City of Everett v. Commonwealth Employment Relations Board

Appeals Court of Massachusetts

October 27, 2022, Entered

21-P-850

Reporter
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CITY OF EVERETT *vs*. COMMONWEALTH EMPLOYMENT RELATIONS BOARD & another.[1]

Notice: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See *Chace* v. *Curran*, 71 Mass. App. Ct. 258, 260 n.4, 881 N.E.2d 792 (2008).

Disposition: Decision and order of the Commonwealth Employment Relations Board reversed.

Judges: Lemire, Singh & Englander, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The city of Everett (city) appeals from a decision of the Commonwealth Employment Relations Board (board), concluding that the city engaged in unfair labor practices by failing to impact bargain with the intervener, Everett Firefighters, International Association of Firefighters, Local 143 (union), regarding the implementation of a new selection process for the position of fire chief. We reverse.

Background. The following facts are not in dispute. The city fire department employed around ninety-five firefighters during the relevant time period. The union is the exclusive bargaining agent for all privates, lieutenants, captains, and deputy chiefs, but not the fire chief, who holds a managerial position within the meaning of G. L. c. 150E, § 1.[2] In 2016, Deputy Chief Anthony Carli was promoted to the position of provisional chief.[3] Prior to 2019, the city used the "80/20" scoring method to establish eligibility lists for all promotions in the department, pursuant to which eighty percent of the candidate's score was based on a written examination and twenty percent on education and experience.

On May 4, 2018, the human resources division of the [*2] Commonwealth (HRD) notified the city that the promotional examination for fire chief scheduled for May 18 had been postponed because less than four eligible individuals had applied.[4] See G. L. c. 31, § 59. HRD indicated that the examination would be automatically rescheduled unless an alternative process, such as an assessment center, was requested and approved. On May 14, 2018, the union notified its members that the next fire chief's examination would be held in March 2019. On the same day, apprised of that notice, the city informed the union for the first time that it was thinking about changing the process of selecting the chief to an

[1] Everett Firefighters, International Association of Firefighters, Local 143, intervener.

[2] Managerial employees, representatives of any public employer, and heads of departments are excluded from coverage under the public employee collective bargaining law. See G. L. c. 150E, § 1.

[3] Pursuant to Article 5.1 of the parties' collective bargaining agreement, the city agreed "to appoint and promote in accordance with Civil Service Law and rules." No eligible list drawn from a competitive examination was available for the fire chief position at the time.

[4] Only deputy chiefs could apply for the position of fire chief. The city posted HRD's notice on the bulletin board. There were seven deputy chiefs at the time of the public hearing in November 2019.

assessment center in order to hire a nonunion chief.[5] The city requested feedback from the union no later than May 31 and expressed a willingness to meet to discuss any "thoughts, concerns, or proposals." On May 31, the union asked the city to confer with HRD about the selection process, and to contact the union if it planned to go forward with the assessment center.

Over a one-year period that began before that exchange, the city entered into a series of delegation agreements with HRD, culminating in a January 2019 final agreement that authorized the city to use an [*3] assessment center as the sole basis (excepting statutory preferences and in-title credit) for scoring and ranking candidates for the chief position eligibility list.[6] No further communications between the city and the union about the assessment center occurred.

On January 31, 2019, the city posted notice that an assessment center would be held on March 14, 2019, for the position of fire chief, and that the center would comprise "100% of the final score." The union immediately filed a prohibited practice charge at the Department of Labor Relations (DLR).

A few weeks before the assessment center, the vendor chosen by the city held an orientation session for the candidates, to explain the types of exercises they might face. One of the deputy chiefs, Michael Ragucci, was unable to attend the orientation session due to a conflict with his wife's medical procedure. Four deputy chiefs participated and passed the assessment center. Ragucci had a previously scheduled family vacation and did not participate. The vendor did not allow the union president to observe the assessment center. Carli received the highest score.[7]

After an investigation into the union charge, a DLR investigator issued a complaint [*4] of prohibited practice.[8] Following a public hearing, a DLR hearing officer concluded that the union failed to prove that the city's decision directly impacted a mandatory subject of bargaining, and therefore, the city did not violate G. L. c. 150E.

