

P.E.R.C. NO. 2008-64

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONMOUTH COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2008-052

MONMOUTH COUNTY SHERIFF'S
OFFICERS, P.B.A. LOCAL 314,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Monmouth County Sheriff's Office for a restraint of binding arbitration of a grievance filed by Monmouth County Sheriff's Officers, P.B.A. Local 314. The grievance contests comments made on an evaluation. The Commission concludes that the negative comments in the evaluation are all evaluative and may not be challenged in binding arbitration. However, any disciplinary action resulting from the evaluation may be challenged in an appropriate forum.

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, LLC,
attorneys (Parthenopy A. Bardis, on the brief)

For the Respondent, Mets Schiro & McGovern, LLP,
attorneys (Roosevelt Porter, of counsel and on the
brief; Brian J. Manetta, on the brief)

DECISION

On January 28, 2008, the Monmouth County Sheriff's Office petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of a grievance filed by Monmouth County Sheriff's Officers, P.B.A. Local 314. The grievance contests comments made on an evaluation. We restrain arbitration.

The parties have filed briefs and exhibits. The County has filed the certification of Lt. Steve Ellis. These facts appear.

The PBA represents sheriff's officers. The parties' collective negotiations agreement is effective from January 1,

2005 through December 31, 2008. The grievance procedure ends in binding arbitration.

Joseph Tuohy has been a sheriff's officer since October 1998. On August 24, 2006, Sergeant Fagan completed Tuohy's performance evaluation for the rating period January 1, 2006 through June 30, 2006. Tuohy received satisfactory ratings in all categories. Fagan also included these comments that the PBA challenges:

1. Faces disciplinary action for the charge of neglect of duty for failing to properly secure evidence on 6/2/06 while being the senior officer present.
2. Seems to take an inordinate amount of time to write reports while on overtime.
3. Works poorly with supervisors. Not a team player.

Ellis states that his comments addressed performance evaluation criteria set forth in the evaluation policy, specifically the sections on interpersonal relationships, ability to accept authority, and quality of service. He also states that having initiated the disciplinary complaint against Tuohy in June, he was aware that Tuohy was the subject of an internal affairs investigation during the rating period. Tuohy was exonerated, but not during that evaluation period.

On September 1, 2006, Tuohy submitted a rebuttal to the chief. He took exception to the comment that his investigative reports should contain more detail and that he takes a long time

to complete reports. Tuohy also took exception to the comment concerning his ability to accept authority. He responded that this comment was related to an arrest that took place on June 1 that resulted in an internal affairs investigation. Finally, Tuohy took exception to the comment about the disciplinary action claiming that it was premature and immature.

On October 23, 2006, the chief responded. He disagreed with Tuohy's characterizations. Since Tuohy received a satisfactory evaluation, the chief said it did not indicate to him that the comments were anything more than constructive criticism. He found no merit to the rebuttal.

On November 1, 2006, the PBA filed a grievance seeking the removal of Ellis's comments from the evaluation. On November 8, the chief denied the grievance. On December 28, 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.

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. The Court stated:

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]

As this dispute arises in the context of a grievance, 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.

The County argues that arbitration must be restrained because the comments are evaluative, not disciplinary. The PBA responds that the comments are not designed to enhance Tuohy's work performance, but are accusatory and insulting. The PBA maintains that Ellis's comments do not offer any ways for Tuohy to improve, but simply state conclusions. The County replies that an employer may offer constructive criticism in an evaluation and the fact that an employee may be insulted by such criticism does not make the comments disciplinary.

There is a presumption that substantive comments on a performance evaluation that are designed to improve performance are not disciplinary and cannot be challenged in binding arbitration. 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. 1986).

The first comment reports that there is a pending disciplinary action. It is not disciplinary in itself. The second comment states a belief that Tuohy takes too long to write reports while on overtime. It is critical, but nonetheless evaluative. The final comment reflects the evaluator's belief

that Tuohy does not work well with supervisors and is not a team player. It too is critical, but evaluative. Should disciplinary action result from the evaluation, Tuohy may challenge that discipline in an appropriate forum. These negative comments in his evaluation may not, however, be challenged in binding arbitration.^{1/}

ORDER

The request of the Monmouth County Sheriff's Office for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: May 29, 2008

Trenton, New Jersey

^{1/} Negative comments in an evaluation need not state that they are intended to improve performance to insulate them from arbitral review.