P.E.R.C. NO. 2005-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WASHINGTON,

Petitioner,

-and- Docket No. SN-2004-061

P.B.A. LOCAL 318,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of Washington for a restraint of binding arbitration of a grievance filed by P.B.A. Local 318. The grievance contests performance notices received by three police officers. The Commission concludes that an employer has a non-negotiable right to select evaluation criteria and that a law enforcement agency has a managerial prerogative to determine how it will deliver services to the public. The Commission further concludes that arbitration would substantially limit the employer's prerogative to use motor vehicle contacts as an evaluation criterion.

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, Ragonese, Albano & Viola, LLC, attorneys (Michael P. Albano, on the brief)

For the Respondent, Alterman & Associates, attorneys (Stuart J. Alterman, on the brief)

DECISION

On April 16, 2004, the Township of Washington petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local 318. The grievance contests performance notices received by three police officers.

The parties have filed briefs and exhibits. These facts appear.

The PBA represents police officers. The parties' collective negotiations agreement is effective from January 1, 2002 through December 31, 2005. The grievance procedure ends in binding arbitration.

Article II is a maintenance of standards clause. It provides:

> A. The rights of both the Township and the employees shall be respected and the provisions of this Agreement for the orderly settlement of all questions regarding such rights shall be observed.
>
> B. Employees shall retain all civil rights under the New Jersey State and Federal Law.

In December 2003, three officers received performance notices stating that they were to increase their motor vehicle contacts and that non-compliance could result in a charge of "neglect of duties" and possible reprimand or dismissal. The officers then issued more summonses for Title 39 violations. The department reviewed the summonses, specifically parking summonses issued in the chief's neighborhood, and began an internal affairs investigation.

On December 11, 2003, the PBA filed a grievance on behalf of the three officers alleging that the performance notices violated the maintenance of standards clause. The grievance stated, in part:

> The performance notices are questionably being used by the department to coerce officers into writing motor vehicle contacts under threat of punitive action. Enforcement of motor vehicle statutes is an important part of law enforcement, but should not be required of an officer prior to the establishment of probable cause.
>
> RELIEF SOUGHT: The performance notices issued do not accurately reflect the activity of the

officers listed above. The performance notices are restrictive and under threat of punishment require compliance. They are ethically questionable with regards to improving job performance. The relief sought would be to rescind the performance notices and to remove same from officers permanent record.

On December 22, 2003, the chief denied the grievance. He wrote:

1. Each officer was counseled on 2-3 occasions for their deficiency in the area of motor vehicle contacts over periods of 3-4 months. The goal of the counseling was to have the officers meet the same standards of performance as their peers on their platoon and in the Patrol Division. The officers in question ignored the counseling and verbal orders of their supervisor and failed to improve after being given ample opportunity and specific direction to do so.

2. The three officers' motor vehicle contacts in October averaged 3.66. Motor vehicle contacts of other members of their platoon averaged 29 per officer. (87.38% more than the involved officers). During the first 11 months of 2003, the 3 involved officers averaged 78 motor vehicle contacts per officer. The Patrol Division average for the same 11 months (excluding supervisory personnel, those on limited duty, and the few performing poorly) is 242.6 per officer. (68% higher than the involved officers).

3. Upon being issued the performance notices for not responding positively to the counseling, the officers were all advised by Sergeant Kennedy of Captain Vannoni's expectations and that improvements should not be achieved by issuing technical violations.

4. The assertion in the grievance that, "Failure to write more tickets and warnings may *immediately* result in a charge of neglect of duty" is incorrect. The word *immediate* does not appear in any of the performance notices, Captain Vannoni did advise the officers that further deficiencies may result in a violation of the rules and regulations and specifically cited rule 6.9(n)-Police Officer Responsibilities. The neglect of duty reference is a direct quote from this lawfully adopted rule in the Police Manual.

5. The assertion that the performance notices are "ethically questionable" not only lacks credibility, it is offensive. The only unethical behavior was that which was exhibited by the three officers. Instead of meeting the reasonable expectation of performing at the same level as their peers, the officers elected to penalize unwary residents. The ticket-writing spree brought public discredit to the officers and to the department. Moreover, the acts were so egregious that all the summonses were subsequently dismissed by the court.

