P.E.R.C. NO. 2009-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY STATE JUDICIARY
(CAMDEN VICINAGE),

Petitioner,

-and- Docket No. SN-2008-036

PROBATION ASSOCIATION OF NEW
JERSEY (PROFESSIONAL CASE-RELATED UNIT),

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the New Jersey State Judiciary (Camden Vicinage) for a restraint of binding arbitration of a grievance filed by the Probation Association of New Jersey (Professional Case-Related Unit). The grievance asserts that the Judiciary violated the parties' collective negotiations agreement when its Human Resources Division Manager sent an e-mail to unit employees that was allegedly critical of an e-mail sent by PANJ's First-Vice President. The e-mails concerned an alleged five-minute grace period in reporting to work. Noting that the grievance does not challenge the employer's ability to determine that employees who arrive after their reporting time are late, the Commission declines to restrain binding arbitration over the alleged contractual violations arising from the e-mail exchange.

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, Nancy M. Mahony, Staff Attorney, Office of Counsel to the Administrative Director

For the Respondent, Mark Cimino, attorney

DECISION

On November 21, 2007, the New Jersey State Judiciary (Camden Vicinage) petitioned for a scope of negotiations determination. The Judiciary seeks a restraint of binding arbitration of a grievance filed by the Probation Association of New Jersey (Professional Case-Related Unit). The grievance asserts that the Judiciary violated the parties' collective negotiations agreement when its Human Resources Division Manager sent an e-mail to unit employees that was allegedly critical of an e-mail sent by PANJ's First-Vice President. The e-mails concerned an alleged five-minute grace period in reporting to work. Noting that the grievance does not challenge the employer's ability to determine

that employees who arrive after their reporting time are late, we decline to restrain binding arbitration over the alleged contractual violations arising from the e-mail exchange.

The parties have filed briefs and exhibits. The Judiciary has filed the certifications of Human Resources Division Manager James Grazioli, Trial Court Administrator Michael O'Brien, Chief Probation Officer Louis Narvaez, and former Chief Probation Officer Robert P. Sebastian. PANJ has filed the certification of First Vice-President Peter Tortoreto.

PANJ represents probation officers as well as certain other employees. The parties' collective negotiations agreement is effective from July 1, 2004 through June 30, 2008. The grievance procedure ends in binding arbitration of alleged contractual violations. Article 2.1 is entitled "Respect and Dignity." It provides:

> The parties shall endeavor to insure that relations between them are characterized by mutual responsibility and respect, and that all employees and representatives of the parties are treated in accordance with accepted standards of courtesy and respect for individual dignity.

Article 3 is entitled "Association Rights and Privileges." It addresses providing the union information concerning Judicial programs and financial resources; union release time; use of buildings and equipment; union bulletin boards; exclusive rights; union leave; conference time off; new hires; and personnel data.

Tortoreto states that on or about April 3, 2006, Chief Probation Officer Narvaez issued a memorandum stating that effective April 10, there would no longer be a five-minute grace period for arriving late to work. A grievance was filed and a step 2 hearing was scheduled for June 2.

Tortoreto states that he had an informal meeting with Trial Court Administrator O'Brien in lieu of a Step 2 grievance hearing to discuss several issues, including the five-minute grace period. Tortoreto states that O'Brien indicated that there would be no discipline for employees who reported to work less than five minutes late. Tortereto also states that O'Brien later told him not to reveal that he would allow a grace period.

In January 2007, a probation officer was counseled concerning coming to work late. On January 29, Tortereto sent the following e-mail to all probation officers and supervising probation officers:

> These facts are being provided to you [for] informational purposes exclusively regarding the continued or discontinued use of the five minute grace period provided by the former VCPO. The grievance filed 4/3/06 is being included as an attachment. The resolution at step one level was that management will give case by case consideration when problems such as elevator breakdown or inclement weather create impediments. When taken to the step 2 level, Mike O'Brien, TCA told the Union that there will be no disciplines for five minutes late. PANJ is guided by these words from the TCA.

The e-mail was not sent to O'Brien, Narvaez, or Human Resources Division Manager Grazioli.

