

P.E.R.C. NO. 2024-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2024-004

PBA LOCAL 165,

Respondent or Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies, in part, and grants, in part the Sheriff's request for binding arbitration of the PBA's grievance, alleging that the Sheriff violated the parties' collective negotiations agreement when a written reprimand was issued to the grievant without conducting an internal affairs investigation, and by failing to conduct an investigation into the grievant's complaint of misconduct, harassment, and discrimination. The Commission finds the Sheriff issued a written reprimand to the grievant because the Sheriff's memo to the grievant contained language that was more critical than evaluative, and thus, the issuance of the written reprimand is legally arbitrable. The Commission, however, further finds that the portion of the grievance relating to the alleged failure to investigate the grievant's discrimination claim relates to the Sheriff's managerial prerogative to make assignments, and therefor, is not legally arbitrable. The Commission concludes that arbitration is not restrained to the extent the PBA's grievance is challenging the issuance of the written reprimand, but arbitration is restrained to the extent the grievance raises discrimination claims relating to the grievant's asserted gender-based assignment.

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.

P.E.R.C. NO. 2024-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2024-004

PBA LOCAL 165,

RESPONDENT OR CHARGING PARTY.

Appearances:

For the Petitioner, Middlesex County Counsel (Thomas F. Kelso, Deputy County Counsel; Michael S. Williams, on the brief)

For the Respondent, C. Elston & Associates, LLC, attorneys, (Catherine M. Elston, of counsel)

DECISION

On July 31, 2023, the Sheriff and County of Middlesex (Sheriff or County) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 165 (PBA). The grievance asserts that the Sheriff violated the parties' collective negotiations agreement (CNA) when a written reprimand was issued to the grievant without conducting an internal affairs investigation, and by failing to conduct an investigation into the grievant's complaint of misconduct, harassment, and discrimination.

The Sheriff filed briefs, exhibits, and the certification of

Kevin Harris, the County's Undersheriff.^{1/} The PBA filed a brief with exhibits, and the certification of Michael Abode, President of FOP Lodge 59.^{2/} These facts appear.

The PBA represents the County's Sheriff's Officers or Investigators, below the rank of Sergeant, and assigned to Courts, Transportation, Identification, Investigation, Administrative or Process division of the County's Sheriff's Department. The County and the PBA are parties to a CNA with a term of January 1, 2021 through December 31, 2024. The grievance procedure ends in binding arbitration.

The PBA's March 17, 2023 Amended Disciplinary Grievance alleges that the Sheriff violated the following CNA provisions, in pertinent part:

Article 27: Sheriff's Investigations

A(3). The officer or investigator shall be informed of the nature of the investigation before any interrogation commences. Sufficient information to reasonably apprise the officer or investigator of the allegations should be provided. If the officer or investigator is a potential target of the investigation, he/she shall be advised.

1/ N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge. Harris' certification appears to simply authenticate the exhibits presented by the Sheriff, but does not certify to the facts asserted in Sheriff's briefs.

2/ Abode's certification indicates that the grievant is a member of FOP Lodge 59. However, PBA Local 165 is the party who filed the grievance.

Article 8: Discrimination and Coercion

A. The Employer and the Association agree that there shall be no discrimination against any employee because of age, race, creed, color, religion, marital status, sex, national origin, political affiliation, sexual preference and physical or mental handicap.

The Sheriff asserts that on February 9, 2023, the grievant was assigned to a court room, on a 7 a.m. to 3 p.m. shift, where a female inmate was on trial. At around 2:30 p.m., the grievant's supervisor advised the grievant that he was trying to obtain relief for her but that he may not be able to as they were shorthanded. The lack of available officers was exacerbated by the assignment of other female officers to assist with the movement of female inmates. The Sheriff further asserts that assigning the grievant, a female, to guard a courtroom where a female defendant was on trial is consistent with Departmental policy. The grievant responded to her supervisor's suggestion that she may need to stay late by saying, "Why, because I have a vagina." The grievant ended up not having to stay later than 3 p.m.

