

**State of Connecticut
State Board of Mediation and Arbitration**

In the Matter of

Case No. 2022-A-0094

Town of East Hartford

Date of Award October 19, 2022

-and-

Location: Virtual Hearing

East Hartford Police Union

AWARD

PANEL MEMBERS:

Dennis C. Murphy, Esq., Chair and Public Member

Santo Franzo, Labor Member

Kenneth Baldyga, Management Member

Representing the Union: Gregory A. Jones

Representing the Town: Floyd J. Dugas, Esq.

Procedural History and Issue

This is a dispute between the Town of East Hartford (Town) and the East Hartford Police Union (Union), concerning the Town's claim that the grievance filed by the Union is substantively not arbitrable. The grievance concerns the weighting on a promotional examination for Officer Jason Guerrero (grievant).

After due notice a hearing was held on the matter on July 12, 2022, wherein both parties had opportunity to present evidence and witnesses and to cross-examine same. The parties filed post hearing briefs.

The joint issue presented to the Panel by the parties is as follows:

"Is this matter arbitrable?"

Relevant Collective Bargaining Provisions

Article XXI, Section 2

a) All promotions shall be by examination. There shall be a written and an oral test. Scoring will consist of fifty-five (55) points for the written examination, forty (40) points for the oral test, and up to, but not in excess of five (5) points for service...

c) Member shall be entitled to service credits on the basis on $\frac{1}{2}$ of 1 point for each full year of service, provided, however, that a total of 5 points shall represent the maximum service points allowed under this Article.

Article XXI, Section 8

All promotions above the rank of Police Officer shall be made in accordance with the Town's Personnel Rules and Merit System.

Article XXII, Section 6(b)

The authority of the Arbitrator shall be limited to the application and interpretation of this Agreement. He shall have no authority to add to or subtract from this agreement. Nothing in this Agreement shall be interpreted so as to limit the authority of the Superior Court to determine the question of arbitrability.

Personnel Rules and Merit System

Section 20.1 Rating of Examinations

A. Method of Rating and Minimum Grades. ...A minimum rating may also apply to the rating of any part of the test. Candidates must attain the minimum rating on each part of the test, in order to be placed on the eligibility list. The final rating of the competitor shall be determined by averaging the rating on each part of the examination in accordance with the weights established for each part of the examination.

Findings of Fact

1. The grievant is a police officer with the Town. In the spring of 2019, the Town administered a promotional exam for the position of sergeant. The examiners determined the grievant did not pass the exam and was not placed on the promotional list. (Town Ex. 3, 5). A passing score to be placed on the promotional list is 70%. The grievant received a score of 60%.

2. The grievant appealed the decision to the Town's Personnel Appeals Board (PAB), which determined that he should be placed on the promotional list. However, "the Board did not define where on the list the names should be placed and could leave the decision up to the Town and its Human Resources Director." (Minutes of Board meeting, Town Ex. 3). As a result, the Town placed the grievant on the promotional list as last on the list. (Town Ex. 8, 9).

3. The grievant wrote to the Town's Human Resources Director that his seniority points should be added and placed higher than others on the list. The Director responded that the PAB's determination was solely advisory and that he did not receive seniority points because he failed to pass the oral portion of the examination. ((Town Ex. 9, 13).

4. A grievance was filed, denied by the Town, and came to this Board. Town filed a timely challenge of substantive arbitrability.

Arguments of the Town

The Town argues that the grievance is not substantively arbitrable as a result of C.G.S. §7-474(g) which states

"The conduct and the grading of merit examinations, the rating of candidates and the establishment of lists from such examinations and the initial appointments from such list ... shall not be subject to collective bargaining, provided once

the procedures for the promotional process have been established by the municipality, any changes to the process proposed by the municipality concerning the following issues shall be subject to collective bargaining: (1) the necessary qualifications for taking a promotional examination; (2) the relative weight to be attached to each method of examination; and (3) the use and determination of monitors for written, oral and performance examinations. In no event shall the content of any promotional examination be subject to collective bargaining." (emphasis added).

