

P.E.R.C. NO. 2022-16

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MONTCLAIR,

Petitioner,

-and-

Docket No. SN-2021-046

FMBA LOCAL 20,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies, in part, the Township of Montclair's request for a restraint of binding arbitration of FMBA Local 20's grievance. The grievance asserts that the Township violated the parties' collective negotiations agreement when it failed to backdate the Grievant's promotion to February 1, 2020 and compensate him accordingly. The Commission finds that to the extent Local 20's grievance is seeking to backdate the Grievant's promotion to a date earlier than his actual promotion date, that would significantly interfere with the Township's managerial prerogative to decide whether and when to promote an employee. However, the Commission also finds that the primary concern of Local 20's grievance is its claim that the Grievant is entitled to additional compensation for the duties he performed as Acting Fire Lieutenant, which is a legally arbitrable claim.

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, Genova Burns, LLC, attorneys  
(Joseph M. Hannon, of counsel and on the brief)

For the Respondent, Law Offices of Craig S. Gumpel,  
LLC, attorneys (Craig S. Gumpel, of counsel and on the  
brief)

DECISION

On June 16, 2021, the Township of Montclair (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the FMBA Local 20 (Local 20). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when it failed to backdate the Grievant's promotion to February 1, 2020 and compensate him accordingly.

The Township filed briefs, exhibits and the certification of its Chief, John Herrmann. The FMBA filed a brief, an exhibit and the certification of its Fire Lieutenant, Kevin Stoute. These facts appear.

Local 20 is the majority representative of rank-and-file members of the Township's fire department. The Township and Local 20 are parties to a CNA with a term of January 1, 2021 through December 31, 2027. The grievance procedure ends in binding arbitration.

Article 4 of the parties' CNA, entitled "Acting Appointments," provides in pertinent part:

- B. Long Term Acting - When a member of the bargaining unit is required to serve as an acting officer to fill in for an officer on terminal leave, the next person on the promotional list will serve in an acting capacity without pay until the departing employee is no longer paid. The acting officer's seniority (including eligibility to move to the next step in the pay scale) in the higher position begins from the time he/she first assumed the position.
- C. The Township retains the right to determine when a vacancy exists and when an acting officer is serving in a short term or long term capacity. Once the Township determines to fill a long term acting position, the acting officer is entitled to the promotion when the departing employee is off the payroll.

Herrmann certifies that on February 1, 2020, Lieutenant Kevin Sweeney retired from the Fire Department, and that the Grievant was next on the list to be promoted to Lieutenant. Herrmann further certifies that it has been the practice of the Township's Fire Department to fill vacancies at the Lieutenant position on an acting basis until the retiree's accrued time off

has been paid out. Herrmann explains that when a retirement leaves a vacancy in the Lieutenant position, the next firefighter on the list for promotion will serve as Acting Lieutenant on a long-term basis. If the previous occupant of the Lieutenant position had accrued one year of paid time off, the Acting Lieutenant would serve in an acting capacity for one year. After one year, the firefighter would be permanently promoted.

Herrmann certifies that during the time a firefighter serves in an acting position, it has been the Township's practice to give credit for the time served in an acting capacity for the purpose of determining at what step the firefighter will be compensated upon a permanent promotion. Herrmann further explains that if a Lieutenant serves in an acting capacity for one year prior to being permanently promoted, he will receive step credit for that year and be compensated at the 2<sup>nd</sup> Step Lieutenant rate upon his permanent promotion. Herrmann certifies that the promotional process detailed above has been the consistent practice prior to and during his tenure as Chief, and it has been consistently applied to vacancies for Chief and Battalion Chief positions.

Herrmann certifies that Lieutenant Sweeney had accrued paid time off that lasted until approximately May 1, 2021. Effective February 2, 2020, the Grievant was assigned as a long-term acting lieutenant, and given an approximate permanent promotion date of

May 1, 2021. Herrmann further certifies that the Grievant did not receive additional pay during his long-term acting assignment in accordance with Article 4 of the parties' CNA. Herrmann also certifies that the Grievant served in the long-term acting capacity until May 6, 2021, when he was permanently promoted to Lieutenant. In accordance with the Township's promotional practice of providing step credit for time served in an acting position, the Grievant has received compensation as a 2<sup>nd</sup> Step Lieutenant since his promotion.