According to the grievant's February 10, 2023 statement regarding the interaction with her supervisor, she asserts that she was ordered by the Chief to write a report of the incident on February 10. The grievant's statement acknowledges that she understands that the report is being made for administrative

internal police department purposes and will not be used as part of an official investigation and that she understands that she can be disciplined for insubordination if she does not write the report. The grievant's statement further states:

This is not the first time, working under [grievant's supervisor], that my fate in going home has been determined by my sex. The first incident resulted in [grievant's supervisor] flipping a quarter in front of my colleagues at the main courthouse to decide what female officer, myself or [another employee], was going to remain on duty for a skeleton crew due to inclement weather. I was completely demoralized and embarrassed in front of my peers and coworkers. At the time of the incident I was advised that [grievant's supervisor] was spoken to and no further action was taken. I find it highly offensive that as a female I am expected to have a thicker skin on a dally basis therefore certain incidents are so easily swept under the rug. I also find it offensive that supervisors continue to single out females in order to manage manpower.

In response to the grievant's statement, the Sheriff wrote the following February 10 Memorandum to the grievant:

Your conduct towards [your supervisor] on 2-9-2023 was unacceptable. You were told you might have to stay, and you questioned [your supervisor] stating "Why, because I have a vagina?" and on why he isn't using other officers.

Your comment about [your supervisor] determining your fate by your sex is inappropriate and unprofessional as was your previous comment. This type of behavior will not be tolerated.

If you feel you are being treated different because you are a woman. Please bring the

specifics to this office or to County Human Resources.

The PBA asserts that the Sheriff did not properly notify the grievant that she was the subject of any investigation that could result in discipline (e.g. the written reprimand) as required by the CNA and the County's Internal Affairs Policy and Procedures. The PBA further asserts that the Sheriff failed to properly investigate the sex discrimination complaints contained in the grievant's statement as required by the CNA and the County's Human Resources Policy. In support of the grievant's sex discrimination complaints, President Abode certifies that it is common practice for a female officer, assigned to the holding cells, to be temporally replaced by a male officer so that the female may escort a female inmate from court back to the holding cells. He further certifies that, on February 9, a female officer already assigned to the holding cells for the shift could have responded to the court to escort the female inmate back to the holding cells. Thus, President Abode maintains that there was no basis to order the grievant to stay late. Additionally, he certifies that he spoke with the Sheriff regarding the grievant's incident with her supervisor and was told by the Sheriff that no disciplinary action was being taken and that she "just wanted to talk" to the grievant.

On February 23, 2023, the PBA filed its grievance, and on March 17, filed an amended grievance, citing violations of the

CNA's Article 27 and 8 and seeking the following remedy:

- 1) The Sheriff's Office will cease future violations of the collective negotiations;
- 2) The Sheriff's Memo of 2-10-23 will be considered null and void and without effect and removed from [the grievant's] personnel and/or Internal Affairs file and all other files in which it is now contained.
- 3) The Sheriff's Office will have [the grievant's] harassment and discrimination complaint investigated in accordance with all policies, practices, procedures, as well as in accordance with the New Jersey Attorney General's Guidelines and Directives on Internal Affairs and the department's policies and procedures as to internal investigations.

The Sheriff denied both grievances, stating:

[The grievant] was never interrogated. When asked what happened she admitted making an inappropriate comment to [her supervisor] and wanted to apologize. This admission was done in the presence of her union representatives....

Following the denial of the PBA's grievances, the PBA filed for arbitration, and this petitions ensued.

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

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

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. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

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.

Because this dispute arises through grievances, arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp., 1983 N.J. Super. Unpub. LEXIS 11 (App. Div. 1983), aff'g P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers. Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it speaks in the imperative and fixes a term and condition of employment expressly, specifically and comprehensively. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The Sheriff argues that arbitration of the PBA's grievance must be restrained because it would substantially limit the Sheriff's policymaking powers as to when to initiate an internal affairs investigation and her managerial prerogative to make staffing decisions, specifically the Sheriff's Policy of assigning female officers to guard female inmates. The Sheriff argues that the decisions regarding when to initiate internal affairs investigations are within its managerial prerogative and are otherwise preempted by the Attorney General's Internal Affairs Guidelines (AG Guidelines). The Sheriff asserts that the

AG Guidelines permit informal resolution of internal affairs complaints, as was done in this case. The Sheriff argues, citing its standard operating procedures, statutes and regulations, that the Sheriff's preference of assigning female officers is a policy decision beyond the scope of negotiations. The Sheriff asserts that such a policy is designed to limit the risk of improper cross-gender interactions, ensure the safety of inmates, and limit the risk of liability arising out of potentially improper interactions between officers and inmates of the opposite sex.

