P.E.R.C. NO. 93-101

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONTCLAIR TOWNSHIP,

Petitioner,

-and-

Docket No. SN-93-14

FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION, LOCAL 20,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies Montclair Township's request for a restraint of binding arbitration of grievances filed by Firemen's Mutual Benevolent Association, Local 20. The grievances contend that the Township violated the parties' collective negotiations agreement when it reactivated an outdated promotional list. The Commission concludes that these grievances are at least permissively negotiable to the extent they seek to enforce an alleged agreement to create a current promotional list to replace the 1988 list and to the extent they assert that the Township did not comply with negotiated procedures before reviving the 1988 list.

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Appearances:

For the Petitioner, Ruderman & Glickman, attorneys (Mark S. Ruderman, of counsel; Ellen M. Horn, on the brief)

For the Respondent, Fox and Fox, attorneys (Stacey B. Rosenberg, of counsel)

DECISION AND ORDER

On August 18, 1992, Montclair Township petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of grievances filed by firefighters represented by the Firemen's Mutual Benevolent Association, Local 20. The grievances contend that the Township violated the parties' collective negotiations agreement when it reactivated an outdated promotional list.

The Township filed exhibits and a brief. The FMBA did not.[1/] These facts appear.

1/ One grievant filed a Superior Court lawsuit alleging that the FMBA breached its duty of fair representation in handling his grievance. The grievant did not seek to intervene in this proceeding. See N.J.A.C. 19:13-3.2.

The Township is not a civil service jurisdiction. The FMBA represents the Township's uniformed firefighters. The parties' current contract is effective from January 1, 1991 through December 31, 1993. The grievance procedure ends in binding arbitration.

Article 26 of the contract covers promotions. It reads:

> Section 1. - Promotional Positions: "Promotional positions" shall be defined as positions which pay a special salary differential, which involve, in part or in full, the performance of supervisory or administrative duties, and which include the positions of Lieutenant, Captain, and Deputy Chiefs.
>
> Section 2. - Notice of Vacancies: The Employer shall prominently post, on a bulletin board designated for this purpose, all openings for promotional positions as defined herein. The notice of any vacancy shall clearly state all qualifications, descriptions, requirements, duties, and any other pertinent information respecting the vacancy. Said notice shall also include the salary to be paid in such position.
>
> Section 3. All notice of vacancies shall be posted, and otherwise publicized, no less than one (1) month prior to the time at which the receiving of applications for said vacancies is closed. (Subject to Docket No. SN-89-54)
>
> Section 4. The right to apply and compete for any and all promotional positions shall be open to all Employees who meet the qualifications and requirements of any or all of the respective positions to be filled.
>
> Section 5. Promotional Procedures: The Employer and the Union agree that the promotional procedure will be the subject of discussions with the FMBA, and the FMBA will be given a written copy of the promotional examination procedure at least sixty (60) days prior to the start of any promotional examination. The Township Manager and Fire Chief shall convene a meeting with the FMBA in order that the FMBA comments on the examination procedure may be presented.

> Section 6. The right to establish examination criteria, and to make promotions based on those criteria, is solely the prerogative of the Township Manager. Changes in examination criteria will occur to improve upon past examinations and to promote professionalism and fair treatment in the Fire Department. (Subject to Docket No. SN-89-54)[2/]

Article VIII, Section 2 also refers to promotions. It reads:

> Section 2. Whenever a promotional examination or procedure is given in the Township Fire Department, the following procedures shall control:
>
> (a) Prior to conducting such examination, the Employer shall inform the Union of the nature, composition and purpose of the examination;
>
> (b) the Employer shall give due consideration to the objections, comments and suggestions of the Union with regard to the examination procedure;
>
> (c) failure to comply with (a) and (b) above, shall render the examination null and void;
>
> (d) after the examination, every employee taking the examination shall have the right to review his own test score or rating, and shall have the right to know how his score on each portion of the examination compares with other employees who participated in the examination and received promotions as a result thereof.

In February 1992, the then Township manager asked the FMBA for assistance in developing a new promotional list for the ranks of captain and lieutenant. The old list had been created in November

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2/ In Montclair Tp., P.E.R.C. No. 90-9, 15 NJPER 499 (¶20206 1989), we held that the last sentence of Section 6 was not mandatorily negotiable.

1988 after a promotional examination. On February 7, 1992, the then manager announced that the old list would be voided and a new list established. In April 1992, the FMBA responded favorably to the decision to create a new list. However some grievances were filed contesting the revocation of the old list. A new Township manager then reinstated the 1988 list indefinitely.

On May 30, 1992, firefighter John Inzilla Sr. filed a grievance alleging that the reactivation of the old list violated several articles of the agreement as well as representations made in memoranda and correspondence between the FMBA and the former Township manager. On June 8, Lieutenant Richard Barbarise filed a similar grievance, attached to which is a sheet containing the signatures of 28 other unit members stating that they concurred with the grievance.[3/]

On June 8, 1992, the fire chief responded to the Inzilla grievance. The chief stated that the former manager had intended that the fire department's promotional list would have the same duration as the police department's list -- no more than three years from the date of the test. The chief also stated that he could not recall a list ever having been used beyond three years. Although the chief believed that the revival of the list may have violated

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3/ Barbarise's grievance noted that he had been promoted to lieutenant from the 1988 list in June 1990.

the agreement, he stated that he lacked authority to overturn the new manager's decision.

