

P.E.R.C. NO. 2003-17

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DIVISION  
OF STATE POLICE),

Petitioner,

-and-

Docket No. SN-2002-69

STATE TROOPERS NON-COMMISSIONED  
OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission partially grants the request of the State of New Jersey (Division of State Police) for a restraint of binding arbitration of grievances filed by the State Troopers Non-Commissioned Officers Association. The Commission grants the request for a restraint of binding arbitration over the decision not to promote several unit members pending internal investigations. The Commission grants the request for a restraint of arbitration over the denial of a promotion except to the extent it alleges violations of negotiable promotion procedures. The employer may refile its petition should an arbitrator issue an award that the employer believes would substantially limit government's policymaking powers.

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, David Samson, Attorney General  
(Sally Ann Fields, Senior Deputy Attorney General, on the  
brief)

For the Respondent, Loccke & Correia, P.A., attorneys  
(Merick H. Limsky, on the brief)

DECISION

On May 30, 2002, the State of New Jersey (Division of State Police) petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of two grievances filed by the State Troopers Non-Commissioned Officers Association. One grievance contests the superintendent's decision not to promote several unit members due to pending internal investigations. The other grievance contests the decision not to promote a unit member to lieutenant.

The parties have filed exhibits and briefs. These facts appear.

The Association represents sergeants, detective sergeants, sergeants first class and detective sergeants first class. The parties have entered into a collective negotiations agreement effective from July 1, 2000 through June 30, 2004. The grievance procedure ends in binding arbitration of claimed violations of the agreement.

Article XV is entitled Promotions. Section A provides: "Promotions to the rank of Sergeant First Class, Detective First Class and Lieutenant shall be made based on the application of relevant and reasonable criteria and subcriteria to be established by the Division as to each vacancy to be filled." Section G provides:

In order to provide the employee with that information necessary in order to prepare for and otherwise be guided in the attainment of career goals, the Division shall:

1. Provide the Association and unit membership with notice of any changes in criteria in advance of announcements for vacancies.
2. The Division shall make reasonable attempts to develop a text or list of approved source material for the guidance and information necessary to meet the criteria for specific positions to which employees can aspire and apply for promotion.

Article XV, Section I. provides:

There shall be no discrimination practiced against any NCO with respect to any provisions of this Article nor shall there be any inequitable or non-uniform application of any of the provisions and requirements of this Article as to any NCO unit member.

Article XVII is entitled Internal Investigation Procedure. Section B.5 provides:

These procedures are established to ensure certain rights to employees under investigation and shall not be construed to limit supervisory or command authority in normal operations. In an effort to ensure that these investigations are conducted in a manner which is conducive to good order and discipline, the following procedure is established.

Article XX is entitled Non-discrimination. It provides that the provisions of the agreement shall apply equally to all employees and that there shall be no intimidation, interference, or discrimination.

Article XXIX is entitled Complete Agreement. It provides, in part, for the maintenance of past practices.

On April 20, 2000, the Association filed a grievance contesting the failure to promote unit members who were ranked number one to vacancies that were announced on March 3 and filled on April 7. The grievance states, in part:

More specifically, the arbitrary and capricious manner in which these members were not promoted due to pending internal investigations, and in some cases, wherein the internal investigation was disposed of and discipline was administered to the member, and the member was not promoted. And as in one case, wherein the pending discipline was determined after an interview by a deputy attorney general in which due process was not afforded the member. This is in direct violation of the Agreement between the State of New Jersey and the State Troopers Non-Commissioned Officers Association, specifically, Article XV, Section G.1., (Criteria change), Article XV, Section I., (Inequitable and non-uniform application), Article XVII, Section B.5., (Investigations

conducted in a manner which is not conducive to good order and discipline), and Article XX, (Non-discrimination).

As a remedy, the grievance seeks the immediate announcement of promotions of those members who were ranked number one but were not promoted.

On October 16, 2001, Michael R. Bartuska filed a grievance contesting the procedures and process used in making a promotion to a specific lieutenant vacancy. The grievance states:

The undersigned grieves the entire promotional procedure and process used, along with the evaluation method, which includes testing, scoring, ranking, rating system or any other means or methods utilized to establish the "list" for promotion or used to determine the eligibility for the promotion to Lieutenant, Vacancy #501045 dated August 13, 2001 reference Teletype #1320 File 1.

