

P.E.R.C. NO. 2023-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PLAINSBORO TOWNSHIP,

Petitioner,

-and-

Docket No. SN-2023-013

PLAINSBORO TOWNSHIP SOA,

Respondent.

SYNOPSIS

The Commission grants, in part, and denies, in part, Plainsboro Township's scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Plainsboro Township Superior Officer's Association, PBA Local 319A, which alleges the Township violated the parties' collective negotiations agreement by allowing a Lieutenant to participate in a promotional process for the position of the Chief of Police when he had not completed the required one year probationary period as a Lieutenant. The Commission restrains arbitration to the extent the grievance challenges the promotional criterion of completion of a one-year probationary period. The Commission denies restraint to the extent the grievance challenges the Township's alleged failure to provide notice about a change in that promotional criterion.

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, Ruderman & Roth, LLC, attorneys
(Mark S. Ruderman, of counsel)

For the Respondent, Arleo & Donohue, LLC, attorneys
(Frank P. Arleo, of counsel)

DECISION

On October 5, 2022, Plainsboro Township (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Plainsboro Township Superior Officer's Association, PBA Local 319A (SOA). The grievance alleges that the Township violated the parties' collective negotiations agreement (CNA), among other things, by allowing a Lieutenant to participate in a promotional process for the position of the Chief of Police when he had not completed the required one year probationary period as a Lieutenant.

The Township filed a brief, exhibits and the certification of its Administrator, Anthony Cancro. The SOA filed a brief and

the certification of one of its members, Sgt. Mathieu Baumann. These facts appear.

The SOA represents all full-time police sergeants and lieutenants employed by the Township, excluding all superior officers above the rank of lieutenant. The Township and SOA are parties to a CNA in effect from January 1, 2020 through December 31, 2022. The grievance procedure ends in binding arbitration under the rules and procedures of the New Jersey State Board of Mediation.

On August 25, 2022, the SOA filed a grievance challenging the Township's inclusion of a Lieutenant, E.B., in a promotional process for the position of Chief of Police.

Specifically, the grievance alleges that on August 12, 2022, the Township, through its attorney, announced by separate emails a promotional process for Chief of Police in anticipation of the retirement of Chief Taverner, the then-current Chief. The grievance alleges the emails were sent to four Lieutenants, including E.B., and that each email contained two attachments including a formal announcement of the process and a copy of General Order 1.2.7, entitled "Promotional Process." The grievance alleges the formal announcement specifically referred to and quoted the eligibility requirements for the process set forth in General Order 1.2.7, stating, "You are eligible to be considered for the Chief of Police position because you have

obtained the rank of Lieutenant and you have completed the mandatory probationary period.”

The grievance alleges E.B. should not have been included in this promotional process because, as he was promoted to the rank of Lieutenant on May 3, 2022, he had not yet concluded his mandatory promotional probation when the promotional process was announced on August 12. The grievance alleges this violated the CNA, as well as, among other things, General Order 1.2.7.

Article II of the parties' CNA, entitled "Management Rights," provides in pertinent part (emphasis added):

Section A.3. The right of management to make such reasonable rules and regulations as it may from time to time deem best for the purpose of maintaining order, safety and/or the effective operation of the Department after advance notice thereof to the employees to require compliance by the employees is recognized.

General Order 1.2.7 - Promotional Process - Section II, Eligibility, provides (emphasis added):

D. Chief - The candidate must have obtained the rank of Lieutenant, including completion of the mandatory probationary period, within this agency.

E. In order to be eligible for a promotional process, candidates shall have completed the prerequisite probationary period of their current rank prior to announcement of the process. Commencement of any promotional process shall be marked by a formal announcement.

On September 8, 2022, the SOA filed a request for arbitration, and on September 28, 2022, the State Board of Mediation appointed an arbitrator.^{1/} This 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 contractual merits of the grievance or any contractual defenses the employer 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), 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,

^{1/} No hearing date had been set as of the date briefing was completed in this matter.

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.

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 Township argues that the right to transfer or reassign employees based on the employer's assessment of the employee's qualifications and abilities to do the work it needs done is not mandatorily negotiable. It argues a union may not challenge an employer's decision to promote that is based on such an assessment. The Township contends that an employee's years of service and "time and grade" relate to a qualification for promotion, and that the SOA is attempting to arbitrate whether a candidate for Chief of Police must have one year of service as a Lieutenant. The Township argues that arbitration should be restrained because the SOA cannot tell the employer who is eligible for promotion and what years of service will qualify for a promotion.