On further appeal, the board reversed that decision, holding that "an employer has a statutory duty to bargain over aspects of the promotional process affecting bargaining unit members' participation in that process that do not implicate the employer's managerial right[s including] . . . [the right] to select the assessment center as the sole basis for scoring and ranking candidates on an eligible list for promotion to Fire Chief." *City of Everett*, 48 M.L.C. 32, 32 (2021). The board reasoned that all of the potential promotees were bargaining unit members, and that participation in the assessment center was "the only way that eligible Deputy Chiefs could avail themselves of this singular promotional opportunity"; most of the subjects for which the union sought bargaining directly impacted the deputy chiefs' terms and conditions of employment,[9] and that "the employees' interest in bargaining over aspects of the promotional process affecting [their]

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[5] An assessment center evaluates candidates based on their performance on various exercises. See generally *Staveley* v. *Lowell*, 71 Mass. App. Ct. 400, 402, 882 N.E.2d 362 & n.2 (2008). The city could not use an assessment center unless it received a delegation of authority from HRD. Third-party vendors hired by municipalities conduct the assessment centers. Carli advocated for the use of an assessment center because he had been "temporary [chief] for 2 years, and [the center] is the current accepted process for the Chief's position."

[6] The delegation agreement delineated the parties' obligations pertaining to the selection process for fire chief. See *Malloch* v. *Hanover*, 472 Mass. 783, 795, 37 N.E.3d 1027 (2015), citing *Staveley*, 71 Mass. App. Ct. at 404-405 (administrator may, pursuant to G. L. c. 31, § 5 [*l*], delegate its responsibility to create and administer process that produces civil service eligibility lists). The agreement named the city's human resources director as the delegation administrator (delegation administrator).

[7] Three deputy chiefs asked the Civil Service Commission to open an investigation into the city's new promotional procedures and the credit for the in-title experience, which favored Carli, the provisional chief. Following a hearing, the commission denied the request for an investigation, on the ground that even if the traditional education and experience component had been used, Carli would still have been the high scorer.

[8] The DLR investigator dismissed the union's retaliation charges. The union did not appeal from the partial dismissal.

[9] The board concluded that the following nonexhaustive list of topics were mandatory subjects of impact bargaining (subjects): the scheduling and timing of the assessment center and the orientation; the types of information to be addressed in the orientation; the format and the adequacy of training materials; the availability of paid leave time to prepare for the examination; the cost to participate; the security of the assessment process; and the right of unsuccessful applicants to feedback. *City of Everett*, 48 M.L.C. at 45. The board rejected only one topic suggested by the union — the weight to be given to education and experience — as a matter falling outside the scope of mandatory bargaining. *Id.*

participation" outweighed the city's interest [*5] in maintaining its managerial prerogatives.[10] *Id.* at 32, 49.

In reaching its ultimate conclusion, the board relied on its prior precedent, stating that "issues relating to promotions are a 'most important condition of employment for those employees who aspire to the promotional position because of the relationship between promotions and increased pay, benefits and prestige and movement on a career ladder.'" *City of Everett*, 48 M.L.C. at 49, quoting *Boston Sch. Comm.*, 3 M.L.C. 1603, 1610 (1977). The board concluded that bargaining over these subjects would not "run afoul of any of the concerns expressed in *Town of Danvers*[, 3 M.L.C. 1559 (1977)] or *Boston School Committee*." *Id.* at 50.

Discussion. No one disputes that the city's decision to use the assessment center fell within the sphere of its core managerial prerogative. The question presented is whether the board erred by ruling that the city nevertheless had a duty to bargain over other "aspects of the promotional process" for fire chief that supposedly would not impinge on the city's core managerial prerogatives. We conclude that the board erred as a matter of law and misapplied established precedent, as the processes for selecting the managerial position of fire chief are not subject to the collective [*6] bargaining process. Therefore, notwithstanding the deferential standard of review, the board's decision cannot stand. See G. L. c. 30A, § 14 (7) (*c*); *Burlington* v. *Labor Relations Comm'n*, 390 Mass. 157, 161, 454 N.E.2d 465 (1983).

