

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY

Petitioner,

Docket No. SN-79-52

-and-

STATE TROOPERS NCO ASSOCIATION
OF NEW JERSEY, INC.,

Respondent.

SYNOPSIS

The Chairman, having been delegated the authority to issue a scope of negotiations determination by the Commission, passes upon the negotiability of a disputed article on promotions which appeared in the previous contract between these parties and which the State of New Jersey seeks to remove from the successor agreement with the State Troopers NCO Association of New Jersey, Inc. The NCO Association seeks to retain the promotions article and to submit any disagreement regarding that article to compulsory interest arbitration pursuant to c.85, P.L. 1977.

Rejecting arguments of both the State that there is no permissive category of negotiations for police officers and fire fighters and that a specific statute which authorizes the Superintendent of the Division of State Police to make promotions precludes negotiations on this subject and, on the other hand, the NCO Association that the scope of mandatory negotiations is broader for employees covered by c.85, P.L. 1977 than for other public employees, the Chairman concludes that the issues must be analyzed to determine whether they relate to criteria for promotions or procedures for promotions. Consistent with a line of judicial and Commission decisions, public employers are not required to negotiate regarding the criteria for promotions. This is a managerial prerogative. However, employers are required to negotiate regarding promotional procedures because these matters do not significantly interfere with the employer's exercise of policy-making functions and do directly affect the work and welfare of public employees.

Therefore, the State is free to determine what factors e.g. examinations, seniority, performance evaluations, etc. are to be used in deciding whom to promote and the weights to be accorded the selected factors. But once having determined the criteria, the State must negotiate with the NCO Association regarding notification of the criteria, adherence to the criteria, posting of examination

scores, and other procedural matters. Disputes regarding these procedural matters, if not resolved by the parties, may be submitted to compulsory interest arbitration but disputes regarding the criteria for promotions cannot be submitted to compulsory interest arbitration absent joint agreement of the parties.

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Appearances:

For the Petitioner, John J. Degnan, Attorney
General (Melvin E. Mounts, Deputy Attorney General, Of Counsel)

For the Respondent, Cerreto & LaPenna, Esqs.
(Jerome J. LaPenna, Of Counsel)

DECISION AND ORDER

A Petition for Scope of Negotiations Determination was filed by the State of New Jersey (the "State") with the Public Employment Relations Commission on January 5, 1979 asserting that certain matters in dispute between the State and the State Troopers NCO Association of New Jersey, Inc. (the "NCO Association") are not within the scope of collective negotiations. The dispute arose during the course of negotiations for a successor agreement to the parties' July 1, 1976 to June 30, 1978 agreement. The State has taken the position that elements of the article in question, which is that which appeared in the recently expired agreement, are non-mandatory as opposed to required subjects of negotiations. The State seeks the removal of these elements from the successor agreement.

The disputed article is quoted in its entirety:

PROMOTIONS

A. All promotions to the ranks of Sergeant First Class, Detective Sergeant First Class and Lieutenant shall be made predicated upon the following criteria:

1. Written Examinations - a maximum of thirty-four percentage (34%) points prorated on the numerical score achieved on the written examination.

2. Seniority - a maximum of thirty-four percentage (34%) points based on the NCO's months of creditable service in the Division of State Police. For each month of such service, an NCO shall receive 0.1 percentage (0.1%) points per month to the maximum of twenty-eight (28) years and four (4) months. Creditable service commences with enlistment after graduation from the New Jersey State Police Academy and does not include time lost during suspension(s) nor time lost during resignation and reinstatement.

3. Performance (Management Criteria) - a maximum of thirty-two percentage (32%) points based on (a) job related experience, (b) evaluation of work performance, (c) record of conduct, (d) medical condition, (e) potential to perform in the next higher rank, and (f) any other factors relevant to a particular promotion. Each of the aforesaid six (6) management criteria will be assigned a part of the total thirty-two percentage (32%) points allotted to management criteria and the points assigned to each criterion will be stated in the announcement of the vacancy to be filled by promotion. The number of points assigned to each of management's criteria shall remain constant as to each vacancy for the same position.