O'Brien states that he never agreed to a policy allowing a five-minute grace period and that Tortoreto's e-mail was "dishonest and confusing" and resulted in supervising probation officers contacting Narvaez for clarification.

Narvaez states that he contacted Grazioli about Tortoreto's e-mail and asked that the matter be clarified so as not to impact operations.

On February 7, 2007, Grazioli sent the following e-mail to all probation officers, supervising probation officers and managers:

> This email is being written to correct information that was sent regarding the above subject matter. A Step 2 was never done on this grievance, and the appeal process for this grievance has expired. The Step 1 decision remains in effect. The decision states: "After discussion with labor at the April 10, 2006 grievance meeting and further review, it is the determination of management that a five minute grace period for reporting to work is not authorized by contract (see Article 5.1). Authority does not exist at the division level. No other division in the Camden Vicinage provides a grace period. Management will give case by case consideration when problems such as elevator breakdown or inclement weather create impediments.
>
> Employees are expected to work 35 hours per week, which means they must arrive to work at their designated starting time. If someone continues not to report to work at his/her designated starting time, then the issue will

> be addressed by the division, which may lead to disciplinary action. The statement made in above subject email implies that employees have a five minute grace period which is not the case.
>
> A participant's reliance on the above subject matter is not a defense in disciplinary action.

Tortoreto states that Grazioli never came to him to address the issue prior to sending the e-mail, which he felt was an attempt to embarrass and discredit him. He believes that the e-mail challenged his credibility by stating that no step 2 meeting had taken place and no agreement reached. He states that he has received e-mails with questions and comments about whether grievances were being timely processed and whether appeals were being timely filed.

On February 7, 2007, Tortoreto e-mailed Grazioli and copied all PANJ members. He stated that his comments were truthful and factual and that they reflected conversations PANJ had had with O'Brien in lieu of a formal step 2 hearing. Tortoreto stated that O'Brien had said that there would be no discipline for five minute lateness and asked Grazioli if that assurance was being retracted.

Grazioli responded by e-mail that the statement was never made and his February 7, 2007 e-mail remains in effect.

On February 8, 2007, PANJ filed a grievance alleging that Grazioli's e-mail violated the parties' contract. The grievance states, in part:

> We the Camden County Probation Officers Association PANJ Local 109 finds this type of response a personal attack upon the Local President. It is grossly and blatantly inappropriate, misleading, inaccurate and circulated in an effort to discredit, degrade our Union and its leadership. Furthermore, we find it violates Respect & Dignity, Non-Discrimination, Labor-Management Cooperation and violates the Association Rights and Privileges. Fundamental Fairness and Common Courtesy are also serious violations.

As a remedy, the grievance seeks a retraction and an apology from management "regarding the inappropriate dissemination and response to internal union matters." It also seeks assurances that the union will be "consulted, advised and be treated, fairly, equally and with mutual respect." The grievance was denied at steps 1 and 2.

A step 3 hearing officer found that the Judiciary's e-mail did not contain any threat of reprisal or force or promise a benefit and did not violate Articles 2 or 3.

On October 5, 2007, PANJ requested arbitration. This petition ensued.

We consider the negotiability of this dispute in the abstract and express no opinion about the merits of the grievance or any contractual defenses the Judiciary may have. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144, 154 (1978).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets forth the traditional balancing test for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405][1/]

1/ The contract's Preamble recognizes a 1994 "Letter of Agreement between the New Jersey Judiciary and the Labor Representatives of the Employees in the New Jersey Judiciary." That agreement specifies that the scope of negotiations covering Judicial employees shall include only the following subjects, and only to the extent they are not preempted by State statute or regulation, and subject to the Judicial Employees Unification Act:

> (1) salary, wages and all other forms of economic compensation;
> (2) health benefits;
> (3) leave time (both paid and unpaid) and holidays;
> (4) the economic impact of the hours worked;
> (5) grievance procedures and disciplinary appeals, including binding arbitration, subject to the provisions of Section 8 of this Letter of Agreement;
> (6) safety and health;

(continued...)