On January 14, 2004, the business administrator denied the grievance, stating that she did not believe that the notices violated the contract.

On February 3, 2004, the grievance was amended, as follows:

> I must formally amend the grievance to include a recent decision to include the performance notices and their content in the officer's evaluations. These officers were never found guilty of any infraction of rules and regs or criminal law. Therefore, in relief sought we add that the incident warrants no mention in the officer's

> evaluations. Feel free to contact me to discuss the issue.

On March 3, 2004, the mayor denied the grievance. On March 15, 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, 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 contractual merits of the grievance or any contractual defenses the Township may have.

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 and condition of employment as we have defined that phrase.

> An item that intimately and directly affects the work and welfare of police and fire fighters, 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 fire fighters, 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. [Id. at 92-93; citations omitted]

Arbitration will be 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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers. No preemption issue is presented.

The Township argues that evaluating officers is a managerial function and that unfavorable evaluations are not subject to arbitration. The Township also argues that performance notices are not required to be considered in any promotion or demotion process.

The PBA argues that the performance notices were issued to coerce officers to write more summonses under threat of punitive action. The PBA asserts that the Township's managerial

prerogative to help officers improve their skills by ordering more motor vehicle contacts does not outweigh the employees' interests in not being punished. It argues that summons quotas by municipalities are illegal and if there were no quota system, the performance notices would never have been issued. The PBA also argues that a performance notice can be used in subsequent discipline affecting the promotional process, it is the first line of progressive discipline, and it becomes part of the officers' personnel files. Finally, the PBA states that the officers were counseled and then attempted to perform their duties at which time they were issued the performance notices. It asserts that arbitration should be permitted under the contract's just cause provision.

An employer has a non-negotiable right to select evaluation criteria. 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); see also N.J.S.A. 34:13A-5.3 (prohibiting negotiation of the standards or criteria for employee performance). Additionally, a law enforcement agency has a managerial prerogative to determine how it will deliver services to the public. See City of Newark, P.E.R.C. No. 88-137, 14 NJPER 442 (¶19181 1988); Brookdale Community College, P.E.R.C. No. 77-53, 3 NJPER 156 (1977). Accordingly, in Howell Tp., P.E.R.C. No. 96-60, 22 NJPER 103 (¶27053 1996), we restrained

arbitration of a grievance contesting the use of a traffic enforcement index as an evaluation criterion and in a monthly activities report. The Howell analysis applies here. Arbitration would substantially limit the employer's prerogative to use motor vehicle contacts as an evaluation criterion.[1/]

We also restrain arbitration over the PBA's just cause claim. The officers were told that non-compliance with the performance notices could result in discipline, including reprimands. Should reprimands be issued, they would constitute minor discipline that could be reviewed in binding arbitration if the parties have so agreed. N.J.S.A. 34:13A-5.3.[2/]

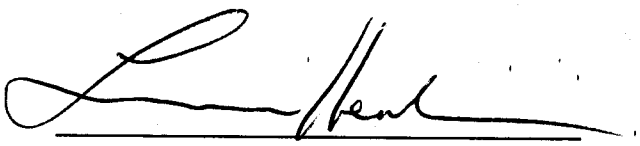
1/ The PBA claims that the Township has imposed an illegal ticket quota. We note that N.J.S.A. 40A:14-181.2 prohibits the establishment of quotas for motor vehicle arrests or citations and provides that the number of arrests or citations shall not be used as the sole criterion for promotion, demotion, dismissal, or the earning of a benefit; but permits any such arrests or citations, and their ultimate dispositions, to be considered in evaluating the overall performance of a law enforcement officer. We do not consider whether that statute applies because a claimed illegality in the exercise of a prerogative, such as establishing an evaluation criterion, cannot be pursued through binding arbitration. Teaneck Bd. of Ed. and Teaneck Teachers Ass'n, 94 N.J. 9 (1983).

2/ The definition of minor discipline under section 5.3 parallels the civil service definition, which includes reprimands. See N.J.A.C. 4A:2-3.1; Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997).

ORDER

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

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz, Mastriani, Sandman and Watkins voted in favor of this decision. None opposed.

DATED: September 30, 2004
Trenton, New Jersey
ISSUED: September 30, 2004