

P.E.R.C. NO. 2008-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COUNTY PROSECUTOR,

Petitioner,

-and-

Docket No. SN-2008-022

MAINLAND P.B.A. LOCAL NO. 77,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Atlantic County Prosecutor for a restraint of binding arbitration of a grievance filed by the Mainland P.B.A. Local No. 77. The grievance alleges that the employer violated the parties' collective negotiations agreement when it issued a second evaluation to a police officer allegedly in violation of department policies and procedures. The Commission declines to restrain arbitration over the alleged procedural violation, but grants a restraint of arbitration to the extent the grievance seeks to require the Prosecutor to give the grievant a satisfactory rating for attitude and professionalism.

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, Eric M. Bernstein & Associates,
LLC, attorneys (Deborah R. Bracaglia, on the brief)

For the Respondent, Loccke, Correia, Schlager, Limsky &
Bukosky, attorneys (Gregory G. Watts, on the brief)

DECISION

On October 2, 2007, the Atlantic County Prosecutor petitioned for a scope of negotiations determination. The Prosecutor seeks a restraint of binding arbitration of a grievance filed by Mainland P.B.A. Local No. 77. The grievance alleges that the employer violated the parties' collective negotiations agreement when it issued a second evaluation to a police officer after the first quarter had ended. We decline to restrain arbitration over the alleged procedural violation, but we restrain arbitration to the extent the grievance seeks to require the Prosecutor to give the grievant a satisfactory rating for attitude and professionalism.

The parties have filed briefs and exhibits. The following facts are undisputed.

The PBA represents sergeants, investigators and investigators I in the Prosecutor's Office. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2006. The grievance procedure ends in binding arbitration.

The pertinent evaluation policy provides:

It is the policy of the Atlantic County Prosecutor's Office Detective Division to conduct annual evaluations for all sworn personnel. Annual evaluations will be prepared by the ratee's commanding officer and reviewed with the ratee.

Procedure

The following procedure will be adopted to conduct annual sworn personnel evaluations:

1. An evaluation report will be prepared for each ratee.
2. Annual evaluations will be conducted by the ratee's present commanding officer during the first quarter of each year reviewing the ratee's performance from the preceding year.
3. The ratee's commanding officer will prepare for the evaluation process by meeting with the personnel from the ratee's chain of command and/or other appropriate personnel to review the work performance of each ratee. Ratees serving under multiple commanding officers during the year will be reviewed with input from their prior chain of command.

4. The rating commanding officer will review the evaluation report with the ratee. The evaluating commanding officer and the ratee will sign the evaluation report. A signed report indicates review of the report but not necessarily agreement of the report.

* * *

7. A ratee may appeal an evaluation report to the Chief for the rating(s) in question. . . .

On March 22, 2007, Captain Stephen Silvern notified Sergeant David Fleming that his 2006 evaluation had been completed. He received an Improvement Needed rating in Attitude & Professionalism.

On March 23, 2007, Fleming filed a notice of appeal with Daren Dooley, the Chief of Detectives, asserting a violation of paragraph 3 of the policy because Silvern did not consult with Fleming's previous supervisors before finalizing his evaluation. Fleming also asserted that the negative rating constituted retaliation for a lawsuit he had filed against the Prosecutor.

On March 26, 2007, the PBA filed a grievance with Dooley. On March 30, Dooley responded to Fleming that he had reviewed his appeal and that Captain Walton, Fleming's supervisor from January to May 2006, had been contacted and had since provided input into a revised evaluation. Dooley informed Fleming that his supervisors would soon meet with him to review the revised

evaluation. Dooley also stated that no discrimination had affected the evaluation process.

On April 2, 2007, Silvern met with Fleming and provided him with the revised 2006 evaluation. This evaluation maintained the Improvement Needed rating under Attitude & Professionalism. Silvern signed the evaluation on March 30. The evaluation noted that Walton and Lieutenant Alexander, another of Fleming's supervisors, participated in the evaluation and agreed with the ratings. A corrective action plan accompanied the evaluation.

On April 5, 2007, Fleming appealed the revised evaluation to Dooley. He asserted that the revised evaluation violated paragraph 2 of the policy providing that evaluations be completed during the first quarter. He asserted that as Captain Silvern met with him on April 2, the evaluation did not occur on time.

On April 10, 2007, the PBA grieved the revised evaluation. The grievance states, in part:

On Monday, 4-2-07, Capt. Silvern informed me that he gave me a second evaluation with negative results in the area of Attitude and Professionalism on my 2006 Annual Evaluation. He added that this evaluation was done in accordance with the Evaluation policy. I disagree strongly again.

I am grieving this evaluation because it too is in violation of current policy. The current policy clearly states that annual evaluation will be conducted during the first quarter with the ratee. The date 4-2-07 falls into the second quarter. I had my annual evaluation during the first quarter. It was discussed with me, and I signed it.

However, I disagreed with Capt. Silvern's assessment and how he conducted the evaluation. Based on the current policy, there is no room for "do over" during the second quarter. Therefore, by default, I do not get any evaluation for 2006. An evaluation "Do Over" is not even written in the policy, another direct violation of the current policy. Are we now creating policy on the fly?

Why is it that Capt. Silvern was given a second opportunity to mask the mistake on my first evaluation, by doing a second evaluation on me? I would like the copy of the first evaluation that I signed and asked for 2 weeks ago, but still have not gotten yet.

The grievance requests that the Prosecutor adhere to relevant contractual provisions and that Sergeant Fleming be given a "Meets Requirements" rating on his evaluation under Attitude & Professionalism or that the 2006 evaluation be thrown out.

On April 17, 2007, Alexander denied the grievance. He concluded that the evaluation was completed in accordance with the policy. At steps 2 and 3, the PBA dropped its request that the second evaluation be thrown out. The grievance at those steps requests only that Fleming's rating under Attitude and Professionalism be raised. The grievance was denied at steps 2 and 3. The PBA's demand for arbitration does not specify a remedy.

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.

A majority representative of police officers may arbitrate alleged violations of procedures pertaining to personnel decisions. City of Newark, P.E.R.C. No. 90-95, 16 NJPER 265

(¶21113 1990). Accordingly, the PBA may seek an arbitral ruling that the employer violated the parties' contract by issuing a revised evaluation during the second quarter of 2007. Although we will generally not speculate about remedies, see Deptford Tp. Bd. of Ed., P.E.R.C. No. 81-84, 7 NJPER 88 (¶12034 1981), we will not permit an arbitrator to issue a remedy that significantly interferes with a governmental policy determination. The decision to assign the grievant an Improvement Needed rating under Attitude and Professionalism involves the exercise of the managerial prerogative to evaluate employees and an arbitrator cannot order a change in that evaluation rating. Hazlet Tp. Bd. of Ed., P.E.R.C. No. 79-57, 5 NJPER 113 (¶10066 1979), rev'd 6 NJPER 191 (¶11093 App. Div. 1980) (employer has prerogative to both set and apply evaluation criteria).

ORDER

The request of the Atlantic County Prosecutor for a restraint of binding arbitration is granted to the extent the grievance seeks a change in an evaluation rating. The request is otherwise denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Joanis and Watkins voted in favor of this decision. None opposed. Commissioner Fuller was not present.

ISSUED: January 24, 2008

Trenton, New Jersey