

P.E.R.C. NO. 2002-22

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WALL,

Petitioner,

-and-

Docket No. SN-2001-61

WALL TOWNSHIP PBA LOCAL 234,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Wall for a restraint of binding arbitration of a grievance filed by Wall Township PBA Local 234. The grievance alleges that the Township violated the parties' collective negotiations agreement when it promoted one officer over another to the rank of corporal. The Commission holds that while promotional criteria are not mandatorily negotiable, promotional procedures are. An employer may normally agree to promote employees in the order they are listed on a promotional list developed by applying its own unilaterally-set criteria to the eligible candidates. Accordingly, the PBA's claim that the employer deviated from its announced promotional list is legally arbitrable. The PBA's claim that the employer violated the contract by not posting the promotional list is also a legally arbitrable promotional procedure.

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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Respondent.

Appearances:

For the Petitioner, Weiner Lesniak, attorneys
(Catherine M. Elston, on the brief)

For the Respondent, Klatsky & Klatsky, attorneys
(Fred M. Klatsky, on the brief)

DECISION

On May 29, 2001, the Township of Wall petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by Wall Township P.B.A. Local 234. The grievance alleges that the Township violated the parties' collective negotiations agreement when it promoted one officer over another to the rank of corporal.

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

The PBA represents patrol officers and detectives. The Township and the PBA are parties to a collective negotiations agreement effective from January 1, 1998 through December 31, 2000. The grievance procedure ends in binding arbitration.

Article 13 is entitled Vacancies. It provides:

A. Existing Waiting Lists of promotion shall be valid for a period of eighteen (18) months. The Township reserves the right to amend such Table of Organization as it shall deem necessary for the best interests of the Township of Wall, by Ordinance or Resolution.

1. Upon completion of the testing and issuance of the Waiting List, the said List shall be posted in a conspicuous location within the Police Department Building.

2. The posted Waiting List shall clearly indicate each participant's written test score, oral test scores, board review scores, and any and all procedural scores used in determining the order or promotion. The list shall clearly indicate in what order each participant stands in for promotion.

General Order 99-07 concerning Employee Promotions was issued August 15, 1999 by Captain Wisniewski and approved by Chief Hall. It states, in part:

Purpose:

To provide a standardized method establishing qualifications, eligibility and documenting procedures to be followed regarding promotions.

In order to comply with contractual agreements and established Township Ordinances promotional procedures will be formalized and promulgated through the office of the Chief of Police. All vacancies will be announced in writing and eligible personnel will be required to submit applications and or resumes for available positions. It will be the policy of the Department to conduct promotional procedures for all ranks within the agency.

Following the completion of the promotional procedures for each rank, the Chief of Police will forward his recommendations to the Township

Administrator. A list of the results will be posted and an eligibility list will remain in effect for a period of 18 months from the date of posting. Candidates may review their individual results through the Captain of Police.

* * *

4- RANK OF CORPORAL

Applicants for the position of Corporal must have held the rank of Patrolman for at least three years prior to the first phase of the test. Applicants will submit a letter of intent and a resume prior to the established deadline.

The examination process for the position of Corporal will consist of (4) four phases, which will be scored with the following percentages:

A. Written Examination	30%
B. Outside Police Executive Oral Interview	30%
C. Oral Interview with Department Supervisors	30%
D. Evaluations	10%

A-WRITTEN EXAMINATION

The written examination will consist of a series of multiple choice type questions. The questions will be based on basic police practice and may include police and investigative procedure, supervisory and administrative principles, report writing and general legal aspects of police work.

B-OUTSIDE POLICE EXECUTIVE INTERVIEW

An oral interview board consisting of outside agency Police Executives will administer this portion of the examination utilizing a uniform set of questions, candidates will be graded on a standardized form. Candidates will be tested on their knowledge of:

Constitutional, State and Municipal Law
Department Policy, Procedure and General Orders
Monmouth County Policies
Rank specific questions

C-ORAL INTERVIEW WITH DEPARTMENT SUPERIORS

An oral interview board consisting of current department Superior Officers will administer this portion of the examination. They will utilize a

uniform set of questions and grade the candidates on a standardized form. Candidates will be tested on their knowledge of:

- Constitutional, State and Municipal Law
- Department Policy, Procedure and General Orders
- Monmouth County Policies
- Rank specific questions
- Community Based Questions
- Rank specific questions

D-EVALUATIONS

The evaluations in the candidate's personnel file for the previous (2) two years will be tabulated and averaged for one score.