B. 1. Each and every promotion shall be made exclusively based upon the highest number of percentage points to a maximum of one hundred percentage (100%) points accumulated by eligible Non-Commissioned Officers from and through the criteria set forth in paragraph A. above. To be eligible for promotion pursuant to this Article, an NCO must take the written examination set forth in A.1. above. The NCO or NCO's who have accumulated the highest total percentage points shall be promoted to the highest rank within ninety (90) days after the announcement of the vacancy.

C. 1. During the term of this Agreement, the written examinations for promotions, referred to in A.1. of this Article, will be developed, prepared, administered and scored by the New Jersey Civil Service Commission acting as an independent contractor and testing agency, independent of the State of New Jersey and the Division of State Police.

2. Written examinations for promotions will be given on a regular schedule or as needed so that there is always in

existence a list of examination scores for use, as set forth in A.1. of this Article, to determine the percentage points achieved by NCO's in the written examination which, when added to the percentage points achieved in the other criteria set forth in A.2. and A.3. of this Article, will determine the NCO or NCO's to be promoted.

3. All NCO's with two (2) years in rank as of the date of the announcement of the written examination shall be eligible to take the written examination for promotion and there will be no other eligibility requirement for taking the examination.

4. There shall be a thirty (30) day period between the date of the announcement of the examination and the date the examination is given and there shall be a makeup examination for those NCO's who miss the regular examination. The announcement of the examination shall contain the date, time and place of the examination and any other information pertinent thereto and in addition thereto shall contain the announcement of the make-up examination together with its time and place and other pertinent information relative to the make-up examination.

5. The scores of the written examinations will be posted within ninety (90) days of the original announcement of the written examination.

6. The scores of the written examination shall remain in effect and operation for one (1) year from the date of the posting of the examination scores or until the list of scores is exhausted by promotion of all of the examinees. If, at the end of the one (1) year period the list of scores is not exhausted, then the scores shall expire and have no further force and effect, and after such expiration, promotions shall only be made based upon the next examination scores together with the other criteria set forth in paragraphs A.2. and A.3. of this Article. (However, the scores of the initial examination given in October 1975, will remain in effect until December 5, 1976.)

D. 1. When a vacancy or vacancies occur in the ranks of Sergeant, Sergeant First Class and/or Lieutenant, the Division of State Police shall announce the vacancy or vacancies by posting the said vacancy or vacancies and shall set forth in the announcement of vacancy or vacancies the weight (number of percentage points) to be assigned to each of the management criteria as set forth in A.3; i.e., how much each of management's criteria is worth in connection with the vacant position or positions announced. The said announcements of position vacancies shall be made by teletype through the Division teletype system and shall contain the aforesaid management criteria weight assignments. The said announcements shall be posted on

bulletin boards throughout the Division and copies thereof shall be sent, at the time of posting, to the President of the State Troopers NCO Association of New Jersey, Inc.

There shall be no discrimination practiced against any NCO with respect to the requirements of this Article nor any inequitable or nonuniform application of any of the terms of this Article to any NCO.

Pursuant to approved requests for extensions of time within which to file briefs, the State submitted its brief on February 1, 1979 and the NCO Association submitted its brief on March 6, 1979. At the request of the NCO Association, the parties appeared before the Commission on March 8, 1979 to argue orally. A stenographic record of the oral argument was taken. Thereafter, the Commission, at the request of the State and with the consent of the NCO Association, delegated to the undersigned, pursuant to N.J.S.A. 34:13A-6(f), ^{1/} the authority to decide the instant matter. The undersigned has carefully considered the scope petition, the parties' briefs, and the transcript of the oral argument.