On June 16, 1992, the new Township manager denied the Inzilla grievance. On July 6, the FMBA demanded arbitration of both grievances. Its demand alleges violations of the above-quoted sections of the agreement and an anti-discrimination clause. The demand also states:

> Proper procedures were not followed and promotional opportunities were denied to grievants and other Montclair Firefighters, when in May 1992, for improper and illegal reasons, the November 1988 list was extended. This extension is apparently for an indefinite period of time at the present time. No new appointments have been made as of June 25, 1992 and as a result the list in question is more than three and one-half years old. It is expected that appointments will be made from this old list and that promotional opportunities are being improperly denied to the large pool of eligibles, including large numbers who were not eligible for the examination and testing procedures that resulted in the November 1988 list. These individuals, as a result, have been improperly denied promotional opportunities. The relief sought is included but not limited to the following: Termination of the old list and creation of a new list; monetary compensation for those individuals who would have received the jobs given to individuals who are appointed from the old list; sanctions; promotion from the new list to positions improperly filled from the old list; other relief as may be appropriate under the circumstances.

This petition ensued.

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. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

> 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. 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. [Id. at 92-93; citations omitted]

We will not restrain arbitration of a grievance involving firefighters unless the alleged agreement is preempted or would substantially limit government's policymaking powers.

Given our limited jurisdiction, we do not consider the contractual merits of the grievance. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). We also emphasize that these grievances cannot interfere with or limit the employer's right to determine promotional criteria; cannot force the employer

to use examinations to assess qualifications; cannot force the employer to fill a vacancy; and cannot preclude the employer from temporarily filling a position while a new list is created. Thus, the issue before us is narrow. Can a non-civil service employer agree with a majority representative that a new promotional list should be created after an old promotional list has been used for more than three years?

The Township asserts that it has a prerogative not to develop a new promotional list and instead to rely on the 1988 list. It does not specify what governmental policies are implicated, but relies on Nutley Tp., P.E.R.C. 88-21, 13 NJPER 723 (¶18271 1987) and State of New Jersey, P.E.R.C. No. 79-68, 5 NJPER 160 (¶10089 1979), aff'd sub nom., Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981). We will address those cases in our analysis.

Our Supreme Court addressed the policy underlying time limits on promotional eligibility lists in reviewing a civil service case. Marranca v. Harbo, 41 N.J. 569 (1964). The Court stressed the shared interests of employees and employers in avoiding stale eligibility lists:

> "Ideally, a competitive examination would be held every time a vacancy existed, thus assuring the selection of the most competent available person." Kaplan, Law of Civil Service, p.163 (1958). But as a practical matter an employment list must serve for some period, and hence our [civil service] statute provides that the list shall endure for...no less than one year nor more than three years for the local service....

> The Legislature has thus fixed the outer time limit of a list because a stale list disserves both the employer units and the coemployees whose eligibility to compete accrues after an examination. [Id. at 572]

The Court also stated that the public interest would be unnecessarily hurt by permitting promotional lists to be extended beyond three years. Id. at 573; see also Imbriacco v. State Civil Service Commission, 150 N.J. Super. 105 (App. Div. 1977) (avoidance of stale lists is a salutary overriding purpose of civil service statute). Thus, in a civil service jurisdiction, an employer would not have the right to reinstate a list more than three years old. See N.J.S.A. 11A:4-6.[4/] Against this backdrop, we now apply the scope of negotiations analysis required by Paterson to this dispute in a non-civil service jurisdiction.

Opportunities to be considered for promotion intimately and directly affect employee work and welfare. See State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90-91 (1978). By determining that the 1988 list will be used indefinitely, the employer has foreclosed the promotional opportunities of any current firefighters who were not able to take the 1988 examination or who could pass an examination administered now. By contrast, a

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4/ N.J.S.A. 11A:4-6 replaced N.J.S.A. 11:9-10, the statute interpreted by the Supreme Court in Marranca. The new statute provides that the duration of an eligible list shall not be more than three years, except that the Commissioner of Personnel may extend the duration of a list to four years for good cause. The list may also be extended to permit implementation of a favorable appeal instituted during the life of a list or to correct an administrative error.

declaration, consistent with civil service practice, that the 1988 list may no longer be used would not appear to limit the employer's policy objectives concerning promotional vacancies. See Marranca. An employer's main interest is in determining which employees are the most qualified for promotion now. That interest is not substantially compromised by enforcing an alleged agreement to create a new promotional list based on current qualifications rather than use a list based on a test given nearly five years ago. Whether any such agreement exists is an issue of contract interpretation for the arbitrator to resolve.

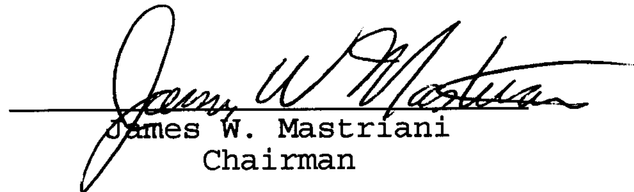
In State Troopers, 5 NJPER at 164, we held not mandatorily negotiable a clause stating that examination scores would be effective for one year and that thereafter promotions would be made from a list based upon a new examination. This case is distinguishable because it involves a list that was more than three years old at the time of the grievances and, unlike State Troopers, it does not involve a contract clause that could limit the employer's right to update a list. In addition, for purposes of this decision we note that State Troopers dealt with mandatory, not permissive, negotiability. Nutley is distinguishable because its grievance challenged the employer's decision not to choose a police chief through an examination. Here the central issue is whether the parties have agreed to make a current promotional list, not whether the employer is required to use an examination to judge qualifications.

We conclude that these grievances are at least permissively negotiable to the extent they seek to enforce an alleged agreement to create a current promotional list to replace the 1988 list and to the extent they assert that the Township did not comply with negotiated procedures before reviving the 1988 list.[5/]

ORDER

The Township's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: May 20, 1993
Trenton, New Jersey
ISSUED: May 21, 1993

5/ Given the facts of this case, we need not decide whether an agreement to limit the validity of a list to less than three years would be legally arbitrable.