The Township is a non-civil service community. In 1999, the Township began promotional procedures for the rank of corporal. Interested candidates had to submit a resume to the police chief. In accordance with General Order 99-07, a written examination was given, candidates were interviewed, and performance evaluations were reviewed.

In October 1999, a promotional eligibility list of 19 officers was established for the corporal rank. The police chief did not post the eligibility list. Each officer was advised individually of scores and ranking in comparison to others.

The first five officers on the eligibility list were promoted over seven months. Officer Bill Connellan was the sixth officer on the promotional list. When another promotional opportunity for a corporal position arose in July 2000, Officer John Brady was promoted. Brady was 14th on the promotional eligibility list.

On July 17, 2000, the PBA filed a grievance. It states:

A grievance has arisen that affects two more members of PBA Local 234. The Articles in the Collective Bargaining Agreement that are involved in this grievance are Article #13 - Vacancies and Article #10 - Residence. The date that the violation took place was on July 12, 2000 when John Brady was promoted to the rank of Corporal.

Back in the fall of 1999, a promotional test was given for the rank of Corporal. In November of 1999 a list of where each candidate finished on the test was generated by the department. The first violation of Article #13 took place when this list was never posted in a conspicuous location in the Police Department building. When the list was generated the candidates that took the test were told where they ranked on the list. In November 1999, the first three officers on the list, Walt Pomphrey, Chris Tango and Pat Connor were promoted to the rank of Corporal to fill three vacancies. In April 2000 number 4 on the list, Steve DesMarais, was promoted to Corporal to fill a vacancy. On July 12, 2000 number 5, Frank Lancellotti, and number 14, John Brady, were promoted to the rank of Corporal. The second violation took place when the Township did not adhere to the Waiting List for Promotion by skipping over numbers 6 through 13.

The relief the PBA is seeking by filing this grievance is to have Bill Connellan promoted to the rank of Corporal. Bill Connellan was number 6 on the waiting list and the next in line for the promotion based on the list generated by the Department. The PBA is asking that the Township adhere to its own list and testing procedure and promote Bill Connellan.

At a PBA Meeting on July 12, 2000, the PBA Membership was informed of all of the facts in this matter. The specific Articles that are involved were read to the membership. After being informed of the facts a vote was taken and it was determined that this was a Valid Grievance and that it affected 2 or more members.

As the next step in the Grievance Procedure (Article 7), I am requesting a hearing on this matter. The hearing must taken place within 10 business days of this request.

A departmental hearing was held on December 21, 2000.

The chief testified that it has been his practice to not post the eligibility list because he did not think employees who were not involved in the process should know the results of the examinations. He stated that neither the union nor any individual had grieved this practice in the past. The chief also testified that he chose Brady because of his maturity and experience and that past practice has been to promote in accordance with the chief's recommendations from the eligibility list.

The hearing officer ruled in favor of the Township on the entire grievance. On March 19, 2001, the PBA demanded arbitration. The statement identifying the grievance to be arbitrated states:

See July 17, 2000 letter from William Hurley, PBA President, to Joseph Verruni, Township Administrator, plus promotion of Officer Brady to Corporal was arbitrary, capricious, unreasonable and against New Jersey law. Plus, officer Bill Connellan was more qualified than Officer Brady to be Corporal. Officer Connellan should be retroactively with full benefits be promoted to Corporal.

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 cannot consider the merits of the grievance or any contractual defenses the parties may have.

The scope of negotiations for police and fire employees 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. Compare Paterson PBA No. 1 v. Paterson, 87 N.J. 78 (1981) with Local 195, IFPTE v. State, 88 N.J. 393 (1982). In Paterson, the Court stated:

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]

Because this dispute arises as a grievance, arbitration will be 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).