In its brief and at oral argument, the State put forth two arguments which it asserts completely foreclose negotiations concerning the subjects covered by this article. Initially, it argues that, pursuant to the Supreme Court's recent decision of Ridgefield Park Ed. Ass'n. v. Ridgefield Park Bd. of Education, 78 N.J. 144 (1978), all aspects of promotions involve governmental

^{1/} N.J.S.A. 34:13A-6(f) provides, "...In carrying out any of its work under this Act, the commission may designate one of its members...to act on its behalf and may delegate to such designee one or more of its duties hereunder and, for such purposes, such designee shall have all of the powers hereby conferred upon the commission in connection with the discharge of the duty or duties so delegated."

policy decisions and are thus inherent managerial prerogatives outside the scope of collective negotiation. The State asserts that the Ridgefield Park decision held that there is no permissive category of negotiations in the public sector in New Jersey, i.e., that negotiations on items other than terms and conditions of employment are not only not mandatory but are illegal. The State, however, does not discuss the fact that the Ridgefield Park decision specifically excepts from the application of its holding negotiations covering police and fire departments covered by the recent amendments to the Act made by Chapter 85, P.L. of 1977. That statute expressly contemplates permissive negotiations. Chapter 85, P.L. 1977, sections 3(b) and 3(f)(4) codified as N.J.S.A. 34:13A-16(b) and 16(f)(4). See Ridgefield Park, supra, at 78 N.J. 158.

The State's second point is that promotions in the Division of State Police are completely covered by a specific statute, N.J.S.A. 53:1-5.2, and pursuant to another of the Supreme Court's recent decisions, State of New Jersey v. State Supervisory Employees Ass'n., 78 N.J. 54 (1978), the existence of the statute completely precludes negotiations even if some aspects of the disputed article would be found to be terms and conditions of employment. The State argued, therefore, that the distinction between promotional criteria and promotional procedures recognized by the Supreme Court in State of New Jersey, supra and by the Appellate Division in In re Byram Twp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977) and Bd. of Ed., Twp. of N. Bergen v. N. Bergen Fed. of Teachers, 141 N.J. Super. 97 (App. Div. 1976) is inapplicable to the instant matter because the

subject has been totally removed from the scope of negotiations by the Legislature's enactment of the above-cited statute.

The NCO Association maintains that substantially all aspects of the promotion system are mandatorily negotiable. It urges narrow readings of Ridgefield Park, supra, and State Supervisory Employees Assn., supra, because those cases relate, in the former instance, to both public school teachers with students as third party beneficiaries and the Public School Education Act of 1975 with its emphasis on citizen participation and accountability to the public and, in the latter instance, to the comprehensive statutory scheme set forth in the Civil Service Act. It is argued that these cases should only be applied in those contexts. Furthermore, the NCO Association argues that the Legislature did create a permissive category of negotiations with the adoption of c.85, P.L. 1977 for police officers and fire fighters and their employers. The establishment of this category, it is urged, renders the negotiability determinations in Ridgefield Park and State Supervisory Employees Assn. inappropriate because these disputes did not arise under c.85, P.L. 1977. The NCO Association asserts that the area of mandatory negotiability is broader for employees covered by c.85, P.L. 1977 than it is for other public employees. The NCO Association also states that the cited portion of Title 53 does not preclude negotiations as the State argues but rather authorizes promotions to be made by the Superintendent of the Division of State Police. This position is buttressed by reference to several other provisions

of Title 53 dealing with the authority of the Superintendent vis-a-vis personnel of the Division. For example, N.J.S.A. 53:1-6 provides that personnel of the Division "...shall receive salaries which shall be fixed by the superintendent..." Yet the State does not contend that this provision causes salaries to be nonnegotiable on the ground that the statute is preemptive. Finally, the NCO Association argues that even if the criteria for promotions are not mandatorily negotiable, the processes and procedures associated with promotions are mandatorily negotiable. It proceeds, as did the State, to analyze the various sections of the disputed article in an effort to identify those portions which relate to procedure as opposed to criteria.

Before proceeding to a resolution of the specific issues in dispute, several comments are in order with respect to the broader arguments of the parties. This will also explain the framework for analysis utilized herein. First, the undersigned does not accept the State's claim that there is no permissive category of negotiations for employees covered by Chapter 85, P.L. 1977. That statute specifically refers to permissive subjects at two points^{2/} and the Commission has found the existence of permissive subjects in police and fire disputes subsequent to Ridgefield Park, supra.^{3/} However, this conclusion, while helpful to the NCO Association in

^{2/} N.J.S.A. 34:13A-16(b) and 34:13A-16(f)(4).