The Judiciary argues that arbitration should be restrained because it has constitutional and statutory rights to free speech and arbitration will significantly interfere with its managerial prerogative to make policy, disavow a non-existent five-minute grace period, and determine when discipline is appropriate. The Judiciary cites to unfair practice case law protecting an employer's right to speak, so long as the statements are not coercive or threatening. The Judiciary contends that its e-mail contains no threats or coercive statements that would tend to interfere with Tortoreto's or the supervisors' exercise of union rights.

1/ (...continued)

(7) payroll deductions including union dues and representation fees;
(8) procedural aspects of employee performance evaluations, promotions, layoffs and subcontracting;
(9) procedural aspects of inter-county transfers and reassignments, including superseniority for union representatives;
(10) any other subjects which the Supreme Court may, from time-to-time, establish, upon petition of a majority representative, under rules established by the Court;
(11) Any matter negotiated and made part of a contract which takes effect on or after January 1, 1995 that is not within the ten scope of negotiations topics set forth above shall have the same force and effect, for that contract only, and only for the life of that contract, as if it had been permitted under those topics.

PANJ questions whether the Judiciary has free speech rights co-extensive with those of citizens and employees for whom the Bill of Rights was intended to protect. It argues that the Judiciary's citation of unfair practice cases addressing whether employer criticism interfered with employee rights is not determinative of whether the merits of this dispute can be decided by an arbitrator. PANJ states that it would frame this issue to an arbitrator:

> Whether the statements contained in the email sent by management to PANJ members . . . criticizing the Probation Association of New Jersey and its officials, namely Peter Tortoreto was without justifiable, substantive reasons:
>
> (1) by alleging the failure to file grievance appeals in a timely manner, thus barring certain grievances; and,
>
> (2) by disputing the integrity and veracity of a recitation of a settlement reached between the parties.

This is not an unfair practice case with allegations that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by making coercive or threatening statements. Unfair practice case law is thus of limited relevance to this dispute.

This is a scope of negotiations case, where we are being asked whether a grievance alleging a contractual violation may proceed to binding arbitration, or should it be stopped because the union's claim is preempted by a statute or regulation or

would significantly interfere with governmental policy. There is no basis to conclude that the State or federal constitution prohibits the employer from agreeing to a contract provision that requires it to treat employees in accordance with accepted standards of courtesy and respect for individual dignity. Nor is there any suggestion that the contract clauses being invoked in this case are not, in the abstract, mandatorily negotiable. See, respectively, State of New Jersey, P.E.R.C. No. 89-39, 14 NJPER 656 (¶19277 1988); Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981). However, where a union seeks to enforce a contractual provision through binding arbitration, we must examine the context and the specific claim to determine whether arbitration should be restrained. For example, in a case involving these same parties, we restrained arbitration of a grievance under the Respect and Dignity clause at issue in this case that challenged a training requirement that probation officers who carry pepper spray be exposed to the spray. State of New Jersey Judiciary (Camden Vicinage), P.E.R.C. No. 2006-38, 31 NJPER 361 (¶145 2006). We concluded that the employer's prerogative to determine what training is required to ensure that officers can do their jobs effectively outweighed the officers' health and safety interests in not being sprayed.

Here, PANJ does not challenge the Judiciary's assertion that it has a right to decide that there is no five-minute grace

period and that employees can be disciplined for coming to work late. We therefore need not discuss the extent of that right any further.

PANJ does however claim that management violated the contract by stating in an e-mail that a grievance was never taken to step 2 and that the appeal process expired, thereby disputing the "integrity and veracity of a recitation of a settlement reached between the parties." Those claims may proceed to binding arbitration. If a step 2 proceeding was held, it would not significantly interfere with any governmental policy for an arbitrator to declare that fact. Similarly, if a step 2 meeting resulted in a commitment not to discipline employees who are no more than five minutes late, an arbitrator could confirm that such a commitment had been made. We will not speculate on the appropriateness of any particular remedy should a contractual violation be found.

ORDER

The request of the New Jersey State Judiciary for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson and Commissioners Buchanan, Fuller and Watkins voted in favor of this decision. Commissioner Joanis voted against this decision. Commissioner Branigan was not present.

ISSUED: August 7, 2008

Trenton, New Jersey