The PBA argues that its grievance is arbitrable because the grievant's claim that the Sheriff should have investigated her discrimination complaint does not infringe on any managerial prerogative, and in fact, the County's own policy requires that such discrimination claims must be investigated, leaving the Sheriff with no discretion. Further, the PBA argues that the grievant's claim that the Sheriff violated the CNA and its own policies and procedures when it investigated the incident without properly notifying the grievant, resulting in discipline in the form of a written reprimand, does not infringe on any managerial prerogative. The PBA asserts that the grievant made a discrimination complaint that the Sheriff failed to act on, but rather, referred the grievant to the County's Human Resources. The PBA maintains that the County's non-action, which adversely affects the grievant's contractual right to a discrimination-free

work environment, is the subject of the grievance and is arbitrable. Moreover, the PBA argues the grievant also has an arbitrable contractual right to be notified of being the target of an investigation that may result in discipline, and she was not notified.

Public employers and majority representatives may agree to arbitrate minor disciplinary disputes, which include reprimands and suspensions or fines of five days or less. See N.J.S.A. 34:13A-5.3; see also Salem Cty. Sheriff's Department (Corrections), P.E.R.C. No. 2022-22, 48 NJPER 256 (¶57 2021) (finding that employer's entries into an internal database concerning alleged misconduct by officers constituted an arbitrable written reprimand because critical language was used in the entries). Notice procedures associated with discipline are also legally arbitrable. See, e.g., In re Rutgers, No. A-0990-16T3, 2018 N.J. Super. Unpub. LEXIS 1811 (App. Div. July 27, 2018), aff'g, P.E.R.C. No. 2017-17, 43 NJPER 117 (¶35 2016) (declining to restrain arbitration with respect to alleged violations of contractual disciplinary procedures); City of Newark, P.E.R.C. No. 2012-19, 38 NJPER 191 (¶64 2011) (major discipline was not arbitrable, but procedural safeguards associated with discipline were arbitrable); City of Newark, P.E.R.C. No. 2010-62, 36 NJPER 50 (¶23 2010) (decision to impose major discipline was not arbitrable, but procedural claims of

notice, opportunity to be heard, and adherence to contractual two-track disciplinary process were legally arbitrable).

The Sheriff's February 10th memo to the grievant states that her conduct towards her supervisor was unacceptable, inappropriate, unprofessional, and will not be tolerated. The memo contains language that is more critical than evaluative. We find that the memo constitutes a written reprimand that is legally arbitrable. Whether the Sheriff had just cause to issue the written reprimand is a determination for the arbitrator. Ridgefield Park. Likewise, the Sheriff's reliance on its internal policy and procedures and the AG Guidelines, permitting it to informally resolve the grievant's incident with her supervisor, are affirmative defenses for an arbitrator.

The portion of the PBA's grievance relating to the Sheriff's alleged failure to investigate the grievant's discrimination claim relates to the Sheriff's managerial prerogative to make assignments. The Commission has previously found gender-based assignments in correctional facilities not to be legally arbitrable because arbitration could infringe on the employer's policymaking powers to make assignments and prevent inappropriate conduct with inmates. State of New Jersey (Department of Corrections), P.E.R.C. No. 2020-37, 46 NJPER 324 (¶79 2020) (restraining arbitration challenging employer's policy requiring female supervision of strip searches of female prisoners

performed by female officers). It is well-settled that a claim of discrimination relating to a managerial prerogative is not legally arbitrable. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 14-18 (1983); see also In re State Police, 2020 N.J. Super. Unpub. LEXIS 973, *9-10 (App. Div. 2020); Jersey City Educ. Assn v. Jersey City Bd. of Educ., 218 N.J. Super. 177, 187-188 (1987). Such claims must be pursued with the New Jersey Division on Civil Rights, which the Legislature has established as "the most appropriate forum for resolving this issue." Bor. of Red Bank, P.E.R.C. No. 2021-44, 47 NJPER 470 (¶111 2021).

For all the foregoing reasons, we deny the Sheriff's request for a restraint of binding arbitration to the extent the PBA's grievance is challenging the issuance of the February 10th written reprimand. However, we grant the Sheriff's request for a restraint of binding arbitration to the extent the grievance raises discrimination claims relating to the grievant's asserted gender-based assignment.

ORDER

The request of the Middlesex County Sheriff's Office for a restraint of binding arbitration is denied to the extent the PBA's grievance is challenging the issuance of the February 10th memo. The restraint is granted to the extent the grievance raises discrimination claims relating to the grievant's asserted gender-based assignment.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Higgins and Papero voted in favor of this decision. Commissioner Voos voted against this decision.

ISSUED: October 26, 2023

Trenton, New Jersey