^{3/} See In re City of Trenton, P.E.R.C. No. 79-56, NJPER (¶ 1979) and In re Township of Mount Holly, P.E.R.C. No. 79-51, 5 NJPER 91 (¶10050 1979).

the instant dispute, means only that negotiations are permissive as opposed to illegal on certain subjects. But a permissive subject is only negotiable if both parties voluntarily agree to negotiate concerning it. It is bad faith negotiations for either party to insist upon such a subject to the point of impasse. N.J.S.A. 34:13A-16(b) and (f)(4) expressly provide that permissive subjects may only go to factfinding or interest arbitration if both parties agree. Therefore, the State can remove any aspect of the promotion article found to be a nonmandatory subject of negotiations from the successor agreement by simply refusing to negotiate concerning it. It has thus exercised its right to retain unilateral control over that managerial prerogative.

The undersigned also rejects the State's claim that N.J.S.A. 53:1-5.2^{4/} is the specific type of statute contemplated by the Supreme Court in State Supervisory Employees Ass'n., supra, as preempting negotiations. The Supreme Court in that case specifically adopted this Commission's analysis of the effect of statutes on the scope of collective negotiations. 78 N.J. at 79. Applying that analysis to N.J.S.A. 53:1-5.2 it appears that that section authorizes the promotion of members of the State Police by the

^{4/} N.J.S.A. 53:1-5.2 provides, "Notwithstanding any other provision of law, the rank and grade of any member of the State Police may be changed from time to time, and the number of personnel increased, by the superintendent of State Police where such change or increase is necessary for the efficient operation of the Division of State Police in the Department of Law and Public Safety; provided, the action of the said superintendent in making any such change or increase, shall be approved by the head of such department. No such change or increase shall be made unless it can be effected within the limitations of the appropriations for the said division." L. 1950, c. 154, p. 337, §3.

Superintendent of the State Police, but it does not set forth the specific procedures or criteria to be utilized in making such changes in grade or rank. It is a general statute which confers authority on the Superintendent but it does not preclude negotiations. Therefore, it will be necessary to determine whether each aspect of the dispute is a mandatory subject of negotiations as defined in State Supervisory Employees Assn, supra:

...those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy. State Supervisory Employees Assn. at 67.

At the same time, the undersigned is not persuaded by the arguments of the NCO Association that Ridgefield Park, supra and State Supervisory Employees Assn., supra, only apply to public education and classified Civil Service employees. The undersigned reads Ridgefield Park as eliminating the permissive category of subjects in non-police and fire disputes -- not relevant here -- and State Supervisory Employees Assn. as restricting negotiations to those terms and conditions of employment within the discretion or authority of the public employer. Nor is the argument accepted that the scope of mandatory negotiations is broader for employees covered by c.85, P.L. 1977 where there is a permissive category of negotiations than it is for other public employees. The Employer-Employee Relations Act requires negotiations regarding grievances

and terms and conditions of employment^{5/} without distinction to the type of employee or employer. Therefore, whether a particular subject is mandatorily negotiable is not dependent upon the employee group. The test quoted above is the relevant test.

Having concluded that N.J.S.A. 53:1-5.2 -- the only statute or regulation cited by the parties as relevant -- does not serve to prohibit negotiations regarding promotions, State Supervisory Employees Assn., supra, it must be determined whether the specific items are terms and conditions of employment as defined above.^{6/}

Section A provides that all promotions to specified ranks will be predicated upon these criteria: a written exam counting 34%, seniority counting 34%, and performance (management criteria) counting 32%. Notwithstanding the fact that these three components are referred to as "criteria" in the article, the NCO Association contends that the examination and seniority^{7/} aspects,

^{5/} N.J.S.A. 34:13A-5.3.

^{6/} In State Supervisory Employees Assn, supra, the court accepted the distinction between nonnegotiable criteria and negotiable procedures: "In dealing with the promotional process, PERC and the Appellate Division have generally followed the view that promotional criteria are not mandatorily negotiable while promotional procedures are so negotiable." (citations omitted at 90)

^{7/} The NCO Association claims that the Supreme Court in State Supervisory Employees Assn, supra, found seniority to be a term and condition of employment. What the Court found was that seniority as it relates to layoffs, recall, bumping and reemployment is a term and condition of employment. However, seniority as a criteria in determining promotions was not at issue. At 84.

which are described as absolute objective factors, are not criteria or, at least, that their use cannot be said to usurp management's right to establish criteria. The arguments, however, go more to the wisdom of utilizing these means of determining whom to promote than to the right of the employer to establish these means. It is the right to establish the criteria which is crucial.