The Township argues that it has a managerial prerogative to select promotional criteria, compare promotional qualifications, and choose the individual best suited for a vacancy or promotion. It asserts that the chief evaluated all nine candidates on the eligibility list and chose Brady because he had experience as a corporal and, except for one other officer, had the most seniority. The chief testified at the departmental hearing that he considered that many officers in the patrol division had less than two years of experience.

The Township further asserts that the PBA cannot arbitrate the chief's failure to post the promotional eligibility list because all officers were told of their scores and rank and the past practice in the department has been to not post the results. It also asserts that no grievances or complaints have been filed over this procedure, and argues that the PBA waived any right to have the list posted.

The PBA asserts that the failure to promote Connellan is arbitrable because an employer can agree to follow its own announced promotional procedures, including promoting in order of an announced promotional list. The PBA relies on Howell Tp., P.E.R.C. No. 96-59, 22 NJPER 101 (127052 1996). The PBA also argues that the reasons given for promoting Brady were a pretext for promoting him based on an illegitimate reason. It relies on Jamison v. Rockaway Tp. Bd. of Ed., 242 N.J. Super. 436 (App. Div. 1990).

The Township responds that the grievance never asserted that promotional procedures were not adhered to or that promotional criteria were changed; nor did the PBA ever assert a retaliatory or discriminatory motive for promoting Brady.

Promotional criteria are not mandatorily negotiable while promotional procedures are. State v. State Supervisory, 78 N.J. at 90. Absent preemption, an employer may normally agree to promote employees in the order they are listed on a promotional list developed by applying its own unilaterally-set criteria to the eligible candidates. Id. at 92; see also Department 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). Unless an employer has announced a change in its promotional criteria, it may remain obligated to fill positions from that list. Howell Tp.

In this case, the PBA claims that the employer violated the contract by deviating from its own promotional list, even

though that list was based on the employer's evaluation of the candidates in light of its announced promotional criteria. State v. State Troopers held that, under the negotiability balancing test, such a claim may be submitted to binding arbitration. Id. at 93. There is no basis for a contrary result here. It appears that in promoting Brady ahead of others on the promotional list, the employer gave more weight to certain promotional criteria than had been announced. The case law recognizes that the highest score on a list may not produce a sufficiently qualified candidate to justify filling a promotional vacancy, but it does not allow an employer to change the weight assigned to promotional criteria without complying with negotiated notice provisions. If it changes its criteria or weighting, an employer may also be required by a negotiated agreement to rerun the promotional process so that all candidates have an opportunity to seek promotion under announced criteria.

The employer argues that its practice does not require adherence to the order of the eligibility list. That argument goes to the merits of the grievance and is not a basis for restraining arbitration. Ridgefield Park. It further argues that its prerogative to compare qualifications and select the best qualified individual for promotion commands a restraint of arbitration. We disagree. Nothing in this record suggests that the employer did not have a right to set qualifications and evaluate candidates against its chosen qualifications before

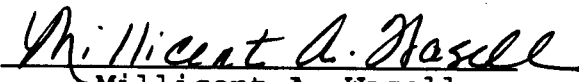
announcing an order for promotion. The limited question in this case is whether the employer violated an agreement to follow its own list by not promoting the person it had designated as next most qualified for promotion. Such a question does not require an arbitrator's reviewing the validity of the chief's reason for wanting to promote another officer instead. An arbitrator will instead focus on whether there was an agreement to promote from an announced list and whether such an agreement was violated.

The PBA's separate claim that the employer violated the contract by not posting the promotional list is also a legally arbitrable promotional procedure. The employer's arguments for restraining arbitration do into implicate legal negotiability or arbitrability. They are contract defenses that can be made to an arbitrator. Ridgefield Park.

ORDER

The request of the Township of Wall for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner Madonna abstained from consideration. None opposed.

DATED: October 25, 2001
Trenton, New Jersey
ISSUED: October 26, 2001