P.E.R.C. NO. 2017-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ENGLEWOOD,

Petitioner,

-and- Docket No. SN-2016-062

IAFF LOCAL 3260,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the request of the City for a restraint of binding arbitration of a grievance filed by the IAFF contesting the City's decision to expire a promotional list and to change the passing score for promotional eligibility after posting the rankings. The Commission holds that the City has a non-negotiable managerial prerogative to determine that the promotional process only produced one qualified candidate and to therefore unilaterally retire the list and lower the composite score and make promotions based on the new lower cut-off score, and to that extent, the Commission restrains arbitration. The Commission declines to restrain arbitration to the extent the grievance alleges that the City failed to comply with any agreed-upon notice provisions before changing the promotional criteria.

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. 2017-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ENGLEWOOD,

Petitioner,

-and- Docket No. SN-2016-062

IAFF LOCAL 3260,

Respondent.

Appearances:

For the Petitioner, Genova Burns, LLC, attorneys (Joseph M. Hannon, on the brief)

For the Respondent, Limsky Mitolo, attorneys (Merick H. Limsky, of counsel and on the brief)

DECISION

On March 31, 2016, the City of Englewood (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by IAFF Local 3260 (Local 3260 or Local). Neither party provided us the grievance, but the City describes it as challenging the City's decision to expire a promotional list. Local 3260 agrees with that characterization but adds that it is challenging the City's decision to change the passing score for promotional eligibility after having posted the rankings of participating firefighters.

The City filed a brief, exhibits, and the certification of its City Manager. Local 3260 filed a brief.[1/] These facts appear.

Local 3260 represents all firefighters employed by the City.[2/] The City and Local 3260 are parties to a collective negotiations agreement (CNA) in effect from January 1, 2014 through December 31, 2017. The grievance procedure ends in binding arbitration.

Article XV of the CNA, entitled "Promotional Procedures," provides in relevant part:

> A. The City agrees that it will provide a minimum of 90 days written notice to Local 3260 and to members of the Fire Department before any promotional testing will take place. The notice provided will include the following information:
>
> 1. Date, time and location of testing;
> 2. Explanation of the testing methods to be used (i.e., written, oral);
> 3. List of books and materials on which testing will be based;
> 4. Criteria to be used for promotion(s) and the weights to be given to each. Management reserves the right to create or amend certain criteria with notice to Local 3260; and
> 5. Explanation of what constitutes passing.

1/ Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with the Commission shall...[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."

2/ We take notice of the fact that the City is a non-civil service jurisdiction.

> B. The list of those passing any promotional test will be in effect for three (3) years from the date the list is issued...
>
> D. The City will provide a written notice of ranking, overall scores and score on each component to each Firefighter who participates in the testing.

The City Manager certifies that on August 12, 2015, the Fire Chief sent a letter to the Local's President providing notice of an upcoming lieutenant's promotional exam. The letter stated, among other things, that the promotional process would begin with a written exam to be administered on November 14, that candidates had to score at least 70 on the written exam in order to move on to an oral evaluation, and that candidates had to earn a composite score of at least 80 based on both components in order "[t]o make it onto the Lieutenant's list." By letter dated December 30, 2015, the City's personnel director provided participating firefighters with the written, oral, and composite scores of all candidates in rank order.[3/]

The City Manager also certifies that the exam process took place as noticed; only one firefighter earned a composite score

---

3/ In its brief, Local 3260 refers to the December 30 letter as both a "ranking of officers" and as the list. Given that neither party has provided us a document identified as a "promotional list" or a list consisting of only candidates who passed the promotional process, and given that the letter identifies in rank order all participating firefighters, including those who scored below the minimum composite score, we find it more accurate to refer to the letter as a notice of ranking. The characterization of the letter, however, is of no particular relevance to our analysis.

of 80 or above and he was promoted on January 12, 2016; and after receiving the exam results, the City lowered the minimum composite score to 70 in order to create an eligible list. The Manager further certifies that the City decided to expire the list after the Local President, whose composite score was only 67.9, filed a grievance on January 8, 2016 contesting the City's refusal to disclose the "correct answers" to the oral evaluation component and, during the processing of the grievance, threatened that the union would sue if the City did not expire the list. In a letter dated January 27, 2016, the City Manager notified firefighters of this chronology[4/] and, further, that a new promotional exam was expected to be given in the fourth quarter of 2016 or early 2017.

On March 7, 2016, Local 3260 filed a Request for Submission of a Panel of Arbitrators identifying the grievance to be arbitrated as "Promotional Process Grievance." This petition ensued.[5/]

4/ Specifically, the letter stated in that regard, "Since only one firefighter scored above 80, it was decided to lower the composite score to 70, creating a list of candidates [but] since this decision has been questioned by a firefighter, ... the City will now 'expire' the list."

5/ The City refers to the Request for Submission as the grievance in this matter. While we accept that designation for purposes of this proceeding, we reiterate that we have not been provided a document, at least prior to the Request for Submission, that sets forth the grievance under consideration.