Furthermore, if it is accepted, as it seems to be by the NCO Association, that the performance component of the decision does relate to criteria, then it can be argued that the employer has the right to increase the extent of his reliance on this factor, thereby reducing the significance of whatever other factors are also utilized.

The undersigned concludes, therefore, that Section A relates exclusively to criteria and is not mandatorily negotiable. Because this case involves police officers under Chapter 85, the parties may, but need not, negotiate regarding this permissive subject of negotiations, and may, but need not, submit any unresolved dispute thereon to interest arbitration in accordance with N.J.S.A. 34:13A-16(f)(4).^{8/}

Section B has three sentences. The first requires that promotions be based exclusively on the number of points accumulated

^{8/} It can be argued that Article VII, Sec. 1, par. 2 of the N. J. Constitution of 1947 mandates the use of competitive examinations as far as practicable in determining promotions. However, having determined that the criteria, whether it be scores on an examination or some other standard, is not mandatorily negotiable, the extent to which this Constitutional provision limits managerial discretion is not within the ambit of this decision.

by applying the criteria for promotions.^{9/} The employer is free to establish the criteria unilaterally. However, once having done so, the utilization of those criteria and their application to employees is mandatorily negotiable. The undersigned interprets this provision to be a notice provision to eligible employees. It provides, in essence, a commitment by the State that, after it has determined what the basis for promotions will be, even to the particular weight to be placed on each criteria unilaterally selected, that it will then make the promotion selection based on the results of the criteria established, and will not, after the fact, decide to change the criteria.

The ability of an employee to know what is expected of him or her for promotion so that one can prepare correctly directly affects one's work and welfare, as does the expectation that the announced criteria will in fact be the criteria utilized. Adhering to the criteria which it has unilaterally selected does not significantly interfere with management's functions. Even if the State were to later decide to change the criteria, this provision would really only require that it not utilize those new criteria without announcing them first and giving people an opportunity to prepare based on the new standards. (This provision is similar to paragraph C4 discussed infra.) In State Supervisory Employees Ass'n, supra, the Supreme Court held that a proposal that

^{9/} This discussion applies to the last sentence of Section A.3 as well, it being similar to and consistent with the first sentence of Section B.

"Employees shall be appointed in the order in which they are listed on a promotional listing, veterans' preference excepted." 78 N.J. at 92, was also mandatorily negotiable. The Court, while finding this to be a close question, held that, "On balance, however, we find this item to be a term and condition of employment." at 78 N.J. 92. The Court went on to find that negotiations on this item were preempted by a specific statute. Having previously concluded that no statutes or regulations preempt negotiations in this area, it is determined that negotiations on this subject are mandatory and that any dispute thereon may be submitted to interest arbitration.

The second sentence requires that employees take the written examinations to be eligible for promotion. If this sentence is understood to require that the State must give a written examination, it is not mandatorily negotiable because it interferes with the employer's establishment of criteria. The employer might not even choose to use written examinations. However, if it is intended only to require that once the employer has decided to use written examinations and that these are to constitute a significant part of the total, then an employee must take the examination to be eligible for promotion as set forth in the first sentence of Section 1 and discussed above. It is mandatorily negotiable. ^{10/}

^{10/} Conceivably the written examination could constitute such a small portion of the total criteria that a particular employee could qualify for promotion without even taking the written examination. In such a situation the employer's decision to permit the employee to skip the examination would not be mandatorily negotiable even under the analysis herein.

The third sentence of this section requires that promotions be made within 90 days of the announcement of a vacancy. This issue relates to the employer's right to fill vacancies, a managerial prerogative which is not mandatorily negotiable. The employer must retain the right to decide whether and when to fill any vacancies. As the Court stated in State Supervisory Employees Assn, supra, "The determination as to the need for filling the higher position on a provisional basis remains, of course, within the sole discretion of the public employer." at 95. Although the above-quoted sentence refers to filling higher positions on a provisional basis, the same logic applies at least as forcefully when considering filling positions permanently. This sentence, therefore, is permissively but not mandatorily negotiable. See also 78 N.J. at 97 Section 4(d).

