P.E.R.C. NO. 2014-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CHERRY HILL FIRE DISTRICT NO. 13,

Petitioner,

-and- Docket No. SN-2013-015

IAFF LOCAL 2663,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Cherry Hill Fire District No. 13 for a restraint of binding arbitration of a grievance filed by the IAFF Local 2663. The grievance asserts that the District disciplined a firefighter without just cause when it counseled him and placed a counseling notice in his personnel file. The Commission holds that the language of the counseling notice is, on balance, disciplinary, and therefore the question of whether the District had just cause to issue the letter is arbitrable.

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, Capehart & Scatchard, P.A., attorneys (Joseph F. Betley, of counsel and Katheryn Eisenmann, of counsel and on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys (Steven R. Cohen, of counsel)

DECISION

On October 23, 2012, Cherry Hill Fire District No. 13 filed a scope of negotiations petition. The District seeks a restraint of binding arbitration of a grievance filed by IAFF Local 2663. The grievance asserts that the District disciplined a Firefighter who is also the Local 2663 President without just cause when it counseled him and then placed a counseling notice in his personnel file.

The District and Local 2663 have filed briefs and exhibits. The District submitted the certification of Thomas Kolbe, Assistant Fire Chief. Local 2663 submitted the certifications of

the grievant and unit members Robert MacDermott, Richard Oberle, Jr., and Ken Stackhouse. These facts appear.

Local 2663 represents a unit of District employees including paid Firefighters, the Battalion Chiefs Aide, the Fire Inspector/Specialist, the Firefighter/Mechanic, and the Public Education Officer. Local 2663 and the District are parties to a collective negotiations agreement (CNA) effective from January 1, 2009 through December 31, 2011. The grievance procedure ends in binding arbitration.

The grievant certifies that he organized voluntary training events in 2009 and 2011, and that Chief Giorgio agreed to allow on-duty firefighters to attend the training. Grievant, MacDermott, Oberle, and Stackhouse have attended multiple voluntary training sessions (outside of training received from the fire department). They certify that they were never told that they needed a superior officer's permission to attend those training or to gain certifications on their own.

On May 5, 2012, grievant was counseled by Battalion Chief Haldeman and Captain Baum about his need to keep his company officer better informed about his training plans. A May 14 letter from Captain Baum to grievant documents the May 5 counseling session. The letter stated:

> ***Details of Infraction*** (Narrative Description)
> Date & Time: 5/5/12, 1015 hours
> Policy Directive: 1001
> Operational Guideline:

> Orders:
> Rule: 19
> FF [grievant] needs to keep his company officer better informed of problems, concerns and communications. If this does not occur, it will be presented as undermining the company officer's authority. This counseling session documents a discussion held with BC Haldeman, Captain Baum and [Grievant] on May 5, 2012 at station #2. We discussed how [Grievant] made contact with a Camden FD Battalion Chief requesting training. Although training was requested for personal enrichment, his company officer should have been the first level of communication. [Grievant] should have also kept his company officer informed of a conversation with Lt. Collins.
>
> ***Action Taken*** (narrative description)
> Discussed the situation and reviewed the need for good communication. During this counseling session, the member also received an informal review of his performance.

The letter was signed by Captain Baum, Battalion Chief Haldeman, and [grievant] (who wrote "As Directed" next to his signature). A copy of the letter was placed in grievant's personnel file.

On May 30, 2012, Local 2663 filed a grievance asserting that the May 14 counseling letter was not justified and should be removed from the personnel file. By memorandum of June 12, Assistant Fire Chief Kolbe denied the grievance, stating:

> As stated in Policy Directive 1002, counseling is an informal discussion between a member and his or her immediate supervisor and is not considered a form of discipline. Your officer has the authority to conduct this when he/she feels it is necessary. At the conclusion of the discussion, a written report is kept on file to verify the points covered.

> In this case, Captain Baum spoke with you regarding tower ladder training with the Camden City Fire Department and a discussion you had with Lt. Collins about tower ladder operations. Because you directly contacted the Camden City Fire Department in pursuit of training, it went through their chain of command. When it was brought to the attention of the Cherry Hill Fire Department, your Battalion Chief was unaware of such request. With respect to Lt. Collins, a conversation about the incident with your Captain would again make him aware of the incident and could prevent further similar actions on Lt. Collins part from reoccurring.
>
> The purpose of the counseling session was to simply reinforce the need to work with the CHFD chain of command and not to prevent you from seeking any professional development.
>
> For these reasons the grievance is denied and the counseling form will remain in your file.

