P.E.R.C. NO. 2009-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PLAINSBORO,

Petitioner,

-and- Docket No. SN-2009-009

PLAINSBORO P.B.A. LOCAL 319,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Township of Plainsboro's request for a restraint of binding arbitration of a grievance filed by Plainsboro PBA Local 319. The grievance challenges the issuance of a Performance Improvement Plan ("PIP") to a patrol officer. The Commission finds that the PIP is not a reprimand and may not be challenged as unjust minor discipline in binding arbitration and restrains arbitration.

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, Ruderman & Glickman, P.C., attorneys (John A. Boppert, on the brief)

For the Respondent, Mets, Schiro & McGovern, LLP, attorneys (Jordan M. Kaplan, on the brief)

DECISION

On August 7, 2008, the Township of Plainsboro petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by Plainsboro P.B.A. Local 319. The grievance challenges the issuance of a Performance Improvement Plan ("PIP") to a patrol officer. We grant the request for a restraint over the issuance of the PIP.

The parties have filed briefs and exhibits. The Township has submitted the certification of its police chief, Elizabeth L. Bondurant. The PBA has submitted the certification of the grievant, Patrol Officer and PBA Delegate Richard Colucci. These facts appear.

The PBA represents all full-time police officers. The parties' collective negotiations agreement is effective from January 1, 2005 through December 31, 2007. The grievance procedure ends in binding arbitration.

Colucci is evaluated every six months. Throughout his career with the department, he has consistently received low grades on his semi-annual evaluations concerning traffic enforcement issues. On November 2, 2007, Colucci met with his supervisor, Sergeant Troy Bell, at which time he was given a PIP. Colucci states that Bell showed him an e-mail from Lieutenant DeSimone stating that Colucci's traffic citations output was unacceptable. Bell allegedly told Colucci that the PIP was not related to traffic stops, but that DeSimone was angry about Colucci's recent PBA activity. Colucci states that at no time during the meeting were traffic enforcement issues discussed nor was he asked why his traffic enforcement numbers were low. Colucci has been unable to obtain a copy of the e-mail, despite having filed a Government Records Request form.

The PIP states that it was for the purpose of identifying employee performance problem areas. It further states:

> A plan was put into place to increase Ptl Colucci's monthly selective enforcements and motor vehicle stops. He will attempt to perform daily selective enforcements and make motor vehicle stops if his work load permits. He will target 8-10 operations per month for the remainder of 2007.

> The employee was informed that failure to improve any noted performance deficiencies will be reflected in the next Performance Evaluation and may subject him/her to future disciplinary action.

Bondurant states that the counseling session was for purposes of performance evaluation and improvement only and that no discipline was imposed. She further states that the PIP did not establish or endorse a ticket quota system and that the evaluation performance plan was based on a review of statistical reports from January through September 2007. The statistical reports provided information on Calls for Service, Motor Vehicle Stops, Selective Enforcements, Vacant House Checks, Warrant Attempts, Park Walk & Talk, Citations, Adult Arrests, and Juvenile Arrests. Colucci's motor vehicle stops averaged 2.3 per month from January through March. The chief points out that this is a fraction of the stops made by other officers for the same period. This pattern continued for the second and third quarters of 2007. Colucci's performance was also below average in selective enforcements in January. The chief states that as a result of these statistical reports, it was determined that Colucci would benefit from a PIP and counseling session.

On November 7, 2007, the PBA filed a grievance asserting that the PIP violates the New Jersey ticket quota law and in turn, the parties' agreement. The chief denied the grievance. She states that she weighed several factors in denying the

grievance, including that traffic enforcement is an essential function of Colucci's duties. On November 21, the PBA demanded arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

As this dispute arises in the context of a grievance involving police officers or firefighters, arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. A subject is mandatorily negotiable if it is not preempted by statute or regulation and it intimately and directly affects employee work and welfare without significantly interfering with the exercise of a management prerogative. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981). A subject involving a management prerogative can

still be permissively negotiable if agreement would not place substantial limitations on government's policymaking powers.

The Township argues that arbitration must be restrained because the grievance challenges the criteria used for evaluation.

The PBA responds that the grievance does not challenge evaluation criteria, but instead challenges the discipline imposed on Colucci in the form of a PIP. The PBA asserts that imposing discipline is an arbitrable issue and that the content and substance of the PIP reveals that the Township was not interested in counseling Colucci, but in disciplining him for poor performance.

