

P.E.R.C. NO. 2001-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PLAINSBORO,

Petitioner,

-and-

Docket No. SN-2001-6

P.B.A. LOCAL 319,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Township of Plainsboro for a restraint of binding arbitration of two grievances filed by P.B.A. Local 319. The grievances allege that the Township violated the parties' contract when its police chief did not consider seniority in making acting assignments to lieutenant and sergeant. The request is granted to the extent the grievance challenges the police chief's substantive determination on the relative qualifications of officers eligible for the acting assignments. The request is denied to the extent the grievance claims that the employer breached the contract by not reviewing the grievants' qualifications before making those acting assignments. The Commission retains jurisdiction. If the arbitrator determines that the parties' contract permits arbitration of permissively negotiable subjects and if the arbitrator rules in the grievants' favor on such a subject, the Commission will determine whether the issues considered by the arbitrator are permissively negotiable.

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 & Glickman, P.C., attorneys
(Joel G. Scharff, on the brief)

For the Respondent, Schneider, Goldberger, Cohen, Finn,
Solomon, Leder & Montalbano, P.C., attorneys
(James M. Mets, of counsel and on the brief; Michael W.
Roche, on the brief)

DECISION

On August 9, 2000, the Township of Plainsboro petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of two grievances filed by P.B.A. Local 319. The grievances allege that the Township violated the parties' contract when its police chief did not consider seniority in making acting assignments to lieutenant and sergeant.

The parties have filed briefs and exhibits. The Township has submitted a certification of police chief David Lyons and the PBA has submitted affidavits of PBA president Nicholas Procaccini,

Sergeant Peter Gately, and Officer Richard Domotor.^{1/} These facts appear.

The PBA represents police officers, excluding officers above the rank of sergeants. The Township and the PBA are parties to a collective negotiations agreement effective from January 1, 2000 through December 31, 2002. The grievance procedure ends in binding arbitration.

Article XXII is entitled Seniority. Section G provides:

In all applications of seniority under this policy where ability to perform work and physical fitness are equal as determined by the Township, seniority shall be given preference in promotions, demotions, layoffs, recalls, vacation scheduling and work shifts.

On June 21, 2000, the police chief sent a memorandum to all personnel concerning temporary reassignments. It states, in part:

On Sunday, June 25th, Lt. Bondurant will be leaving for the FBI National Academy in Quantico, VA. She will be attending an eleven (11) week training program and will return to her duty assignment on September 11, 2000.

Recent discussions with the Township Administrator have led to his support of my proposal to appoint an Acting Lieutenant during Lt. Bondurant's absence to handle the duties and responsibilities for this position. Additional factors which warrant maintaining the department's ... [complement] of command

^{1/} We deny the PBA's request for an evidentiary hearing. There are no substantial and material disputed factual issues.

level staff include; police officer hiring process, communications officer hiring process, special events, grant programs and the routine matters of scheduling and extra duty, to name just a few.

In accordance with departmental Rules & Regulations and the Collective Bargaining Agreement, I have made the decision to assign Sgt. Chris Weidman to the position of Acting Lieutenant. This decision will create a supervisory vacancy within Sgt. Weidman's squad. To address this matter, I have made the decision to assign Officer Scott Seitz to the duties of Acting Sergeant.

On June 21, 2000, Sergeant Peter Gately filed a grievance alleging that the chief's assignment of another sergeant to the acting lieutenant position violated Article XXIII. Gately states that he has been a Hillsborough police officer for 21 years, including the last 13 years as a sergeant, and notes that he worked for three months as an acting lieutenant in 1986. He notes that he is a patrol supervisor, a position that traditionally has been filled by a lieutenant.

On June 22, 2000, Officer Richard Domotor filed a grievance alleging that the chief's assignment of another officer to the acting sergeant position violated Article XXIII. His certification recites that he has 15 years of experience with the department as a patrol officer and that his most recent evaluation commended his ability to run his patrol squad when his supervisor was absent.

Both grievances allege that the chief did not consider their qualifications or abide by the contract's seniority clause.

On July 5, 2000, the Township Administrator denied the grievances. He stated that it is an inherent management prerogative to make assignments based on employees' abilities to perform the assignment. On July 10, the PBA demanded arbitration. 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 Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) outlines the steps of a scope of negotiations analysis for issues involving 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.

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

When a negotiability dispute arises over a grievance, arbitration will be allowed if 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).

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 arbitrability or merits of this grievance or any contractual defenses the employer may have.

The Township asserts that the PBA is seeking to have an arbitrator second-guess the chief's assessment of the officers' abilities for temporary appointments. The Township maintains that seniority provisions are mandatorily negotiable only if it has found that qualifications are equal. It has submitted a certification from the chief stating that:

In each instance my decision initially involved an assessment of operational considerations relating to overall manpower needs. Within the framework of the above, I then examined the training and performance of each officer or sergeant in the areas critical to the acting

assignments. My decision to appoint Officer Seitz and Sergeant Weidman to their respective acting assignments reflected my conclusion that the other compared officers/sergeants were not equally qualified to perform the acting assignment.

