

P.E.R.C. NO. 2018-50

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Petitioner,

-and-

Docket No. SN-2018-032

NEW JERSEY LAW ENFORCEMENT
SUPERVISORS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the State of New Jersey, Department of Corrections' request for a restraint of binding arbitration of a grievance filed by the New Jersey Law Enforcement Supervisors Association contesting the State's alleged failure to provide notice of the promotional criterion of "whether an officer is the subject of an open investigation." Finding that the grievance concerns the mandatorily negotiable issue of promotional procedures, the Commission holds that an arbitrator may decide the factual dispute over whether the State had a practice of using "whether an officer is the subject of an open investigation" as a promotional criterion.

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, Gurbir S. Grewal, Attorney General
(Daniel Pierre, Deputy Attorney General, on the brief)

For the Respondent, Crivelli & Barbati, LLC, attorneys
(Frank M. Crivelli, of counsel and on the brief; Donald
C. Barbati, on the brief)

DECISION

On February 20, 2018, the State of New Jersey, Department of Corrections (State or Corrections) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the New Jersey Law Enforcement Supervisors Association (NJLESA).^{1/} The grievance challenges a Corrections Sergeant not being promoted due to being the subject of an open investigation and asserts that notice was not provided regarding

^{1/} In its opposition brief, NJLESA requested oral argument. The parties have adequately briefed the issues raised in the scope petition. Accordingly, NJLESA's request is denied.

the use of "whether an officer is part of an open investigation" as a promotional criterion.

The State has filed a brief, exhibits, and the certification of Jennifer Rodriguez, Human Resources Manager for Corrections. NJLESA has filed a brief, exhibits, grievant's certification, and the certification of William Toolen, its President. These facts appear.

NJLESA represents employees in the Primary Level Supervisory Law Enforcement Unit. The State and NJLESA are parties to a collective negotiations agreement (Agreement) with a term of July 1, 2011 through June 30, 2015. The grievance procedure ends in binding arbitration.

Standard Operating Procedure #49, entitled "Review of Disciplinary History to Determine Eligibility for Promotion" (SOP#49), provides in pertinent part:

Effective May 7, 2007 only major disciplinary infractions (as defined in each bargaining unit contract) indicated on the Employee Work history will be reviewed for promotional consideration. A candidate must be free of major infractions for the past three (3) years from the last noted infraction or they will NOT receive first consideration for promotion. Since the work history includes minor disciplines, these must be redacted from the record.

Exception: All EED^{2/} disciplinary infractions (major and minor) within the past three (3)

2/ There is no information in the record defining an "EED disciplinary infraction."

years must be considered and will result in a candidate's ineligibility for first consideration for promotion for three (3) years from the date of the last infraction.

Internal Management Procedure #CUS.001.CPC.001, entitled "Centralization of Custody Promotional Certification Process," (IMP CUS.001.CPC.001) provides in pertinent part:

In instances where an employee's work history, weapons privilege status, drivers license validity, and/or updated background clearance results is/are deemed unacceptable in accordance with SOP #49 and the standards set forth in PREA,^{3/} the Director of Human Resources, in consultation with the Deputy Commissioner's or Assistant Commissioner of Operations' office, will render a determination whether the employee should be removed from the certification list or bypassed.

The grievant certifies that in 2015 he took the promotional examination for the Corrections Lieutenant title, was ranked 78th on the eligible list, and was certified for a promotion to become effective on April 29, 2017 at Northern State Prison in Newark. On April 25, the Custody Recruitment Unit's (CRU) Supervisor provided the grievant with the following written notice:

Please be advised that your promotion to Correction Lieutenant at Northern State Prison was not approved. The promotion was not approved because you are the subject of an open investigation. The [CRU] of the New Jersey Department of Corrections does not possess specific information or any details concerning this investigation. However, your name will remain on the promotional list for

^{3/} "PREA" stands for the "Prison Rape Elimination Act."

Correction Lieutenant for possible future consideration prior to the expiration of the list.

The grievant certifies that he was wholly unaware and had never received notice, written or otherwise, that he was the subject of an open investigation. He ultimately ascertained that the incident pertaining to the open investigation occurred on December 1, 2016. He attests that he was never questioned regarding the incident nor did he receive criminal and/or disciplinary charges relating to the incident, and that "whether an officer is the subject of an open investigation" was not a promotional criterion used by Corrections.