Section C has six subsections, the first of which calls for the Civil Service Commission, acting as an independent contractor, to develop, prepare, administer and score examinations, independent of the State and the Division of State Police. This is not a term and condition of employment and is, in effect, twice removed. First, as stated above, whether or not there will be an examination at all, subject again to Constitutional requirements, goes to the establishment of promotional criteria which is not mandatorily negotiable. Second, if the employer chooses to utilize examinations, the type, administration, scoring, etc.

is a necessary extension of that decision.^{11/}

Subsection C2 calls for examinations to be given as needed or on a regular basis so that there is at all times an eligibility list for promotions. It then provides that the points for the examination will be added to the points for the other criteria to determine which NCO(s) will be promoted. The first aspect of the promotion clause is procedural although certain conditions must first be met. First, this provision can only be invoked if the employer determines to utilize examinations at all. Second, the decision as to whether and when to make promotions is a managerial prerogative. But if the employer determines to use examinations and, subject to the employer's right to promote or not to promote at any time, the clause relates only to procedures, i.e., the assurance that there is a pool of qualified candidates available if the employer decides to make any promotions. This clause, within the above limits, does not interfere with the employer's managerial prerogatives or policy-making responsibilities. At the same time, it does relate to terms and conditions of employment because it relates to an employee's "...legitimate expectation^{12/} that he will at least be eligible for consideration for promotion."

11/ The State's argument at page 6 of its brief that this proposal attempts to bind the Civil Service Commission impermissively is not persuasive. In this case, the Civil Service Commission is apparently acting as an independent contractor rather than pursuant to its statutory mandate to determine merit and fitness for classified employees.

12/ State Supervisory Employees Assn., supra, at 90.

The second aspect of this clause -- utilization of the criteria in determining which (if any) NCO(s) will be promoted -- is identical to the first sentence of Section B and is a mandatory subject of negotiations.

Subsection C3 states that all NCOs with two years in rank will be eligible to take the written examination for promotions without other eligibility requirements. This sentence is interpreted as establishing an initial qualification for promotions -- a managerial prerogative -- rather than a limitation upon eligibility to take the examination if the employee meets the established qualifications. This is to be distinguished from the discussion in State Supervisory Employees Assn, supra, at 91 where the Court affirmed PERC's analysis that an employee otherwise qualified but who was demoted or involuntarily transferred not due to unsatisfactory work performance would be eligible to take an examination. Therefore, in accordance with numerous judicial and Commission decisions,^{13/} this is not a mandatory subject of negotiations.

Subsection C4 provides for a thirty day period between the announcement for and date of the examination as well as for a make-up examination for those NCOs who miss the regular examination. The announcement, according to the next sentence, is to

^{13/} See In re Byram Twp. Bd. of Ed. and Byram Township Ed. Assn, P.E.R.C. No. 76-27, 2 NJPER 143 (1976) affmd 152 N.J. Super 12 (App. Div. 1977) and Bd. of Ed., Tp. of North Bergen v. North Bergen Fed. of Teachers, 141 N.J. Super. 97 (1976). See also the Supreme Court's general endorsement of PERC's approach to this subject in State Supervisory Employees Assn, supra, at 90.

contain the date, time and place of the examination along with other pertinent information and it also is to contain the same information regarding the make-up examination. This item is totally procedural with the significant condition that it assumes that an examination will be used by the employer as at least a part of the criteria to determine whom to promote. If the employer decides to use an examination, then the announcement regarding that examination and a make-up examination in no way interferes with the prerogatives of the employer. It does, however, directly affect employees' terms and conditions in that it relates to promotional expectations, time to prepare, notice, etc. Therefore, it meets the balancing test for negotiability established by the Supreme Court and is mandatorily negotiable, if the employer chooses to use an examination.^{14/} See discussion of the first sentence in paragraph B supra.