The Township further asserts that we have found that an employer's assessment of qualifications may not be reviewed by an arbitrator regardless of whether the criteria have been unilaterally determined by management or have been set forth in an agreement.

The PBA asserts that the issue of acting assignments is at least a permissive subject of negotiations. It contends that the Township failed to specify any valid reasons for bypassing seniority. And the PBA asserts that the chief never considered any officers for the positions other than the two junior officers he assigned. It asserts that the chief never reviewed the officers' qualifications and proposes that we should either order a hearing or allow an arbitrator to preliminarily decide the veracity of the Township's claim that the assignments were an exercise of its managerial prerogative rather than a breach of the seniority article. The PBA relies on Jefferson Tp., P.E.R.C. 98-161, 24 NJPER 354 (¶29168 1998), where we permitted an arbitrator to consider the factual claims initially, as well as both parties' contractual claims and defenses, but retained jurisdiction to reassess the employer's managerial prerogative defense in the event the arbitrator found a contractual violation.

Article XXIII calls for the use of seniority only when qualifications are equal, as determined by the employer. Applying the balancing test, and consistent with our precedent, we hold that this clause is mandatorily negotiable. See, e.g., Mercer Cty. Sheriff, P.E.R.C. No. 99-46, 25 NJPER 19 (¶30006 1998).

Employees have an interest in acting appointments in higher titles. Such appointments generally bring higher pay and an opportunity to gain experience that may improve prospects for a permanent position. Employers have an interest in matching the best qualified employees to particular jobs. Article XXIII does not significantly interfere with any governmental policy interests because it provides for the application of seniority where ability to perform work and physical fitness are equal as determined by the Township. An arbitrator may not second-guess the employer's criteria for promotion or its substantive determination that the grievants were not equally qualified. The PBA may, however, pursue its procedural claim that the employer did not review the grievants' qualifications at the time he selected other employees and therefore made the acting assignments without complying with Article XXIII.

The PBA also appears to be claiming separately that assignment to acting positions is permissively negotiable. Our case law establishes that such assignments are not mandatorily negotiable but may be permissively negotiable depending on the facts. City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008

1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994). We have permitted arbitration in some acting assignment cases where the employer had determined that the grievants were qualified for the acting positions, but the employer nevertheless appointed other employees. See, e.g., Camden; Town of West New York, P.E.R.C. No. 92-38, 17 NJPER 476 (¶22231 1991); Town of Kearny, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1979), aff'd NJPER Supp.2d 106 (¶88 App. Div. 1981); see also Montclair Tp., P.E.R.C. No. 90-9, 15 NJPER 499 (¶20206 1989); City of Newark, P.E.R.C. No. 81-96, 7 NJPER 134 (¶12057 1981). But we have other cases where acting assignments were found to be not permissively negotiable, depending on the particular facts of the case. See, e.g., City of Atlantic City, P.E.R.C. No. 97-132, 23 NJPER 339 (¶28154 1997) (restraining arbitration of grievance challenging selection of deputy chief to fill position of acting chief where decision affected who would be in charge of public safety department); Nutley Tp., P.E.R.C. No. 91-17, 16 NJPER 483 (¶21209 1990) (restraining arbitration of grievances challenging use of captains instead of firefighters to replace captains on shifts at minimum staffing levels); City of Atlantic City, P.E.R.C. No. 83-93, 9 NJPER 79 (¶14043 1982) (restraining arbitration of grievance challenging use of deputy chiefs rather than battalion chiefs to assume command in the absence of the fire chief).

The employer argues that it has only agreed to arbitrate disputes over mandatorily negotiable issues. Parties are free,

absent statutory preemption, to limit the range of disputes that can be submitted to binding grievance arbitration. See West Windsor Tp. v. PERC, 78 N.J. 98 (1978). An assertion that the parties have not agreed to arbitrate certain matters is an issue of contractual arbitrability appropriate for resolution by the arbitrator or the courts. We do not normally address such disputes in a scope of negotiations proceeding arising in a grievance arbitration context.


Under these circumstances, since the grievances will be proceeding to arbitration on the mandatorily negotiable claims, we will retain jurisdiction should the arbitrator deny those claims but nevertheless find that the PBA may separately arbitrate claims that are at most permissively negotiable. Should the PBA prevail on any claim that does not concern a mandatorily negotiable subject, the employer may reactivate its petition. We will then decide whether the subject of the dispute considered by the arbitrator was or was not permissively negotiable.

ORDER

The request of the Township of Plainsboro for a restraint of binding arbitration is granted to the extent the grievances challenge the police chief's substantive determination on the relative qualifications of officers eligible for the acting assignments announced on June 21, 2000. The request is denied to the extent the grievances claim that the employer breached Article XXII by not reviewing the grievants' qualifications before making

those acting assignments. Jurisdiction is retained. If the arbitrator determines that the parties' contract permits arbitration of permissively negotiable subjects and if the arbitrator rules in the grievants' favor on such a subject, the Commission will determine whether the issues considered by the arbitrator are permissively negotiable.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

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

DATED: December 14, 2000
Trenton, New Jersey
ISSUED: December 15, 2000