

P.E.R.C. NO. 2014-65

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WALL,

Petitioner,

-and-

Docket No. SN-2013-070

PBA LOCAL 234,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Wall for a restraint of binding arbitration of a grievance filed by PBA Local 234. The grievance seeks the removal of written reprimands that are more than six months old from unit members' personnel records. The Commission finds that the Attorney General's guidelines on retention of written reprimands are not preemptive of arbitration because they were not adopted by the Township until after this dispute arose. The Commission finds that the grievance relates to a subject that was permissively negotiable at the time of the expungement request because the Township admits that its policy allowed removal of written reprimands more than six months old where the officer had not repeated the misconduct. The Commission holds that allowing an arbitrator to consider, under the policy at the time, whether to order expungement of a written reprimand, would not substantially limit the Township in the implementation of any governmental policy goal. The Commission also holds arbitrable the PBA's claim that the Township violated a contract provision regarding providing notice of changes in policies.

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. 2014-65

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WALL,

Petitioner,

-and-

Docket No. SN-2013-070

PBA LOCAL 234,

Respondent.

Appearances:

For the Petitioner, Cleary Giacobbe Alfieri Jacobs, LLC, attorneys (Matthew J. Giacobbe, of counsel)

For the Respondent, Charles E. Schlager, Jr., LLC, attorney (Charles E. Schlager, Jr., of counsel)

DECISION

On May 9, 2013, the Township of Wall petitioned for a scope of negotiations determination. The Township seeks to restrain binding arbitration of a grievance filed by the Wall Township Policemen's Benevolent Association, Local 234, seeking the removal of written reprimands that are more than six months old from the personnel records of police represented by the PBA, and, in particular, from the records of PBA President Todd Verrechia.^{1/} The Township asserts that, pursuant to the Attorney General's "Guidelines for Internal Affairs Policy and

^{1/} The demand for arbitration (AR-2013-708) states that the grievance targets written reprimands issued on or before June 1, 2012.

Procedures," a municipal police department, in cases where a complaint is sustained and discipline imposed, must retain the record of the disciplinary charge and its disposition in the police officer's personnel file. Its petition maintains that the grievance is outside the legal scope of negotiations and cannot be submitted to binding arbitration.^{2/}

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

The PBA represents the Township's patrolmen and detectives. The PBA and the Township are parties to a collective negotiations agreement (CNA) in effect from January 1, 2011 through December 31, 2015. The CNA's grievance procedure ends in binding arbitration.

N.J.S.A. 40A:14-181 provides:

Every law enforcement agency shall adopt and implement guidelines which shall be consistent with the guidelines governing the "Internal Affairs Policy and Procedures" of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements.

^{2/} The Township's petition seeks a ruling only as to written reprimands that, if challenged, were determined to have been issued for just cause. It does not argue that records regarding disciplinary charges that have not been sustained must be retained or seek a ruling about retaining records of other forms of discipline, whether less severe or more severe than a written reprimand.

The Attorney General's Guidelines on Internal Affairs Policy and Procedures, as revised September 2011, provides (at p. 22):

Each agency should establish its own protocol for reviewing and purging performance notices and oral reprimands from an employee's personnel file. Written reprimands should remain permanently in the employee's personnel file.

The Township concedes that, prior to the December 1, 2012 request filed by PBA President Verrechia seeking the expungement of written reprimands issued on or before June 1, 2012, it had a less restrictive policy in force. The practice was that, where no other breach of discipline had occurred, written reprimands issued to police could be removed on request from an officer's personnel file six months after issuance.

On January 15, 2013, a police captain denied the request as to written reprimands issued to Verrechia, relying on the Attorney General's guidelines. On January 21, the PBA initiated a formal grievance. On February 7, the chief denied the grievance and, on the following day, February 8, he revised the Department's Standard Operating Procedures regarding Internal Affairs Investigations to follow the Attorney General's Guidelines. The revised policy provides that "Written reprimands will remain permanently in the employee's personnel file."

On March 14, 2013 the Township Administrator denied the grievance and on April 1, the PBA demanded arbitration. This petition ensued.

Our scope of negotiations jurisdiction is limited. In Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144, 154 (1978) the Supreme Court stated:

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 Association's contractual claims or the Board's defenses.

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. Paterson, 87 N.J. 78, 92-93 (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. 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.