Stoute certifies that on February 5, 2021, the Grievant filed a grievance seeking a determination that his permanent promotion date would be February 1, 2020, and that he would be compensated for the time served in the long-term acting capacity of Fire Lieutenant. The grievance states:

My Grievance is:

Pursuant to Article 4 Sec. 1(B) My promotion date should have been set to 02/01/2020 when retired member Kevin Sweeney was "no longer paid". I am still in long term acting and believe this to be a violation of our contract.

To correct my grievance the following should be done:

Back date my promotion to 02/01/2020 and compensate me monetarily for the last 11 months.

Stoute asserts that the Township's promotional process, explained above, is not consistent with the plain meaning of

Article 4. Stoute certifies that under Article 4 a firefighter serving in a long-term acting capacity serves "without pay until the departing employee is no longer being paid". He further certifies a departing employee is "off the payroll" at retirement. Stoute asserts that the grievance seeks compensation, in accordance with the CNA, for the Grievant's performance of Lieutenant duties since Lieutenant Sweeney was no longer being paid as of February 1, 2020. Stoute also asserts that the Grievant was deprived of overtime opportunities and additional vacation time from February 2, 2020 to his permanent promotion to Fire Lieutenant effective May 6, 2021, which are further issues encompassed by the grievance. Stoute certifies that the Grievant prepared and submitted the grievance, including the description and the remedy sought, but that the above-detailed issues further explain the basis for the grievance.

On February 15, 2021, Herrmann denied the grievance stating that there was no violation of the CNA or past practice. The grievance was then denied at the subsequent steps of the parties' grievance procedure for similar reasons. On March 15, Local 20 filed a Request for Submission of a Panel of Arbitrators. This petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider

the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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 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.

The Township argues that promotional decisions are non-negotiable, and thus, the union's request for arbitration regarding the Grievant's promotion must be restrained. The Township argues that permanent promotional decisions are an essential managerial prerogative, and allowing arbitration of the grievance would undermine the Township's ability to decide when to permanently fill vacancies. Citing several Commission cases, including cases between these same parties (further discussed infra), the Township asserts that the Commission has repeatedly restrained arbitrations seeking to require municipalities to promote firefighters pursuant to CNAs, which is what Local 20 is seeking through its grievance. The Township further argues that the Grievant was made a long-term Acting Lieutenant does not affect the Township's non-negotiable managerial prerogative to decide when and whether to permanently promote the Grievant.



Local 20 argues that its grievance is mandatorily negotiable and legally arbitrable as it is not seeking to challenge the Township's managerial prerogative to make promotions, but rather, it is addressing issues of compensation, seniority, overtime opportunities, and vacation entitlement, during the period in which the Grievant was assigned as an Acting Fire Lieutenant. Local 20 argues that the Grievant is entitled, both contractually and statutorily under N.J.S.A. 40A:9-6,<sup>1/</sup> to Fire Lieutenant's pay, among other emoluments of the position, during the period he was assigned as an Acting Fire Lieutenant, and such issues of compensation are mandatorily negotiable. As such, Local 20 asserts that arbitration of its grievance must not be restrained.

In its reply brief, the Township responds that Local 20 is attempting to disguise its grievance concerning a non-negotiable permanent promotional decision as a compensation grievance. The Township further argues that Local 20's statutory and contractual

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<sup>1/</sup> N.J.S.A. 40A:9-6 provides:

Any person who has held or who may hereafter hold, de facto, any office or position in the public service of any county or municipality, and who has or shall have performed the duties thereof, shall be entitled to the emoluments and compensation appropriate to such office or position for the time in fact so held and may recover therefor in any court of competent jurisdiction, notwithstanding any refusal or failure of any other person or officer to approve or authorize the payment of said emoluments and compensation.

claims regarding compensation were never presented to the Township during the grievance procedure. Moreover, the Township argues that Local 20's compensation claim based on N.J.S.A. 40A:9-6 is not arbitrable because this statutory claim implicates the Township's managerial prerogative regarding promotions and a litigant may only recover under this statute in a court of competent jurisdiction rather than arbitration.

A public employer has a prerogative to determine promotional criteria and make promotional decisions, but must negotiate over promotional procedures. See State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90 (1978). Employers also have a prerogative not to fill promotional positions. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981). However, employees have a right to negotiate over the compensation they receive for the duties they perform. See Woodstown-Piles Grove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Piles Grove Ed. Ass'n, 81 N.J. 582 (1980).