On June 29, 2012, Local 2663 demanded binding 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 merits of the grievance or any contractual defenses that the Township 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 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). Thus, if we conclude that the union's grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The District argues that the counseling session and letter are non-arbitrable evaluations because they were meant to notify grievant of performance and communication deficiencies, not to penalize him. It asserts that the counseling was not punitive in nature, did not inflict any punishment, and did not warn of potential disciplinary actions. Citing Edison Township, P.E.R.C. No. 2009-60, 35 NJPER 141 (¶51 2009), the District contends that the fact that evaluative documents may be placed in a personnel file and used in future promotional decisions is not dispositive in categorizing them as disciplinary.

Local 2663 responds that the counseling letter is disciplinary, not evaluative, because it is the first level of discipline in Policy Directive 1002, Disciplinary Actions. It asserts that the counseling letter's section entitled "Details of

Infraction" indicates its disciplinary nature, as does the fact that it was placed in grievant's personnel file and can be used to support future discipline. Furthermore, Local 2663 contends that the counseling letter is not evaluative because it threatened punishment by noting that the next infraction "will be presented as undermining the company officer's authority." Finally, Local 2663 asserts that the Commission has found that even if the employer claims that counseling is not a form of discipline, it can be found to be an arbitrable reprimand if the notice is actually part of the disciplinary process and warns of future discipline for failure to take corrective action.[1/]

The District's replies that noting future problems will be "presented as undermining the company officer's authority" does not contemplate future disciplinary action. It argues that even if that statement is considered as a warning of future discipline, the Commission has found that a Performance Improvement Plan warning of future discipline for failure to improve noted performance deficiencies is not a reprimand and not arbitrable.[2/]

An employer has a non-negotiable right to select the criteria for evaluating its employees. See Bethlehemn Tp. Bd. of

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1/ Local 2663 cites: New Jersey Transit, P.E.R.C. No. 2006-90, 32 NJPER 171 (¶77 2006); New Jersey Transit, P.E.R.C. No. 2006-91, 32 NJPER 175 (¶78 2006).

2/ The District cites: Plainsboro Township, P.E.R.C. No. 2009-26, 34 NJPER 380 (¶123 2008).

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). However, if an employer issues a reprimand to an employee for failing to meet performance criteria, that reprimand may be challenged in binding arbitration.

In 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. 1987), we set forth our approach for determining whether a document critical of employee performance is a non-arbitrable evaluation or an arbitral reprimand.

> We realize that there may not always be a precise demarcation between that which predominantly involves a reprimand and is therefore disciplinary within the amendments to N.J.S.A. 34:13A-5.3 and that which pertains to the Board's managerial prerogative to observe and evaluate teachers and is therefore non-negotiable. We cannot be blind to the reality that a "reprimand" may involve combinations of an evaluation of teaching performance and a disciplinary sanction; and we recognize that under the circumstances of a particular case what appears on its face to be a reprimand may predominantly be an evaluation and vice-versa. Our task is to give meaning to both legitimate interests. Where there is a dispute we will review the facts of each case to determine, on balance, whether a disciplinary reprimand is at issue or whether the case merely involves an evaluation, observation or other benign form of constructive criticism intended to improve teaching performance. While we will not be bound by the label placed on the action taken, the context is relevant. Therefore, we will presume the substantive comments of an evaluation relating to teaching

> performance are not disciplinary, but that statements or actions which are not designed to enhance teaching performance are disciplinary.

Here, the counseling session and subsequent letter did not penalize the grievant for a specific incident of past misconduct, but notified him of deficiencies and reminded him to be more diligent in the future. *Cf.* Plainsboro Tp., P.E.R.C. No. 2009-26, 34 NJPER 380 (¶123 2008) (arbitration restrained where grievance challenged issuance of performance improvement plan). The letter makes a passing reference to an informal performance evaluation, but stated also stated that it contained "Details of Infraction." On balance, we find that this language implies that the letter was predominately disciplinary and may be submitted to binding arbitration. Whether the District had just cause to issue the letter under its Policy is a determination for the arbitrator. Ridgefield Park.

ORDER

The request of the Cherry Hill Fire District No. 13 for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: October 31, 2013

Trenton, New Jersey