

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
STATE CONFERENCE OF LIQUOR :
LAW ENFORCEMENT LODGES :
 : Case No. PERA-C-01-10-E
v. :
 :
COMMONWEALTH OF PENNSYLVANIA :

FINAL ORDER

On January 9, 2001, the Fraternal Order of Police, State Conference of Liquor Law Enforcement Lodges (FOP) filed a charge of unfair practices against the Commonwealth of Pennsylvania (Commonwealth) in which it alleged a violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA). The FOP essentially alleged that the Commonwealth maintained a prior practice of administering a promotional examination and ranking candidates for promotion to the position of Liquor Enforcement Officer III in numerical order based upon scores on the written examination. The FOP alleges that the Commonwealth filled positions in numerical order based upon the promotional test scores until they reached Officer James Salmon and passed over Officer Salmon and resumed offering promotions to candidates in ranked order based solely on test scores. The FOP alleges that Officer Salmon suffered an on-the-job work injury that caused a temporary disability and was on disability leave at the time promotions were offered, that the FOP made written inquiry as to the reason Officer Salmon was excluded and was informed by the Commonwealth that because he was on disability leave, he was unavailable for promotion. The FOP further alleges that the Commonwealth did not inquire as to whether Officer Salmon's temporary disability disqualified him from the job duties of Liquor Enforcement Officer III. The FOP alleges that the Commonwealth's prior practice of effecting promotions solely on the basis of the ranked promotion list was a binding past practice on the Commonwealth and its decision not to offer a promotion to Officer Salmon was a unilateral change in the promotional procedure without satisfaction of the Commonwealth's bargaining obligation.

On February 5, 2001, the Secretary dismissed the charge, finding that the FOP did not set forth a cause of action under Section 1201(a)(1) and (5) of PERA. The Secretary determined that while promotional procedures are a mandatory subject of bargaining, the ultimate decision to select a particular candidate remains a matter of selection of personnel under Section 702 of PERA. The Secretary therefore reasoned that no collective bargaining duty was owed to the FOP because the ultimate selection of a candidate from the list was a matter of inherent managerial prerogative.

On February 21, 2001, the FOP filed exceptions and a supporting brief to the Secretary's decision declining to issue a complaint. The FOP alleges that the Secretary erred in determining that the Commonwealth's action was protected managerial prerogative, because the Commonwealth altered the promotional procedures which have been previously determined by the Pennsylvania Labor Relations Board (Board) to be negotiable matters.

In reviewing the decision of the Secretary declining to issue a complaint, it is the Board's practice to resolve factual claims favorable to

the allegations set forth in the charge of unfair practices as amended. PSSU Local 668 v. PLRB, 481 Pa. 81, 392 A.2d 256 (1978). In this regard, the Board shall accept as factual the claim by FOP that Officer Salmon was not offered the promotion because the Commonwealth regarded him as unavailable or otherwise unqualified due to the alleged temporary disability, as contended in the charge and reiterated in the exceptions.

After review of the charge, the exceptions and supporting brief, the Board determines that the charge of unfair practices does not state a cause of action for alleged alteration of promotional "procedures" without prior bargaining. The Board agrees with the FOP that personnel procedures such as promotional and disciplinary procedures, as a matter of law, are bargainable issues and must be negotiated by a public employer and cannot be unilaterally altered or implemented. AFSCME v. Berks County, 29 PPER ¶ 29044 (Final Order, 1998), aff'd sub. nom.; Troutman, et. al. v. PLRB, 735 A.2d 192 (Pa. Cmwlth. 1999); Fairview Township Police Ass'n v. Fairview Township, 31 PPER ¶ 31019 (Final Order, 1999); aff'd, No. 1890 C.D. 1998 (Pa. Cmwlth. 1999), unreported. The Board has found that job posting and bidding procedures are negotiable and require prior bargaining (Berks County, supra), also disciplinary procedures (Fairview Township, supra), drug testing procedures (Cambria County Transit Authority, 21 PPER ¶ 21007 (Final Order, 1989)), and probationary period and terms procedures (SEIU v. Allentown, 26 PPER ¶ 26059 (Proposed Decision and Order, 1995)). Under these cases, public employers are obliged to negotiate over the procedural aspects of employe selection and direction including posting, employe bidding, establishing of probations, and disciplinary procedure.

On the other hand, the Board has held that the ultimate selection of candidates for positions including evaluation of qualifications and standards for promotion remain managerial prerogative within the employer's right to select, direct and discipline personnel. Fraternal Order of Police Lodge 3 v. PLRB, 729 A.2d 1278 (Pa. Cmwlth. 1999); Delaware County Lodge 27, Fraternal Order of Police v. PLRB, 722 A.2d 1118 (Pa. Cmwlth. 1998); Berks County, supra. Accordingly, while the employer is obliged to bargain over matters such as posting notices of job vacancies, bidding procedures, applicant testing, and matters such as employe probation terms and periods, it is ultimately the public employer's managerial right, at the conclusion of these processes, to select among candidates and retain qualified candidates based on the public employer's assessment of the qualifications of candidates.

In this case it is alleged, and the Board assumes for purposes of issuance of a complaint, that the FOP can prove that the Commonwealth declined to promote Officer Salmon based on the Commonwealth's assessment that Salmon's disability disqualified him from presently performing in the position of Enforcement Officer III. Whether or not the Board or the FOP agrees with the Commonwealth's assessment of the qualifications of Officer Salmon does not remove the matter as a managerial prerogative and allow the Board to substitute its judgment for that of the employer as to Salmon's fitness for the position. 43 P.S. § 1101.706; PLRB v. Kaufmann Department Stores, 345 Pa. 398, 29 A.2d 90 (1942). The matter remains one of managerial prerogative for purposes of the duty to bargain regardless of this Board's assessment of Salmon's qualifications for the position. Accordingly, we determine as a matter of law that the Commonwealth's decision not to offer the position to Officer Salmon for the reasons alleged does not state a cause of action for refusal to bargain as an alleged matter of procedure in the promotion process.

The FOP argues in its brief that the Board has held that the institution of a written test for promotion was a negotiable matter relying on Fraternal Order of Police v. Commonwealth of Pennsylvania (Pennsylvania State Police), 30 PPER ¶ 30040 (Proposed Decision and Order, 1999). First, that case was not a decision of the Board, but rather a decision of a hearing examiner which was not appealed to the Board. Second, the FOP cites this case as holding that "an employer must bargain over the procedures used to fill positions". Brief at 4. As above stated, we do not quarrel with this statement of law and our review of the decision of the hearing examiner in that case shows adherence, at the same time, to the right of the employer to establish criteria and qualifications of candidates in the ultimate selection process. Accordingly, we do not find this case to support the exceptions of the FOP.

In reaching this result, we note that employes are generally not without relief when they have been passed over for a promotion or other similar consideration on an individualized basis. Collective bargaining agreements often contain "just cause" and other protections for employes when employers make managerial decisions which unfairly impact employes without legitimate or just cause. When such circumstances are presented, employes usually may obtain relief through the contractual grievance procedure. However, claims by individuals that they have been denied promotion without just cause under collective bargaining agreements does not rise to the status of an unfair practice.

After a thorough review of the exceptions, brief in support and the Secretary's letter declining to issue a complaint, the Board shall dismiss the exceptions and affirm the Secretary's decision declining to issue a complaint.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions be and the same are dismissed and the Secretary's decision not to issue a complaint be and the same is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, L. Dennis Martire, Member, and Edward G. Feehan, Member, this twenty-seventh day of March, 2001. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.