A public employer's duty to negotiate in good faith extends only to mandatory subjects of bargaining, which includes the "terms and conditions of employment" of bargaining unit employees. See *Somerville* v. *Commonwealth Employment Relations Bd.*, 470 Mass. 563, 569-570, 24 N.E.3d 552 (2015) (matters listed in G. L. c. 150E, § 6, including terms and conditions of employment, "subject to limited exceptions, are deemed mandatory subjects of bargaining"). Accord *Newton* v. *Commonwealth Employment Relations Bd.*, 100 Mass. App. Ct. 574, 579, 181 N.E.3d 1083 (2021). This begs the question whether the procedures for selecting a managerial employee — by definition, a position outside of any bargaining unit — constitute "terms and conditions of employment" subject to mandatory bargaining. No case so holds, and indeed, the board's own precedents establish that processes for choosing managerial employees such as fire chiefs are not subjects of mandatory bargaining.

The board first considered whether promotional procedures were mandatory subjects of bargaining in *Town of Danvers*, 3 M.L.C. 1559 (1977).[11] *Town of Danvers*, *supra* at 1562, was also the first case in which the board considered the scope of bargaining under the then "new" public employee bargaining law.[12] In that case, the union representing all uniformed firefighters except for [*7] the chief and the deputy chief challenged the town's refusal to bargain over several subjects, including the required duties of new promotional jobs within the bargaining unit and the procedures for selecting incumbents for those jobs. *Id.* at 1560-1561. The board found that "[p]rocedures for promotion affect an employee's conditions of employment to a significant degree[,]" and therefore are a mandatory subject of bargaining. *Id.* at 1574. However, as the board pointed out, not every issue relating to promotions is necessarily a mandatory subject of bargaining. *Id.* at 1575. By way of example, the board looked to Federal labor law stating, "The [National Labor Relations Board] makes a distinction between promotions within the bargaining unit, and promotions of unit personnel to supervisory positions outside of the unit. Under the [National Labor Relations Act (NLRA)], there is no mandatory duty for

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[10] In concluding that the balancing test set forth in *Town of Danvers*, 3 M.L.C. 1559 (1977), favored the employees, see note 12, *infra*, the board explained that the subjects "directly impact bargaining unit members' ability to prepare for and participate in the assessment center, potentially improve their performance on future assessment centers, and with respect to security-related subjects, help ensure the fairness of the assessment center and the validity of the results." *City of Everett*, 48 M.L.C. at 49.

[11] The board is the successor to the Labor Relations Commission. See *Board of Higher Educ.* v. *Commonwealth Employment Relations Bd.*, 483 Mass. 310, 310 n.1, 131 N.E.3d 833 (2019). We shall refer to the commission as the board for the sake of clarity.

[12] The board adopted the mandatory/permissive doctrine for purposes of resolving scope of bargaining issues under G. L. c. 150E, see *Town of Danvers*, 3 M.L.C. at 1568-1569, and adopted a balancing test to evaluate the dichotomy, see *id.* at 1577. The board instructed that the interests of the employees in bargaining over a particular subject should be balanced with the interest of the employer in maintaining its management prerogative. *Id.* Courts have sanctioned the use of a balancing test to assess the duty to bargain. See *Local 346, Int'l Bhd. of Police Officers* v. *Labor Relations Comm'n*, 391 Mass. 429, 434, 437-438, 462 N.E.2d 96 (1984).

an employer to bargain regarding its non discriminatory choice of supervisory personnel." *Id.*, citing *Kono-TV-Mission Telecasting Corp.*, 163 N.L.R.B. 1005, 1008 & n.16 (1967) (promotions of bargaining unit members to supervisory positions not mandatory subjects of bargaining).[13] The board repeated its finding that "*[a]bsent such considerations*, . . . the generic topic of promotions is so strongly tied to an employee's terms [*8] and conditions of employment as to be a mandatory subject of bargaining under [G. L. c. 150E]" (emphasis added). *Id.* at 1575. The board ultimately ruled that by refusing to bargain with the union about promotions, the town violated G. L. c. 150E, §§ 10 (*b*) (1) and (5). *Id.* at 1577.

