

P.E.R.C. NO. 90-124

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HOBOKEN,

Petitioner,

-and-

Docket No. SN-90-67

HOBOKEN POLICE SUPERIOR  
OFFICERS ASSOCIATION

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Hoboken Police Superior Officers Association against the City of Hoboken. The grievance alleges that the City violated the parties' contract when it did not call for a competitive examination for the positions of captain and lieutenant. The Commission finds that a contractual commitment to request an examination even if the employer does not intend to fill the current vacancies or have any vacancies contravenes the civil service statutory scheme.

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Appearances:

For the Petitioner, Michael J. Pecklers, attorney

For the Respondent, Schneider, Cohen, Solomon, Leder &  
Montalbano, attorneys (David S. Solomon, of counsel)

DECISION AND ORDER

On April 11, 1990, the City of Hoboken petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Hoboken Police Superior Officers Association ("PSOA"). The grievance alleges that the City violated Article 29, Section 1 of its agreement with the PSOA when it did not call for a competitive examination for the positions of captain and lieutenant.

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

The PSOA is the majority representative of the City's police sergeants, lieutenants and captains. The most recent collective negotiations agreement is effective from January 1, 1989 through December 31, 1990. Its grievance procedure ends in binding

arbitration. Article 29, Section 1 states: "The City agrees to maintain a promotional eligibility list at all times for all ranks." The City is a civil service municipality and thus this article presumably refers to a promotion list issued by the Department of Personnel after competitive examinations.

On March 6 and December 1, 1989, the PSOA requested that DOP promotional examinations be called for the ranks of captain, lieutenant and sergeant. The City denied the requests. On February 15, 1990, the PSOA filed a grievance making the same request for the ranks of lieutenant and captain. The City denied the grievance and the PSOA demanded arbitration. This petition ensued.<sup>1/</sup>

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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

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<sup>1/</sup> The City's petition asserts that similar language in three other agreements it has with units of police and fire employees is non-negotiable. Since only the PSOA grievance presents an active dispute, we limit our decision to that grievance.

Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts. [Id. at 154.]

Thus we do not consider the merits of the grievance or any defenses. Instead, we consider only the abstract issue of whether the Township could legally be required to call for competitive examinations to maintain current promotional eligibility lists.

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 police and fire fighters.<sup>2/</sup>

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 fire fighters, 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 fire fighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policy-making powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental

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<sup>2/</sup> 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, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [87 N.J. at 92-93, citations omitted]

Arbitration of this grievance must be restrained because its subject is preempted. N.J.S.A. 11A:4-2 and N.J.S.A. 11A:4-5 come into play when a civil service employer requests an examination to fill a vacancy. N.J.S.A. 11A:4-2 provides:

A vacancy shall be filled by a promotional examination when considered by the commissioner to be in the best interest of the career service.

N.J.S.A. 11A:4-5 provides:

Once the examination process has been initiated due to the appointment of a provisional or an appointing authority's request for a list to fill a vacancy, the affected appointing authority shall be required to make appointments from the list if there is a complete certification, unless otherwise permitted by the commissioner for valid reason such as fiscal constraints. If the commissioner permits an appointing authority to leave a position vacant in the face of a complete list, the commissioner may order the appointing authority to reimburse the department for the costs of the selection process.

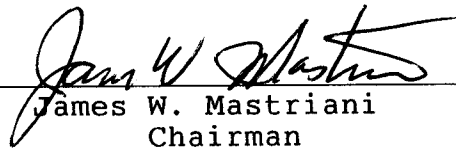
The decision to hold a promotional examination lies with the Department of Personnel. N.J.S.A. 11A:4-2. An appointing authority may request an examination, N.J.S.A. 11A:4-5, but the statute contemplates that a request for an examination will be made only if there is a vacancy that the employer intends to fill. In fact, if a municipality does not use a complete list produced by the examination to fill a vacancy, it may be required to reimburse the Department of Personnel for the cost of the selection process. This statutory scheme means that an employer must be committed to filling

a vacancy before it requests an examination. Thus a contractual commitment to request an examination even if the employer does not intend to fill current vacancies,<sup>3/</sup> or have any vacancies, contravenes the statutory scheme.<sup>4/</sup>

ORDER

The City's request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid and Wenzler voted in favor of this decision. None opposed. Commissioners Smith and Ruggiero were not present.

DATED: Trenton, New Jersey  
June 25, 1990  
ISSUED: June 26, 1990

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<sup>3/</sup> Paterson holds that a civil service employer's discretion not to fill vacancies may not be given up in a collective negotiations agreement.

<sup>4/</sup> State of New Jersey (State Trooper NCO Ass'n), P.E.R.C. No. 79-68, 5 NJPER 160 (¶10089 1979) is distinguishable. State police promotions are not governed by these civil service statutes. State Trooper Fraternal Ass'n, Inc. v. State, 62 N.J. 302 (1973).