Same is arbitrary, capricious and in violation of the contract between the State of New Jersey and the State Troopers Non-Commissioned Officers Association, more specifically Article XV, Article XX and Article XXIX of the agreement.

As a remedy, the grievance seeks the full disclosure of the process used and promotion to the position with all rights, privileges and benefits, including salary and time in grade, retroactive to the date of the promotion.

Both grievances were denied and the Association demanded arbitration. This petition ensued.

As for the group grievance, the employer asserts that we have restrained arbitration of virtually identical grievances contesting delays in promotions pending an investigation. State

of New Jersey (Div. of State Police), P.E.R.C No. 2002-51, 28 NJPER 172 (¶33063 2002); State of New Jersey (Div. of State Police), P.E.R.C. No. 2000-61, 26 NJPER 98 (¶31040 2000), recon. den. P.E.R.C. No. 2000-80, 26 NJPER 206 (¶31083 2000).

The Association recognizes that the group grievance deals with some of the issues in P.E.R.C. No. 2002-51, but asserts that the facts are not identical. It states that an arbitrator can decide whether the employer violated Article XV, Section G when it allegedly made unannounced retroactive changes in certain criteria.

As for the Bartuska grievance, the employer states that four other sergeants were ranked higher than Bartuska and one was tied with him. The SFC ranked as number one was promoted on October 6. Bartuska's grievance seeks to have him promoted retroactively to that position.

The Association responds that the grievance cites Article XV and the provisions that must be adhered to during the promotional process. It asserts that these are legally arbitrable promotional procedures.

The employer replies that the grievances do not mention the promotional process or a change in promotional criteria.

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 cannot consider the contractual merits of the grievances or any contractual defenses the employer may have.

The scope of negotiations is broader for police officers and firefighters than for other public employees. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), sets forth these tests for determining the negotiability of a subject affecting police officers:

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. [87 N.J. at 92-93; citations omitted]

Arbitration of grievances is permitted if the subject of the dispute 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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers.

#### The Group Grievance

We have previously held that the employer's interest in knowing the results of internal investigations before permanently promoting employees outweighs the employees' interests in being promoted. State of New Jersey (Div. of State Police), P.E.R.C. No. 2000-61. No severable arbitrable procedural claims have been identified. We therefore restrain arbitration of this grievance.

#### The Bartuska Grievance

In State of New Jersey (Div. of State Police), P.E.R.C. No. 2002-78, 28 NJPER 265 (¶33102 2002), we declined to restrain arbitration over another grievance filed by Bartuska to the extent that grievance claimed that the employer violated contractual procedures allegedly applicable to filling an acting unit head position. We stated:

Under State v. State Troopers NCO Ass'n, 179 N.J. Super. [80 (App. Div. 1981)] at 93, Article XV is negotiable and the STNCOA can arbitrate its claim that the procedures set forth in it were breached. The employer can assert before the arbitrator its contractual defense that this article did not apply to the acting unit head position. We will restrain arbitration, however, over any claim that Bartuska was denied the position for discriminatory or political reasons. Howell Tp., P.E.R.C. No. 96-59, 22 NJPER 101 (¶27052 1996).




Here, Bartuska is alleging that contractual procedures were violated when an SFC was promoted to the title of lieutenant. He seeks, among other things, to have the procedures used fully disclosed. As in P.E.R.C. No. 2002-78, we decline to restrain arbitration to the extent the grievance asserts that negotiable contractual promotional procedures have been violated. Because specific procedures have not been fully addressed by the parties, we will permit the employer to refile its petition should an arbitrator issue an award that the employer believes would substantially limit government's policymaking powers.

ORDER

The request of the State of New Jersey (Division of State Police) for a restraint of binding arbitration over the "Group Grievance" is granted. The request for a restraint of binding arbitration over the Bartuska grievance is granted except to the extent it alleges violations of negotiable promotion procedures. The employer may refile its petition should an arbitrator issue an award that the employer believes would substantially limit government's policymaking powers.

BY ORDER OF THE COMMISSION

  
 Millicent A. Wasell  
 Chair

Chair Wasell, Commissioners Buchanan, Mastriani, McGlynn, Ricci and Sandman voted in favor of this decision. Commissioner Katz was not present.

DATED: September 26, 2002  
 Trenton, New Jersey  
 ISSUED: September 27, 2002