The Township replies that the PIP was properly implemented through the Township chain of command, Colucci's traffic enforcement record was below standard, and the PIP did not result in any disciplinary consequences.

An employer has a non-negotiable right to select the criteria for evaluating its employees. See Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982); Bridgewater Tp. and PBA Local 174, 196 N.J. Super. 258 (App. Div. 1984). In particular, a law enforcement agency has a managerial prerogative to use a traffic enforcement index as an evaluation criterion or a traffic enforcement standard. Washington Tp., P.E.R.C. No. 2005-15, 30 NJPER 404, 406 n.1 (¶130 2004).

However, if an employer issues a reprimand to an employee for failing to meet performance criteria, that reprimand may be challenged in binding arbitration. Under N.J.S.A. 34:13A-5.3, public employers and the majority representatives of their police officers may agree to arbitrate minor disciplinary disputes, but not major disciplinary disputes. Minor discipline includes reprimands and suspensions or fines of five days or less unless the employee has been suspended or fined an aggregate of 15 or more days or received more than three suspensions or fines of five days or less in one calendar year. Monmouth Cty. and CWA, 300 N.J. Super. 272 (App. Div. 1997)

In Holland Tp. Bd. of Ed., P.E.R.C. No. 87- 43, 12 NJPER 824 (¶17316 1986), aff'd NJPER Supp.2d 183 (¶161 App. Div. 1987), we set forth our approach for determining whether a document critical of employee performance is an non-arbitrable evaluation or an arbitrable reprimand.

> We realize that there may not always be a precise demarcation between that which predominantly involves a reprimand and is therefore disciplinary within the amendments to N.J.S.A. 34:13A-5.3 and that which pertains to the Board's managerial prerogative to observe and evaluate teachers and is therefore non-negotiable. We cannot be blind to the reality that a "reprimand" may involve combinations of an evaluation of teaching performance and a disciplinary sanction; and we recognize that under the circumstances of a particular case what appears on its face to be a reprimand may predominantly be an evaluation and vice-versa. Our task is to give meaning to

> both legitimate interests. Where there is a dispute we will review the facts of each case to determine, on balance, whether a disciplinary reprimand is at issue or whether the case merely involves an evaluation, observation or other benign form of constructive criticism intended to improve teaching performance. While we will not be bound by the label placed on the action taken, the context is relevant. Therefore, we will presume the substantive comments of an evaluation relating to teaching performance are not disciplinary, but that statements or actions which are not designed to enhance teaching performance are disciplinary.

In the context of sick leave verification, we have recognized that the employer's prerogative to verify illness may include the right to conduct a conference with the employee to find out why the employee was absent and to determine whether a disciplinary sanction is warranted. City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999). But once the employer decides that there is abuse and invokes a disciplinary sanction, arbitration may be invoked. In Town of Guttenberg, P.E.R.C. No. 2005-37, 30 NJPER 477 (¶159 2004), we permitted arbitration over counseling documents discussing an employee's absenteeism. We stated that:

> The language of the letters, their context, and their placement in the employee's personnel file indicate an intent to criticize D'Amore for taking too much sick leave. In particular, the counseling documents indicate a determination that his attendance record has not noticeably improved and that the counseling should be construed as constructive criticism. These counseling

> documents are more in the nature of a reprimand issued after a review of an employee's attendance record than a memorialization of a conference conducted to determine why an employee has been absent and to ascertain whether any disciplinary action should be taken.

Here, the counseling session and PIP were not designed to criticize Colucci for past conduct, but to notify him of performance deficiencies and give him a PIP that specifies that he must endeavor to increase his selective enforcements and motor vehicle stops. The PIP also notifies him that failure to improve will be noted in his next Performance Evaluation and may subject him to future disciplinary action. But the PIP itself neither notes a failure to improve nor imposes discipline. This PIP is not a reprimand and thus may not be challenged as unjust minor discipline in binding arbitration.[1/]

1/ Under Teaneck Bd. of Ed. and Teaneck Teachers Ass'n, 94 N.J. 9 (1983), an assertion that discrimination tainted the exercise of a managerial prerogative must be made in a statutory forum, rather than through binding arbitration.

ORDER

The request of the Township of Plainsboro for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed.

ISSUED: November 25, 2008

Trenton, New Jersey