The Town cites *Town of Hamden*, Decision 3743 (1999) where the State Board of Labor Relations held that §7-474(g) " makes clear that, as long as a civil service commission or its equivalent exists in a municipality, most aspects of the promotional process are considered illegal subjects of bargaining. The only exceptions are spelled out in the statute and are quite limited."

The Town further argues that the inclusion of the language in the concerning the Personnel Rules does not make the language a permissive subject of bargaining, and cannot render an illegal subject of bargaining a lawful one, outside the exceptions stated in the statute. And these are only subject to bargaining should the Town propose to make changes to the three specifically outlined matters.

Arguments of the Union

1. The Union argues that the matter is arbitrable, that judicial bodies favor arbitration and employ the positive assurance test as set out in the *Steelworkers Trilogy*. It argues that unless it can be said with "positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute...(d)oubts should be resolved in favor of coverage." *Board of Education v. Frey*, 174 Conn.578, 582 (1978).

The Union further argues that the arbitration clause of the agreement grants to this Panel broad authority to interpret language in the agreement. and the grievance identifies specific language of the agreement, Section 2(c) concerning seniority points, that are clear and unambiguous.

The Union argues further that the Town's Personnel Rules and Merit System are proper subjects of collective bargaining because they are incorporated into the collective bargaining agreement. The Union then concedes, that if the Personnel Rules are not a proper subject of collective bargaining, that that should not defeat the entire grievance, that this Panel should

"blue pencil" the Rules and Merit System, somehow ignore them, and focus instead on the seniority points. With that focus, the Panel can find the matter arbitrable.

Discussion

The Town has the burden to demonstrate by a clear preponderance of the evidence, that the grievance is substantively not arbitrable. It has met that burden.

The grievance asks this Panel to decide whether or not the Town should be ordered to grant the grievant seniority points so that he is placed higher on the promotional list, despite the fact that he failed the oral exam, and received 60% as a final score when the rules require that one receive a 70% to even be placed on the list. This Panel would therefore be engaged in an act of conducting and grading a merit examination, rate the candidate and establishing a final list. Since those areas are clearly unlawful subjects of bargaining, any award on this Panel's part in those areas would be equally unlawful. The exceptions in §7-474(g) are not implicated here.

We fully acknowledge that there is a strong presumption of arbitrability. We further acknowledge that the parties did collectively bargain certain terms with respect to the grading of examinations and granting of seniority points for those who reach the list. However, for us to find that we have authority to second guess the Personnel Appeals Board's determination, and the Human Resources Director's interpretation of that determination, would necessitate an unlawful act. The Union's solution that we somehow "blue pencil" the Personnel Rules out of existence is, well, pie in the blue sky.

As the State Board of Labor Relations has found, "(c)ontract provisions concerning exempted subjects will not prevail over civil service rules even under Conn. Gen. Stat. §7-747(f)", *Town of Winchester*, Decision No. 4007. Also "a grievance settlement which conflicts with Section 7-474(g) cannot be given effect." *City of Bridgeport*, Decision No.. 2140. Unlawful language cannot be interpreted with lawful authority.

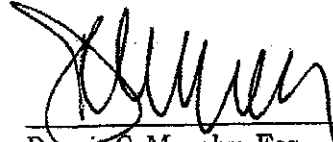
It should be noted that although we find this matter not arbitrable, the union may perhaps have other judicial opportunities for the relief it seeks.

AWARD

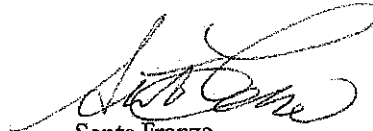
This matter is not arbitrable.

Case No. 2022-A-0094

By the Panel



Dennis C. Murphy, Esq.
Chair and Public Member



Santo Franzo
Labor Member

Dissenting



Kenneth Baldyga
Management Member