Citing the Attorney General's guidelines and N.J.S.A. 40A:14-181, authorizing their adoption, the Township argues that the grievance is preempted and is not legally arbitrable. It also points to our decisions in cases arising during successor negotiations. Those decisions hold that expired or proposed contract language providing for expungement of police disciplinary records are not mandatorily negotiable.^{3/}

The PBA counters that the Attorney General's Guidelines are not preemptive because by the use of the word "should," the section on written reprimands is discretionary not mandatory. The PBA points out that its grievance also challenges the Township's failure to advise the PBA that it was changing its

^{3/} See Highland Pk. Bor., P.E.R.C. No. 99-93; 25 NJPER 237 (¶30099 1999); Montgomery Tp., P.E.R.C. No. 99-19; 24 NJPER 452 (¶29209 1998); South Brunswick Tp., P.E.R.C. No. 86-115, 12 NJPER 363 (¶17138 1986).

policy and thus violated Article 4.E of the CNA.^{4/} It argues that Montgomery is different as that case arose an expired contract, not one still in force.

The Supreme Court has directed that scope of negotiations determinations be issued on a case-by-case basis and that different facts or contexts may warrant different results in seemingly similar cases. See Troy v. Rutgers, 168 N.J. 354, 383 (2001); Jersey City and POBA and PSOA, 154 N.J. 555, 574 (1998).

We first consider whether the Attorney General's guidelines are preemptive. Cases construing N.J.S.A. 40A:14-181, the statute addressing the Internal Affairs policies of law enforcement agencies in light of the guidelines promulgated by the Division of Criminal Justice, have recognized that an affirmative act is needed to implement the Attorney General's guidelines. See McElwee v. Bor. of Fieldsboro, 400 N.J. Super. 388, 395-396 (App. Div. 2008); In re King, 2013 N.J. Super. Unpub. LEXIS 2664 (App. Div.).^{5/} Thus the existence of the

^{4/} This section provides:

Any change in Department Procedures and Regulations that is promulgated by the Chief of Police shall be served upon the President of the PBA immediately, except [in an emergency].

^{5/} If adopted, the guidelines must be followed. See O'Rourke v. City of Lambertville, 405 N.J. Super. 8 (App. Div. 2008), certif. den. 198 N.J. 311 (2009) (failure to refer investigation of officer to internal affairs as required by the guidelines required reinstatement with back pay).

guidelines on the retention of written reprimands, not adopted by the Township until after this dispute arose, does not preempt arbitration.

We next consider whether the grievance is legally arbitrable. Based upon the perhaps unique chronology and context of this dispute, including that it involves records of past written reprimands rather than any major disciplinary sanction, we find that the PBA's grievance relates to a subject that, at the time the dispute arose, was permissively, though not mandatorily, negotiable and therefore legally arbitrable.

At the time the expungement request was made, the Township's policy, as it admits, allowed removal of written reprimands that are more than six months old, where the officer had not repeated the misconduct. It was not until after Verrechia, requested and was denied removal of his written reprimands, and after the PBA initiated a formal grievance, that the Township changed its policy on the retention of written reprimands.^{6/}

We conclude that the dispute is permissively negotiable as allowing an arbitrator to consider whether, under the policy in force at the time of Verrechia's request, to order the expungement of a written reprimand, a minor disciplinary

^{6/} As the revised guidelines respecting the retention of written reprimands were not in effect when this dispute arose, we need not determine if the February 2013 policy revision would bar arbitration of similar, future grievances.

sanction, would not substantially limit the Township in the implementation of any governmental policy goal. And, we also conclude the PBA's claim that the Township violated Article 4.E is also legally arbitrable. See North Hudson Regional Fire and Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184, 185 (¶31075 2000) (employees have an interest in knowing what the employer's rules are providing such notice does not generally trench on the employer's prerogative to adopt them).

We reiterate that our holding is based upon the special context of this dispute which we conclude is permissively, but not mandatorily, negotiable. We do not alter our decisions in Montgomery, Highland Park and South Brunswick, all of which arose during negotiations for successor agreements and did not present the issue of permissive negotiability.

ORDER

The request of the Township of Wall for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioners Bonanni and Wall recused themselves.

ISSUED: March 27, 2014

Trenton, New Jersey