

P.E.R.C. NO. 2011-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF TINTON FALLS,

Petitioner,

-and-

Docket No. SN-2010-039

TINTON FALLS PBA LOCAL 251,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants a restraint of binding arbitration of a grievance filed by Tinton Falls PBA Local 251 against the Borough of Tinton Falls. The grievance asserts that the Borough violated the parties' collective negotiations agreement when it changed an evaluation procedure. The Commission restrains arbitration because the particular deviation from the alleged past practice was prompted by the police chief's finding of a conflict of interest.

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, Scarinci Hollenbeck, attorneys
(Yaacov Brisman, of counsel)

For the Respondent, Loccke, Correia, Schlager, Limsky &
Bukosky, attorneys (Lauren P. Sandy, of counsel)

DECISION

On November 12, 2009, the Borough of Tinton Falls petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by Tinton Falls PBA Local 251. The grievance asserts that the Borough violated the parties' collective negotiations agreement when it changed an evaluation procedure. We restrain arbitration because the particular deviation from the alleged past practice was prompted by the chief of police's finding of a conflict of interest.

The parties have filed briefs and exhibits. The Borough has filed a certification from its police chief. These facts appear.

The PBA represents Borough police officers. The parties' entered into a collective negotiations agreement effective from January 1, 2007 through December 31, 2010. The grievance procedure ends in binding arbitration. It also provides, in pertinent part, that "[o]nly those grievances involving the interpretation, application, or alleged violation of the terms and conditions of this Agreement shall be eligible for binding arbitration."

Standard Operating Procedure 1.18 governs the evaluation process for police officers. In addition, it is Department practice that an officer who receives three or more marks of "marginally below standard" meets with the police chief to discuss ways to improve the officer's evaluation.

In July 2009, a superior officer issued an evaluation of an officer that contained three "marginally below standard" ratings. The superior officer is the Police Chief's son. The Chief certifies that he designated a captain to review the evaluation with the officer to avoid a conflict that may arise in reviewing an evaluation issued by his son. The designated captain met with the officer and advised him of his right to provide written objections to the evaluation. The officer submitted written objections to the evaluation, which were subsequently attached to it.

On July 28, 2009, the PBA filed a grievance contesting the procedural change, asserting that the past practice requires that the officer meet with the Police Chief rather than a designee. On September 17, the Borough denied the grievance. The PBA demanded arbitration and 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 Township may have. In particular, the employer's assertion that the grievance is not arbitrable under the parties' agreement is an issue for an arbitrator.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson Police PBA No. 1 v. City of

Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

[87 N.J. at 92-93; citations omitted]

Because this dispute involves a grievance, arbitration is permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983).

The Borough argued in its initial brief that it has a managerial prerogative to determine the content of officer evaluations. The Borough also argued that there is no procedural violation because the officer had an opportunity to meet with the Police Chief's designee and that a grievance on a past practice is not eligible for binding arbitration under the parties' grievance procedure, which limits arbitrable grievances to those concerning the language of the agreement.

The PBA responded that it is not grieving the content of the evaluation, its grievance merely concerns a procedure relating to evaluations, and evaluation procedures are negotiable and arbitrable.

A majority representative of police officers may normally arbitrate alleged violations of procedures pertaining to personnel decisions. City of Newark, P.E.R.C. No. 90-95, 16 NJPER 265 (¶21113 1990); Atlantic Cty. Prosecutor, P.E.R.C. No. 2008-40, 34 NJPER 7 (¶3 2008). To do so does not generally limit government's policymaking powers. However, under the particular facts of this case, the Chief had a managerial prerogative to determine that it would be unethical for him to discuss the evaluation completed by his son. An arbitrator cannot second-guess that determination. State of New Jersey (OER), P.E.R.C. No. 93-55, 19 NJPER 60 (¶24028 1992), aff'd in pt. rev'd in pt. 267 N.J. Super. 582 (App. Div. 1994), certif. den. 135 N.J. 468

(1994) (adoption of code of ethics was exercise of managerial prerogative).

ORDER

The request of the Borough of Tinton Falls for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Commissioners Eaton, Fuller, Voos and Watkins voted in favor of this decision. None opposed. Commissioner Colligan recused himself. Commissioner Krengel was not present.

ISSUED: September 23, 2010

Trenton, New Jersey