

P.E.R.C. NO. 2018-37

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

-and-

Docket No. SN-2018-019

PBA STATE LAW ENFORCEMENT UNIT,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the request of the State of New Jersey, Department of Environmental Protection (DEP) for a restraint of binding arbitration of grievances contesting the DEP's failure to advance Trainees to the Officer title and to the next salary guide level after 12 months. Finding that the unit members' appropriate placement on the salary guide is a mandatorily negotiable topic that is not preempted by Civil Service statutes or regulations, the Commission declines to restrain arbitration to the extent the grievances concern the proper contractual salary for the grievants. Finding that managerial decisions regarding promotional criteria are not mandatorily negotiable, the Commission restrains arbitration to the extent the grievances seek the automatic advancement of the affected unit members from Trainee to Officer.

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. 2018-37

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

-and-

Docket No. SN-2018-019

PBA STATE LAW ENFORCEMENT UNIT,

Respondent.

Appearances:

For the Petitioner, Gurbir S. Grewal, Attorney General
(Rimma Razhba, Deputy Attorney General, on the brief)

For the Respondent, Law Office of David Beckett,
attorneys (David Beckett, on the brief)

DECISION

On November 20, 2017, the State of New Jersey, Department of Environmental Protection (DEP), filed a scope of negotiations petition seeking a restraint of binding arbitration of two grievances filed by the PBA State Law Enforcement Unit (SLEU). The grievances assert that the DEP violated the parties' collective negotiations agreement (CNA) by continuing four officers in provisional Trainee titles for an extended period and failing to appoint them from Trainee to Officer titles after 12 months of probationary employment.

The DEP has filed briefs, exhibits, and the certification of Deni Gaskill, DEP Assistant Director of Human Resources. SLEU

has filed briefs, an exhibit, and the certification of Chris Smith, SLEU President. These facts appear.

SLEU represents all full-time permanent and provisional employees of the State of New Jersey in various titles listed in Appendix II of the CNA, including campus police officers, special agents, weights and measures inspectors, conservation officers, State Park Police Officer Trainees, and State Park Police Officers. The DEP and SLEU are parties to a CNA effective from July 1, 2011 through June 30, 2015. The grievance procedure ends in binding arbitration.

Article XIV., paragraph C. (14.C.) of the CNA provides, in pertinent part:

C. Recruit/Trainee Salary

Effective for employees hired on or after the first full pay period following ratification, they shall be hired for their twelve month period of probationary employment as a recruit/trainee into the following recruit/trainee titles, and the salary shall be as shown below for the term of the Agreement. The parties shall jointly support action needed, including but not limited to action by the Civil Service Commission or its successor, to establish the compensation levels or titles for such new hires consistent with this provision. All employees going into these titles following ratification shall be paid at the amount shown below for the duration of this Agreement during the time that they are in the recruit/trainee title:

. . .

* State Park Police Officer Trainee \$40,000

. . .

On July 22, 2015, the Civil Service Commission issued an Eligible/Failure Roster listing the names of four unit members (grievants) who were eligible for appointment to the title of State Park Police Officer Trainee (Trainee). On October 20, 2015, Director Gaskill notified the four grievants that were receiving permanent appointments to the Trainee position retroactive to October 3, 2015 and that "in accordance with N.J.A.C. 4A:4-5.2(d)," they had to serve a one-year working test period.

On July 8, 2016, Smith filed two grievances. One alleged that three of the grievants had been provisionally appointed as Trainees on February 21, 2015, completed "all requirements listed" for the State Park Police Officer (Officer) title within 12 months of appointment, and therefore should have been moved to the title of Officer on February 21, 2016. The second grievance alleged that the fourth grievant was appointed to Trainee on April 6, 2015, completed 12 months of probationary employment and all listed requirements by May 30, 2016, and therefore should have been appointed to the title of Officer on that date.

Smith certifies that the grievants were paid at the Trainee rate of \$40,000 for more than 12 months and that under the contract and past practice, they should have been moved to the Park Police Officer salary of \$53,000 after 12 months of probationary service.