C5 calls for the posting of the written examination scores within 90 days of the announcement of the examination. This is similar to an issue in State Supervisory Employees Assn, supra, which PERC found to be a mandatorily negotiable procedural matter and which the State did not challenge. The Court reversed PERC's holding because it ruled that the State as the employer could not bind the Civil Service Commission. That element is not present here. Accordingly, the item is mandatorily negotiable.

^{14/} The State argues that this item and subsection C.2. are non-negotiable based on the Supreme Court's holding regarding the administration of promotional examinations within ninety days of the provisional appointment of an employee. That is a different issue. It attempts to compel the employer to make a promotion within a fixed time. That is a managerial prerogative. Subsections C.2. and C.4. are totally procedural and therefore distinguishable.

Subsection C.6. involves the length of time that examination scores remain in effect. This is a policy question subject to the exercise of managerial discretion and, although it does have an effect on employees' terms and conditions of employment, that effect is outweighed by the managerial judgment involved. It is noted that a portion of this item requires that, after examination, "...promotions shall only be made based upon the next examination scores together with the other criteria set forth in paragraphs A.2. and A.3...." This has been held to be a mandatory item, subject to the State's unilateral right to establish the criteria unilaterally.

The last section contains two paragraphs. The first sentence of Section D. calls for the announcement of vacancies by posting -- an item that is solely procedural and in no way inhibits the employer's exercise of discretion^{15/} nor interferes with the establishment of promotional criteria -- and for the specification of weights or percentage points to be assigned to the management criteria set forth in A.3. This latter component is also one that does not restrict the employer's ability to adopt criteria. It simply calls for the announcement of those criteria, a matter which affects terms and conditions of employment. It will permit employees to know how promotions will be determined so that they can attempt to perform in a fashion most likely to lead to promotion if they choose. The paragraph also requires the

15/ The existence of a vacancy does not obligate the employer to fill a particular position.

announcement of position vacancies by teletype with the announcement setting forth the management criteria weight assignments. Also, it calls for copies of the announcement to be sent to the President of the NCO Association at the time of posting. This aspect is concerned only with procedure and in no way can be said to impede the exercise of managerial discretion. It is, therefore, mandatorily negotiable.

The final paragraph prohibits discrimination with respect to the requirements of the article and prohibits inequitable or nonuniform application of the terms of the article. The State does not dispute the negotiability of this latter provision so in the absence of a dispute ^{16/} we will not address that provision. The segment dealing with discrimination is claimed by the State to be statutorily governed and therefore nonnegotiable. While it is true that it is statutorily governed, this does not mean that it cannot be included in the agreement. Any dispute arising therefrom, however, must be resolved in a fashion that is consistent with the statute. ^{17/} The Commission recently held that a non-discrimination clause was mandatorily negotiable. ^{18/}

ORDER

Based upon the above discussion, the State of New Jersey is hereby ordered to negotiate in good faith with the State Troopers


^{16/} See N.J.S.A. 34:13A-5.4(d).

^{17/} In State Supervisory Employees Assn., supra, the Court held that statutes relating to terms and conditions of employment are effectively incorporated by reference into agreements. At 80. Disputes regarding these matters are grievable. Op. of W. Windsor v. PERC, 78 N.J. 98 at 116.

^{18/} In re Fair View Board of Education, P.E.R.C. No. 79-64, 5 NJPER (1979).

NCO Association, Inc., and to submit any unresolved disputes to interest arbitration pursuant to N.J.S.A. 34:13A-1 et seq. regarding all items herein held to be mandatorily negotiable terms and conditions of employment. The State Troopers NCO Association, Inc. is hereby ordered to refrain from insisting to the point of impasse or from submitting to interest arbitration, absent mutual agreement, regarding all items herein found to be permissive or nonmandatory^{19/} subjects of negotiations.

BY ORDER OF THE COMMISSION


Jeffrey B. Tener
Chairman

DATED: Trenton, New Jersey
April 4, 1979

^{19/} Because no statute nor regulations prohibit negotiations regarding any of the disputed items, all subjects which are not mandatorily negotiable terms and conditions of employment are permissively negotiable. It is observed that the duty to negotiate does not entail the duty to agree. State v. Council of State College Locals, 141 N.J. Super. 470 (App. Div. 1976).