Rodriguez certifies that she has been employed with Corrections since 2000, was supervisor within the CRU from 2011 through 2015, and is currently Human Resources Manager of the Civilian Recruitment and Position Monitoring Unit. She certifies that as the CRU's former supervisor, she oversaw the promotion and appointment process within Corrections. She certifies that Corrections relies on IMP CUS.001.CPC.001, and that the promotional process entails reviewing the employee's work history and requesting background checks from the Office of Employee Relations, the Equal Employment Division, Ethics, and the Special Investigations Division. She attests that it has been the practice of the Department to hold a promotion or appointment in abeyance when an employee's background check reveals an open

investigation or pending discipline. She further certifies that the CRU does not make the final determination on the employee's application, but rather the information gathered from the background checks is forwarded to the proper chain of command within Corrections for the promotion to be approved.

A copy of the department level grievance decision reflects that Rodriguez testified that she was unaware of a written Internal Management Procedure stating that an employee would be denied a promotion or that a promotion would be held in abeyance due to a pending investigation; however the practice has been part of the process since 2015 when the Department began incorporating PREA into its process. The decision also states under the Hearing Examiner's findings that "Human Resources acknowledges that the IMP does not reflect the requirements and past practices to hold promotions in abeyance pending an SID investigation, the IMP is being updated to reflect the past practice."

Toolen certifies that Corrections never provided notice to NJLESA that it was changing promotional criteria to include the criterion of "whether an officer is the subject of an open investigation." He disputes Rodriguez's assertion that Corrections has a past practice of considering "whether an officer is the subject of an open investigation," and certifies that NJLESA was never aware of any such practice. Toolen further

certifies that the only promotional criteria considered by Corrections were those delineated in SOP#49 and IMP CUS.001.CPC.001.

The State argues that promotional criteria are not mandatorily negotiable. It further argues that if NJLESA is contesting notice regarding a change in promotional criteria, it must do so through the filing of an unfair practice charge, and that the remedy it seeks (reinstatement of grievant's promotion) cannot be awarded through the arbitration process. NJLESA responds that it is only contesting the lack of notice regarding the use of "whether an officer is the subject of an open investigation" as a promotional criterion, and that it may do so through arbitration.

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.

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 No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

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.

Arbitration is permitted if the subject of the grievance 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). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator

can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

It is well-settled that promotional criteria are not mandatorily negotiable, however promotional procedures are mandatorily negotiable. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90 (1978); Fairlawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554, 558 (App. Div. 1980). The opportunity to apply for a promotion is a term and condition of employment, and candidates should be made aware of the basis upon which they will be evaluated so that they are equipped to understand how promotional decisions are made. State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80, 89-91 (App. Div. 1981).

SOP#49 states that a candidate must be free of major infractions for three years to be considered for a promotion.^{4/} IMP CUS.001.CPC.001 relies on the standard established in SOP#49

^{4/} SOP#49 states that an exception is that all EED disciplinary infractions (major and minor) within the past three (3) years must be considered and will result in a candidate's ineligibility for first consideration for promotion for three (3) years from the date of the last infraction. As stated in footnote 2, no information in the record defines an "EED disciplinary infraction," and the State has not asserted that the grievant was charged with such an infraction.

to determine if a candidate's work history is deemed unacceptable to be considered for a promotion. The State has not asserted that the grievant committed a major infraction, but rather that he was "the subject of an open investigation." The criterion of "whether an officer is the subject to an open investigation" is not listed in SOP#49 or IMP CUS.001.CPC.001. There is a factual dispute as to whether the State had a practice of using "whether an officer is the subject to an open investigation" as a promotional criterion, and that factual dispute is outside of our scope of negotiations jurisdiction. Ridgefield Park. NJLESA is contesting the State's failure to provide notice of the application of that criterion, and since that issue concerns promotional procedures, it is mandatorily negotiable. We make no findings as to an appropriate remedy.

ORDER

The State of New Jersey, Department of Corrections' request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones and Voos voted in favor of this decision. None opposed. Commissioner Boudreau was not present.

ISSUED: May 31, 2018

Trenton, New Jersey