Smith further certifies that prior to the arbitration hearing, and based on the DEP's objection to submitting the issue of provisional status and title to arbitration, SLEU agreed that the issue before the arbitrator would solely concern compensation. He certifies that SLEU does not seek any changes in title, civil service status, or provisional or permanent hire dates, but only the proper contractual salary.

Gaskill certifies that the Human Resources Office of the DEP relies upon the civil service rules and regulations to determine requirements for provisional and regular appointments, the length of working test periods, and appropriate salary ranges for corresponding titles.

On August 12, 2016, SLEU filed requests for binding grievance arbitration of the two grievances. The requests state, in pertinent part:

[Grievants] should have remained in a "trainee" title for 12 months and then moved to "step 1" of the salary guide (FA17). [Grievants] and I were informed that [they] spent an extended period in "provisional" status and therefore [they] would not move to the "officer" title in a timely fashion. . . . Article XIV(C) states trainees "shall be hired for their twelve month period of probationary employment as a recruit/trainee"

According to the parties' briefs, the DEP filed this scope of negotiations petition after the parties completed the grievance arbitration hearing, but prior to issuance of the

arbitration award. Although SLEU objects to the timing of the DEP's petition, the petition is timely because it was filed prior to the issuance of the grievance arbitrator's decision.^{1/}

The Commission's inquiry on a scope of negotiations petition is narrow. We are addressing a single issue in the abstract: whether the subject matter in dispute is within the scope of collective negotiations. The merits of SLEU's claimed violation of the agreement, as well as the DEP's contractual defenses, are not in issue, because those are matters for the arbitrator to decide if the Commission determines that the question is one that may be arbitrated. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated

^{1/} See, e.g., Ocean County Library, P.E.R.C. No. 2006-47, 31 NJPER 407 (¶161 2005); New Jersey Highway Authority and IFPTE Local 193, P.E.R.C. No. 2002-76, 28 NJPER 261 (¶33100 2002), aff'd, 29 NJPER 276 (¶82 App. Div. 2003); and City of Union City and Union City Employees Association, P.E.R.C. No. 2000-89, 26 NJPER 271 (¶31105 2000), aff'd, 27 NJPER 362 (¶32131 App. Div. 2001).

agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[Id. at 404-405.]

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 DEP asserts that arbitration is preempted because the grievants' appointments, provisional and permanent, were made in accordance with Civil Service statutes and regulations, which leave no discretion to the employer, and that the issue of salary is inextricably tied to the grievants' Civil Service titles. More specifically, the DEP argues that under N.J.A.C. 4A:3-4.1 and N.J.A.C. 4A:4-5.2, an employee's salary goes hand in hand with the employee's job title and that until the grievants completed the required one-year working test period in October 2016 following their regular appointment to the Trainee position in October 2015, they could not be promoted to the Officer title. The DEP also notes that under the regulations, the working test period does not include time served under provisional appointment. The DEP does not dispute that compensation is

negotiable and that the parties have negotiated the salaries for the Trainee and Officer positions.

N.J.A.C. 4A:3-4.1(d) (2) provides in relevant part:

2. Each employee in the career and unclassified services shall be paid within the salary range or at the pay rate assigned to the employee's job title and pay shall be adjusted in accordance with this subchapter, except as otherwise provided by law, rule, or action of the Civil Service Commission.

N.J.A.C. 4A:4-5.2 provides in relevant part:

(a) The working test period shall not include any time served by an employee under provisional, temporary, interim or emergency appointment. The working test period shall begin on the date of regular appointment. See N.J.A.C. 4A:1-1.3 for definition of regular appointment.

(b) The length of the working test period, except as provided in (c) through (e) below, shall be as follows:

* * *

(d) Persons appointed to entry level law enforcement, correction officer, juvenile detention officer and firefighter titles shall serve a 12-month working test period .

. . .

SLEU asserts that the Civil Service laws and regulations do not preempt arbitration because they do not speak in the imperative concerning compensation. Noting that the DEP sets forth in its brief the court's statement in State v. CWA, 285 N.J. Super. 541, 551 (App. Div. 1995), that under Civil Service regulations, the Civil Service Commission (CSC) establishes and approves changes to a compensation plan for state employees, the

SLEU notes that N.J.S.A. 11A:3-7 was later amended by P.L. 2001, c. 240. The amendment adds a new subpart (b) making State employee compensation negotiable pursuant to N.J.S.A. 34:13A-5.3 of the New Jersey Employer-Employee Relations Act.

