

P.E.R.C. NO. 2014-91

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONMOUTH COUNTY PROSECUTOR,

Petitioner,

-and-

Docket No. SN-2014-013

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL #256,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part and denies in part the request of the Monmouth County Prosecutor for a restraint of binding arbitration of a grievance filed by the Policemen's Benevolent Association, Local #256. The grievance asserts that "performance notices" issued to a County Investigator constituted discipline without just cause, and that the Investigator was denied the right to have a PBA representative present at an interview conducted by superiors prior to the issuance of the notices. The Commission holds that the performance notices were not designed to penalize, but specified proper protocols and are therefore not reprimands and cannot be challenged as unjust minor discipline in binding arbitration. The Commission also holds that the PBA may arbitrate its claim that the Investigator had a right to a PBA representative during the interview, because it is a procedural claim that, if sustained, would not substantially limit any of the Prosecutor's policy goals.

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, Steven W. Kleinman, Special County
Counsel

For the Respondent, Detzky, Hunter and DeFillipo,
attorneys, (Daivd J. DeFillipo, of counsel)

DECISION

On September 11, 2013, the Monmouth County Prosecutor petitioned for a scope of negotiations determination. The Prosecutor seeks a restraint of binding arbitration of a grievance filed by Policemen's Benevolent Association, Local #256. The grievance asserts that "performance notices" that were issued to a County Investigator constituted discipline imposed without just cause and also asserts that the Detective was denied the right to have a PBA representative present at an interview conducted by Superior Officers before the notices were issued. The PBA seeks the removal and destruction of the notices.

We restrain arbitration over the challenge to the contents of the notices, but permit arbitration over a claim that the investigator was entitled to have a PBA representative present during her interview and of the PBA's allegation that the issuance of the notices were procedurally defective.

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

The PBA represents County Investigators. The parties entered into a collective negotiations agreement effective from January 1, 2010 through December 31, 2013. The grievance procedure ends in binding arbitration. Article XVII addresses procedures and terms for conducting departmental investigation. Article XXII is an anti-discrimination clause. In addition, the Prosecutor has established (effective March 26, 2012) a comprehensive performance evaluation policy which provides that Detectives will receive their annual performance evaluation, covering the preceding year, by the end of April. It also provides that Detectives will receive a semi-annual performance appraisal.

On June 7 and June 28, 2013, respectively, performance notices were issued to the Detective. The Prosecutor states that the June 7 notice related to an incident that occurred in May, 2013 and the second notice, dated June 17, concerned a November, 2012 incident. The notices indicate that both incidents involved

investigations related to shootings. The June 7 notice asserts that, while investigating a shooting of a burglar by a homeowner, the Detective:

- Failed to notify supervisors of her investigative techniques;
- Used a typewritten witness statement rather than a videotaped statement including Miranda warnings;
- Failed to contact the on-call Assistant Prosecutor for legal advice on the appropriate procedure to be used.

The June 17 notice provides that, in connection with a shooting incident, the Detective:

- Failed to put her report in final format;
- Failed to inform an Assistant Prosecutor that there was a videotaped interview of the "target" prior to a "proffer" meeting;
- Disclosed during the proffer meeting, held with the Assistant Prosecutor, the target, and his attorney present, that there was a videotaped interview, resulting in an immediate end to the meeting;
- Failed to turn over the investigative file when the Assistant Prosecutor asked for it.

Before the notices were issued, the Detective was summoned to a May 24 meeting where she was questioned by four superior officers. No PBA representative was at the meeting.

The PBA asserted that the Performance Notices were "procedurally defective, substantively without merit as well as unduly harsh and severe." Its grievance asserts that the Prosecutor violated several provisions of the Agreement, including, but not limited to, Articles XVII and XXII. The PBA's grievance was denied at each step of the grievance procedure. The PBA demanded arbitration and 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.

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.

The Prosecutor argues that the Commission's decision in Edison Tp., P.E.R.C. No. 2009-60, 35 NJPER 141 (¶51 2009) controls.^{1/} The PBA concurs that Edison Tp., is an appropriate yardstick but disagrees with the Prosecutor's assertion that the notices were not disciplinary. It also cites Town of Guttenberg, P.E.R.C. No. 2005-37, 30 NJPER 477 (¶159 2004) (counseling notices re use of sick leave were disciplinary and could be challenged through binding arbitration).

An employer has a non-negotiable right to select the criteria for evaluating its employees. 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). And, N.J.S.A. 34:13A-5.3, provides in relevant part:

Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance.

^{1/} Edison restrained arbitration of challenges to the counseling notices and allowed arbitration over claims that the officers were not advised of productivity levels that were the basis for issuing the counseling notices.

However, if an employer issues a reprimand to an employee for failing to meet performance criteria, that reprimand may be challenged in binding arbitration. Under N.J.S.A. 34:13A-5.3, public employers and the majority representatives of their police officers may agree to arbitrate minor disciplinary disputes, but not major disciplinary disputes. Minor discipline includes reprimands and suspensions or fines of five days or less unless the employee has been suspended or fined an aggregate of 15 or more days or received more than three suspensions or fines of five days or less in one calendar year. Monmouth Cty. and CWA, 300 N.J. Super. 272 (App. Div. 1997).

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 an non-arbitrable evaluation or an arbitrable 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 performance notices were not designed to penalize the Detective, but were issued to specify the manner in which she deviated from the proper protocols while investigating a shooting incident. The notices emphasize the need to adhere to proper procedures so as not to jeopardize a possible criminal prosecution. Also, the Notices neither note a failure to improve nor impose discipline. Thus, the Notices are not reprimands and thus may not be challenged as unjust minor discipline in binding arbitration.

We hold that arbitration of the PBA's claim that the Investigator had a right to the presence of a PBA representative during the May 24 interview/meeting conducted by her superior officers, presents a procedural claim, that, if sustained, would not substantially limit any of the Prosecutor's policy goals. Cf. Manville Board of Education, P.E.R.C. No. 94-58, 19 NJPER 605 (¶24288 1993) (restraining arbitration over challenge to contents

of evaluation, but allowing portion of grievance asserting employee had a right to presence of representative to proceed to arbitration).^{2/}

ORDER

The request of the Monmouth County Prosecutor for a restraint of binding arbitration is granted to the extent the grievance challenges the contents of the Performance Notices. The request is denied with respect to the portion of the grievance alleging that the Detective had a right to have a PBA representative present at the May 24, 2013 meeting.

BY ORDER OF THE COMMISSION

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

ISSUED: June 26, 2014

Trenton, New Jersey

^{2/} We make no determination as to whether, based on contract language or past practice, the Detective had a right to have a PBA representative present during the May 24, 2013 interview. Nor do we determine whether, if such right existed, the Detective had the obligation to request representation. Finally, we make no determination on whether the preconditions triggering a right to representation under NLRB v. Weingarten, 420 U.S. 251 (1975) were present.