To the extent Local 20's grievance is seeking to backdate the Grievant's promotion to a date earlier than his actual promotion date, we find that would significantly interfere with the Township's managerial prerogative to decide whether and when to promote an employee. However, we find that the primary concern of Local 20's grievance - and the reason it seeks to backdate the Grievant's promotion - is its contractual and

statutory claim that the Grievant is entitled to additional compensation for the 15 months he served as Acting Lieutenant. Local 20 interprets Article 4, and other provisions, of the CNA, to require that the Grievant be additionally compensated as an Acting Lieutenant as soon as Lieutenant Sweeney retired. The Township disagrees with that interpretation and claims that the Grievant was compensated properly in accordance with the CNA and the established promotional practice of not providing the Acting Lieutenant higher compensation until the departing employee is paid all of their accrued leave time. Whether the Grievant is entitled to additional compensation for duties performed as Acting Lieutenant is a mandatorily negotiable and legally arbitrable issue, regardless of the date the Grievant receives the status of permanent promotion to Fire Lieutenant. The Township's contractual defenses that the Grievant was compensated appropriately under the CNA and established past practice are considerations for the arbitrator.

Likewise, an arbitrator may decide the applicability, if any, of N.J.S.A. 40A:9-6 to the Grievant's compensation claims, including the Township's argument that arbitration is an improper forum under the statute. See W. Windsor v. PERC, 78 N.J. 98, 116 (1978) ("...statutes and regulations are effectively incorporated by reference as terms of any collective agreement covering employees to which they apply. As such, disputes concerning

their interpretation, application or claimed violation would be cognizable as grievances subject to the negotiated grievance procedure contained in the agreement.") Thus, grievances involving the application of controlling statutes or regulations may be arbitrable so long as the award does not have the effect of establishing a provision of a negotiated agreement inconsistent with the law. Old Bridge Bd. of Education v. Old Bridge Education Assoc., 98 N.J. 523, 527-528 (1985).

Additionally, we address the Township's argument that Local 20's grievance seeks only to mandate when the Grievant's promotion became effective and did not raise issues of compensation during the grievance process. We have stated that the Commission determines scope of negotiations petitions based on the totality of the certified facts and arguments raised by the parties and has often acknowledged that a dispute becomes more sharply focused as the grievance proceeds and professional assistance is received at higher levels of the grievance process. See North Hunterdon Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 86-55, 11 NJPER 707, n.3 (¶16245 1985); City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988). Here, the Grievant drafted and submitted the grievance seeking that his promotion be backdated; however, he clearly stated in the grievance that he was seeking additional compensation based on a misapplication of the CNA's Article 4. Moreover, Stoute's certification expounded on the

basis of the grievance, including the contractual and statutory claims supporting Local 20's position that the Grievant was improperly compensated.

Lastly, we find the Township's reliance on Tp. of Montclair, P.E.R.C. No. 98-36, 23 NJPER 546 (¶28272 1997) (Montclair I) and P.E.R.C. No. 98-151, 24 NJPER 322 (¶29153 1998) (Montclair II) to be inapposite. In both Montclair I and II the Commission upheld the Township's managerial prerogative to leave a position vacant and to not promote the next firefighter on the promotional list. Unlike the instant matter, in Montclair I, the Township did not appoint anyone to long-term Acting Fire Lieutenant, and thus, there were no issues raised about compensation owed pursuant to the CNA for duties performed as Acting Fire Lieutenant, as is claimed by the Grievant here. In Montclair II, the grievant was challenging the Township's decision to not appoint him Acting Deputy Chief and to appoint two other officers that had been serving in that role. Thus, there, the grievant did not claim any compensation issues because he never served in the long-term acting position.

For the foregoing reasons, we restrain arbitration to the extent that the Grievant is seeking to backdate his promotion to February 1, 2020. However, we do not restrain arbitration over Local 20's claims that the Grievant was entitled to additional compensation for the duties performed as Acting Lieutenant.

ORDER

The Township of Montclair's request for a restraint of binding arbitration is denied to the extent the grievance seeks additional compensation for duties performed as Acting Lieutenant. The request for a restraint of binding arbitration is granted to the extent the grievance seeks to backdate the Grievant's promotion.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: October 28, 2021

Trenton, New Jersey