The board next considered promotions in *Boston Sch. Comm.*, 3 M.L.C. 1603 (1977). In that case, the board held that a residency requirement as a condition of continued employment was a mandatory subject of bargaining. See *id.* at 1607-1608. Although the issues were not before it, the board expressed two views of relevance here: (1) "residency as a condition of promotion from one job to another within the same bargaining unit" is a mandatory subject of bargaining, citing *Town of Danvers*; and (2) "residency as a pre-condition of promotion to a job in a different bargaining unit is a mandatory subject of bargaining, where the promotional position constitutes a step in an established career ladder or is a position which is typically filled from within the bargaining unit." *Id.* at 1610. Once again, however, the board expressly noted that an exception to the bargaining duty rule applies if the promotional position is "managerial" or "confidential" within the meaning of G. L. c. 150E. *Id.* at 1611.

Finally, in *Town of Arlington*, 42 M.L.C. 97 (2015), the board [*9] directly addressed the issue of scope of bargaining over promotions to unionized positions in different bargaining units. *Town of Arlington*, *supra* at 97-98, involved the town's refusal to bargain over its use of an assessment center as a criterion for patrol officers seeking promotions to the supervisory positions of sergeants, members of another bargaining unit. In affirming the hearing officer's decision and firmly embracing the rationale of *Boston Sch. Comm.* regarding promotions, the board expressly noted that the second view expressed by the board above in *Boston Sch. Comm.*, 3 M.L.C. at 1610, did not apply if the promotional position was a managerial or confidential one outside the bargaining unit excluded from collective bargaining.

The above precedent establishes that the city had no duty to bargain with the union over the procedures for choosing its fire chief. The considerations absent from *Town of Danvers* are squarely presented in this case. The fire chief is a managerial position outside the bargaining unit of the deputy chiefs that is not covered by G. L. c. 150E. See G. L. c. 150E, § 3, first and second pars. (distinguishing subordinate uniformed members of fire department from fire department chief; prohibiting representatives of public employer, chiefs of departments, [*10] and managerial and confidential employees from inclusion in bargaining units and coverage under G. L. c. 150E); *City Manager of Medford* v. *Labor Relations Comm'n*, 353 Mass. 519, 526, 233 N.E.2d 310 (1968) (commission correctly excluded fire chief as executive officer of department from bargaining unit).

Under those circumstances, it is incorrect to say that the processes for selecting the fire chief impact the "terms and conditions of employment" of the deputy fire chiefs. The selection processes for chief do not change, alter, or impose upon the current jobs of the deputy chiefs or other bargaining unit employees. Rather, the selection process has to do with the deputies' efforts to *leave* the bargaining unit and to become part of management, where they would occupy a supervisory and in some ways adverse position to the bargaining unit. As the chief officer, the city's fire chief, among his or her other duties, leads the department, acts under the direction of the mayor, works with employee organizations, responds to employee grievances, assists city officials in the collective bargaining process, and is a member of the city's management team. Cf. *Harrison* v. *Labor Relations Comm'n*, 363 Mass. 548, 553, 296 N.E.2d 196 (1973) (fire chiefs participate in development of department policy and implement it on behalf of management). The board's suggestion that bargaining [*11] is required because the fire chief position is part of the "promotional ladder" for deputy chiefs is accordingly inapt. The promotion the deputies seek here would have them cross over to a fundamentally different job. The dicta from *Boston Sch. Comm.* relied on by the board — regarding the importance of promotions to bargaining unit members — concerned promotions to positions within different bargaining units, not to a managerial position.

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[13] Similar to the fire chief's position under G. L. c. 150E, supervisors are not protected employees under the NLRA for purposes of collective bargaining. See *Town of Danvers*, 3 M.L.C. at 1575 n.17.

Finally, and for essentially the same reasons, the board is incorrect in contending that the law requires application of a "balancing test," under which courts must weigh "the employer's legitimate interest in maintaining its managerial prerogative to effectively govern against the impact the subject has on bargaining unit members' terms and conditions of employment." Whatever the merits of such a balancing test, it does not apply where, as here, the proposed subject of negotiation does not actually impact employment terms and conditions. Here, the board erred by overlooking the controlling language in *Town of Danvers*, as reaffirmed in *Boston Sch. Comm.* and *Town of Arlington*, in favor of general principles and dicta that are not applicable in the circumstances of this case.

*Decision and order of the Commonwealth Employment [*12] Relations Board reversed*.

By the Court (Lemire, Singh & Englander, JJ.[14]),

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[14] The panelists are listed in order of seniority.