violated the parties' collective negotiations agreement (CNA) and past practice in its application of promotional procedures when it removed several officers from acting assignments.

The State has submitted briefs, exhibits, and the certification of Lieutenant Timothy Idland, the head of the New Jersey State Police Office of Labor Relations (certifying to the facts set forth in the "Statement of the Case" filed by the State). The STFA/NCOA submitted a brief, exhibits, and the certification of Christopher Burgos, STFA President.

The STFA represents all New Jersey State Troopers holding Trooper and Detective titles. The STFA and State are parties to a CNA effective from July 1, 2008 through June 30, 2012. The NCOA represents all New Jersey State Troopers holding Sergeant titles. The NCOA and State are parties to a CNA effective from July 1, 2008 through June 30, 2012. The grievance procedures end in binding arbitration.

Article XXII of the STFA's CNA and Article VIII of the NCOA's CNA are entitled "Out-of-Title Work". They provide, in part: "Out-of-title work assignments occur when a member is formally designated to occupy a position in an acting capacity which is structured at a higher rank in the then currently published staffing tables of the Division." It also 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."

Article VIII of the STFA's CNA and Article XV of the NCOA's CNA are entitled "Promotions" and are nearly identical. Section A

provides: "Promotions to the rank of Sergeant First Class, Detective First Class and Lieutenant shall be made based on the application of relevant and reasonable criteria and subcriteria to be established by the Division as to each vacancy to be filled." The ensuing sections set forth procedures for announcing promotional criteria and vacancies and for compiling promotional lists.

Article XXVII of the STFA's CNA and Article XX of the NCOA's CNA are entitled "Non-Discrimination." They provide that contractual provisions shall apply equally to all unit employees and that there shall be no illegal discrimination based on specified characteristics.

Article XXVI of the STFA's CNA and Article XXIX of the NCOA's CNA are entitled "Complete Agreement." They provide that the agreement incorporates the parties' entire understanding on all negotiable issues, whether or not discussed.

The grievants are five officers who had been serving in "Acting" assignments since 2009-2011. Four of the grievants are Troopers who served as Acting Sergeants, and one grievant is a Sergeant First Class who served as Acting Lieutenant. On February 5, 2013, the STFA/NCOA became aware that Division of State Police would be removing the grievants from their acting assignments. On February 8, Lieutenant Colonel Louis P. Klock, Deputy Superintendent of Administration of the State Police,

signed two personnel orders removing the grievants from their acting assignments effective February 9.

Lieutenant Idland certified to the following:

- Although the grievances refer to promotion procedures and the promotion article of the contract, the underlying actions being challenged are the removal of the grievants from acting assignments.

- The most recent completed State Police promotional process began on November 16, 2011 and culminated with members being promoted on September 22, 2012.

- Because the State Police has not completed a promotional process since September 2012, as of the February 2013 dates of the grievance, no promotional procedures have been applied to the grievants.

STFA President Burgos certified to the following:

- Each Trooper is ranked on a promotion eligibility list.

- Both contracts provide that the highest ranked eligible shall be first promoted and that the exclusive basis for any promotion will be the ranking system.

- The ranking system typically occurs annually. Interwoven with the contractual promotional process is an accompanying policy for placement and rank of any temporary promotion which is also tied to the highest ranked eligible.

- The ranking system for permanent, provisional, and temporary appointments is off the same ranking list. It is long standing policy that if the Superintendent determines there is a need for a provisional or temporary appointment, the top ranked candidate has the right to that position.

- There is a policy that the Trooper entitled to any temporary or acting position will be the candidate who then maintains the highest score on the final promotional eligibility list.

- Because remaining on the promotional eligibility list and in the acting position are interchangeable, if you are removed from an acting assignment you are no longer eligible for promotion.

- The grievants were appointed to acting positions because they held the highest score on the promotional list.

- In removing the grievants from their acting assignments, they have been removed "from the promotional eligibility list for reasons other than objective test scores although the lists apparently have remained unchanged."

- The grievants have been "blacklisted" from their eligibility to either temporary or formal promotion even though they remain the highest ranked."

- No reason was given for the removal of the grievants from their acting assignments, and they did not get prior notice or an opportunity to be heard.

On February 6, 2013, the STFA filed four grievances for the STFA Troopers which stated the following:

> Grieve application of Promotion procedures AND REMOVAL FROM A/SGT for the above [Grievant] as arbitrary, capricious, and in violation of existing agreement, specifically Article VIII "Promotions", Article XXVI "Complete Agreement", and Article XXVII "Non-Discrimination."
>
> RELIEF SOUGHT: The uniform application of Promotion procedures, to include [Grievant] in the promotional eligibility process, and he be deemed qualified for promotion to Sergeant AND RE-INSTATED TO A/SGT.

On February 25, the NCOA filed a grievance for the NCOA Sergeant which stated the following:

> Grieve application of promotion procedures and the removal from Acting Lieutenant for the above as arbitrary, capricious and in violation of existing agreement between the State and the NCO Association, specifically Article XV "Promotion", Article XX "Non-Discrimination" and Article XXIV "Complete Agreement."

> Relief Sought: The uniform application of promotion procedures for [Grievant] to include grievant in promotional eligibility process and be deemed qualified for promotion to Lieutenant, reinstated to A/Lt. with all pay and allowances without interruption from February 8, 2013 to present.

After the Superintendent of State Police denied expedited handling of the grievances, a June 18, 2013 arbitration decision ruled that the grievance warranted expedited treatment on the merits. On June 25, the Superintendent of State Police denied the grievances. The STFA/NCOA demanded arbitration of all five grievances, and this consolidated 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. 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 merits of the grievance or any contractual defenses that the State 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). Because this dispute involves grievances, 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 (¶111 App. Div. 1983). Thus, if we conclude that the STFA/NCOA's grievances are either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievances should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers. No statute or regulation is asserted to preempt arbitration.

The State asserts that the grievances involve the Superintendent's non-negotiable prerogative to reassign troopers. The STFA/NCO assert that the grievances involve promotional procedures because remaining on the promotional eligibility list and in the acting position are interchangeable, since if you are removed from an acting assignment you are no longer eligible for promotion.

We find that the grievances primarily concern the substantive decision to reassign an employee which is preeminently a policy determination. State of New Jersey (Division of State Police), P.E.R.C. No. 2002-78, 28 NJPER 265

(¶33102 2002); State of New Jersey (Division of State Police), P.E.R.C. No. 2000-60, 26 NJPER 97 (¶31039 2000). We do not find that these grievances clearly invoke the provisions in the CNAs relating to promotional procedures because there is no evidence in the record that promotional procedures have been applied to grievants. We therefore restrain arbitration.

ORDER

The request of the State of New Jersey for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson and Wall voted in favor of this decision. Commissioner Voos voted against this decision. Commissioner Jones recused himself. Commissioner Boudreau was not present.

ISSUED: May 29, 2014

Trenton, New Jersey