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 contractual merits of the grievance or any contractual defenses the employer may have.[6/]

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), outlines the steps of a scope of negotiations analysis for firefighters and police:

> 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

---

6/ Similarly, we do not address in a scope of negotiations proceeding the City's claim that Local 3260 did not follow any of the steps of the negotiated grievance procedure with respect to the grievance. That claim goes to contractual arbitrability rather than legal arbitrability.

> 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 or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, 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 firefighters, 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.

Arbitration is permitted if the subject of the grievance 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 a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The City argues that determining an appropriate cut-off score for a promotion is a non-negotiable managerial prerogative. It maintains that Local 3260 was given proper notice of the promotional criteria required to be placed on the eligible list, including a composite score of 80 or above. Given that only one candidate scored 80 or above, the City contends that it properly expired the eligible list.

Local 3260 responds that it is not challenging the City's right to establish criteria for promotion, but rather the City's failure to adhere to the negotiated promotional procedures set forth in Article XV. The Local does not identify which of those procedures the City allegedly failed to follow. However, the City highlights the provision that states a promotional list "will be in effect" for three years from the date of its issuance.

We set forth, in detail, the framework for considering a similar dispute in Washington Tp., P.E.R.C. No. 2002-80, 28 NJPER 294 (¶33110 2002). As we said there, public employers have a non-negotiable right to fill vacancies and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs as well as the right to decide that promotional vacancies will not be filled. See also, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982) and Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) and

Paterson, supra, 87 N.J. at 97-98. We also noted in Washington Tp. that public employers have a managerial prerogative to determine the type, administration, and scoring of a promotional exam; to elect not to give a promotional exam; to determine the components of a promotional exam and the weight to be given to each; and to announce new criteria and begin the promotional process anew. It follows from this analysis, but also from a weighing of the parties' respective interests, that the City had a non-negotiable managerial prerogative to determine that the subject promotional process only produced one qualified candidate to justify a promotion.

While we have held that the establishment and alteration of promotional criteria are not mandatorily negotiable, we have also held that promotional procedures are generally mandatorily negotiable. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90 (1978); see also, Bethlehem Educ. Ass'n v. Bethlehem Bd. of Ed., 91 N.J. 38 (1982); Egg Harbor Tp., P.E.R.C. No. 86-20, 11 NJPER 518 (¶16181 1985). The Appellate Division in State v. State Troopers NCO Ass'n, 179 N.J. Super. 80, 91-92 (App. Div. 1981) addressed this distinction, stating:

> [A public employer] may not be required to make all promotions from [an eligible] list since such a provision binds the [employer] not to change the criteria or method of selection for the term of the contract. As indicated, the [public employer] remains free to unilaterally alter the criteria or method of selection, provided it complies with any

> notice provisions agreed upon. Since the [employer] may not use a particular list and may adopt different criteria from those used in compiling the list in another examination for the same type of promotional position, the requirement that it make all promotions from a continuously maintained list is nonnegotiable. This should be distinguished from the [public employer's] actually maintaining and utilizing a list during the period when it has announced no changes in the promotion system.

The Appellate Division followed its discussion with a citation to Schroder v. Kiss, 74 N.J. Super. 229, 240 (App. Div. 1962), where the court said in a different context:

> One who successfully passes an examination and is placed on an eligible list does not thereby gain a vested right to appointment. The only benefit inuring to such a person is that so long as the eligible list remains in force, no appointment can be made except from that list.

Taking this additional case law into consideration, and assuming that the City generated a promotional list from the initial announced composite score, it follows that the City also had a non-negotiable managerial prerogative to unilaterally retire that list and, after giving any notice required by Article XV to the Local, to unilaterally lower the composite score and make promotions from a "new" list based on the reduced cut-off score, assuming such a list was created. Accordingly, we restrain arbitration except to the extent Local 3260's claim is that the City failed to comply with any agreed-upon notice provisions before changing the promotional criteria. The

arbitrator may address that issue, assuming it is contractually arbitrable under the CNA, but the arbitrator may not substitute his or her judgment for that of the City regarding whether any of the candidates were qualified. See, e.g., Union County Sheriff's Office, P.E.R.C. No. 2016-35, 42 NJPER 266 (¶76 2015).

Finally, if it is the Local's contention that the City must maintain for three years the promotional list based upon the reduced composite score, if any, we find such a limitation would substantially interfere with the City's managerial prerogatives, as delineated above. Therefore, the arbitrator may not award such a remedy. If the arbitrator finds that the City failed to give proper notice before changing promotional criteria, the arbitrator may only require that the City maintain the "new" list until such time as the City has given whatever amount of notice the arbitrator finds that the CNA required.[7/] Alternatively, the arbitrator may direct the City to retire the "new" list, to the extent he or she finds one was issued.

7/ During that time, the City is free to decide that promotional vacancies will not be filled.

ORDER

We restrain arbitration except to the extent Local 3260's claim is that the City failed to comply with any agreed-upon notice provisions before changing the promotional criteria.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: August 18, 2016

Trenton, New Jersey