SLEU asserts that the applicable salary levels for probationary Trainees were negotiated by the parties, pursuant to N.J.S.A. 11A:3-7(b), to last for a maximum of 12 months, even though the DEP may have maintained the grievants in provisional Trainee status, thus delaying their regular Trainee appointments and subsequent Officer appointments. Finally, SLEU contends that the working test period cited by the DEP in N.J.A.C. 4A:4-5.2 is not applicable because that concerns the 12-month working test period following regular appointment to the Officer position. It argues that the applicable working test period for the Trainee position, N.J.A.C. 4A:3-3.7, specifically allows provisional service to count towards the maximum 12-month training period. That regulation provides, in pertinent part:

4A:3-3.7 Trainee, apprentice, recruit, and
intern titles

* * *

(b) Positions in competitive trainee titles may only be filled by regular appointments from open competitive, promotional, regular, or special reemployment lists, or, in the absence of such lists, by provisional appointments. . . .

(c) Upon regular appointment, trainees must successfully complete a working test period.

(d) The duration of the training period shall be as follows:

1. In the case of trainees and recruits only, the length of the training period shall be designated in the job specification for the particular title.

I. The designated length of a training period for a trainee (not an apprentice, recruit, or intern) title shall not be longer than 12 months, unless otherwise provided by law.

* * *

(f) The training period may include provisional service in the case of a trainee title.

In response, the DEP maintains that the above regulations pertain to a "training period," not a "working test period," and that the governing regulation is N.J.A.C. 4A:4-5.2, which mandates that the latter not include probationary time.

Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically, and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). subjected to resolution by binding arbitration." Ibid.

We find that the regulations cited by the DEP, N.J.A.C. 4A:3-4.1(d) and N.J.A.C. 4A:4-5.2, do not expressly, specifically, and comprehensively set forth the compensation levels for State Park Police Trainees or Officers. The language in N.J.A.C. 4A:3-4.1(d) vesting the Civil Service Commission with the power to establish salaries for State employees was

superceded by the 2001 amendments to N.J.S.A. 11A:3-7, which made compensation mandatorily negotiable for State employees represented by a majority representative under our Act. The DEP and SLEU were therefore free to negotiate salary levels for trainees, whether provisional or not, which it is undisputed that they did.

However, a claim for automatic movement from the position of trainee to regular officer cannot be submitted to binding grievance arbitration. State of New Jersey (Dept. of Human Services) and CWA, P.E.R.C. No. 97-106, 23 NJPER 194 (¶28096 1997), recon. granted, P.E.R.C. No. 97-136, 23 NJPER 343 (¶28157 1997), rev'd, 24 NJPER 432 (¶29200 App. Div. 1998) is instructive. There, the Commission held that movement from the title of Teacher II to Teacher I after three years was mandatorily negotiable given the identical qualifications and duties for both titles and the fact that holders of the Teacher I position did not supervise persons in Teacher II posts.

However, the Appellate Division of the Superior Court reversed, holding:

Our courts have repeatedly and uniformly held that the establishment of promotional criteria is a managerial prerogative and consequently is not negotiable. No prior decision of this court or of the Supreme Court has suggested that there are any exceptions to this principle. Nevertheless, PERC ruled that where the duties of a promotional title and of a lower title, and the knowledge and abilities required to

perform the work, are substantially the same, and there is no supervisory relationship between the positions, an employer may be required to negotiate with respect to automatic promotions from the lower to the higher title. We conclude that this ruling is inconsistent with our courts' prior decisions which exclude managerial decisions regarding promotional criteria from the scope of negotiations.

[24 NJPER at 434-435, citations omitted]

ORDER

The request of the State of New Jersey, Department of Environmental Protection, for a restraint of binding arbitration is granted to the extent the grievances seek the automatic advancement of the affected officers from Park Police Officer Trainee to Park Police Officer. To the extent, however, that the grievances seek only a determination of the proper contractual salary of the affected officers, restraint is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: April 26, 2018

Trenton, New Jersey