The SOA argues that while an employer has a prerogative to determine promotional qualifications and criteria, it must negotiate over promotional procedures. The SOA contends the grievance should be arbitrated as it concerns a promotional procedure governing the eligibility of certain individuals for consideration. The SOA does not dispute the Township's right to transfer and assign its personnel, but it contends the grievance does not involve that substantive decision. The SOA further

concedes that employers are free to determine the promotional criteria necessary for a specific role. But it argues that setting a minimum duration of employment in a specific role, as a necessary procedure for the consideration of a promotion, is not the same as an employer determining the skills necessary for the performance of a new duty.

Analysis

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. Washington Tp., P.E.R.C. No. 2002-80, 28 NJPER 294 (¶33110 2002) (citing, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park, supra). Promotional criteria are not mandatorily negotiable, while promotional procedures are. Washington Tp. (citing, Bethlehem Ed. Ass'n v. Bethlehem Bd. of Ed., 91 N.J. 38 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978)). As we further explained in Washington Tp., supra:

The line between a substantive and procedural matter is sometimes indistinct, and giving a matter a particular label may not resolve the issue. However, mandatorily negotiable procedures include notice of promotional criteria and changes in such; guarantees that employees meeting all of the employer's promotional criteria will be considered; and requirements that employees be informed of their scores on oral examinations.

. . .

In addition, . . . we have held that an employer has the right . . . to determine what constitutes relevant professional experience for purposes of assessing whether candidates meet minimum qualifications for promotion...

[28 NJPER at 296 (internal citations omitted).]

We have further held that "[a]fter an employer has selected and announced promotional criteria, including how much each criterion will be valued, a commitment to adhere to those standards during a particular round of promotions . . . is a mandatorily negotiable promotional procedure." State of New Jersey, P.E.R.C. No. 2014-50, 40 NJPER 346, 350 (¶126 2014), aff'd, 42 NJPER 165 (¶41 App. Div. 2015) (citing, State Troopers NCO Ass'n. 179 N.J. Super. at 92). See also, Wall Tp., P.E.R.C. No. 2002-22, 28 NJPER 19, 22 (¶33005 2001), aff'd, 29 NJPER 279 (¶83 App. Div. 2003) (employee at top of promotional list was allowed to arbitrate not being promoted where promotional appointment deviated without notice from list established through employer's evaluation of candidates in light of its announced promotional criteria); Freehold Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 95-2, 20 NJPER 315, 316 (¶25159 1994) ("[I]f an employer had a contractual obligation to announce criteria in advance, an arbitrator could review a claim that promotions were based on unannounced criteria . . . [and] would not be reviewing the employer's assessment of relative qualifications, but rather

whether employees were misled as to the requirements for the job.”)

Against this backdrop, we turn to the grievance at issue here. We find the Township’s requirement of completion of a one-year probationary period in the rank of Lieutenant relates to the determination of relevant professional experience to be eligible for promotion to Chief of Police, a promotional criterion that is not mandatorily negotiable or legally arbitrable. Washington Tp., supra. Thus, to the extent that the SOA’s grievance challenges that promotional criterion, it is not mandatorily negotiable or legally arbitrable.

However, the SOA’s grievance also contests the Township’s alleged failure to provide notice of a change in that promotional criterion, by its consideration of E.B., who the SOA alleges had not completed the one-year probationary period in the rank of Lieutenant. This allegation of the Township’s failure to provide notice of a change in that promotional criterion involves a promotional procedure that is mandatorily negotiable and legally arbitrable.

Therefore, to the extent that the SOA’s grievance challenges the promotional requirement of completion of a one-year probationary period, it is not mandatorily negotiable or legally arbitrable. However, to the extent the SOA’s grievance challenges the promotional procedure of the Township’s alleged

failure to provide notice of a change in a promotional criterion, it is mandatorily negotiable and legally arbitrable. State of New Jersey, Freehold Reg., supra.

ORDER

The Township of Plainsboro's scope of negotiations petition seeking a restraint of binding arbitration is granted to the extent the SOA's grievance challenges the promotional criterion of completion of a one-year probationary period. The restraint is denied to the extent the grievance challenges the promotional procedure of the Township's alleged failure to provide notice about a change in a promotional criterion.

BY ORDER OF THE COMMISSION

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

ISSUED: March 30, 2023

Trenton, New Jersey