

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SALEM COUNTY SHERIFF'S DEPARTMENT  
(CORRECTIONS),

Petitioner,

-and-

Docket No. SN-2022-006

PBA LOCAL 400,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies, in part, the request of the Salem County Sheriff's Department (Corrections) for a restraint of binding arbitration of a grievance filed by PBA Local 400 asserting that the County violated the parties' collective negotiations agreement (CNA) when a Sergeant entered a "Training/Mentoring" entry in a software system for the entire B shift due to an unsubstantiated claim of officers who used foul language and otherwise disrespected inmates during the booking process. The Commission finds that the disputed entries are more in the nature of a written reprimand for past conduct and may be appealed through arbitration as a form of minor discipline, as they discuss "officers possibly having inappropriate communications between themselves and also between them and inmates," and state that "[o]fficers cannot play loud music, use profanity and be disrespectfull [sic]." The Commission finds that such language is indicative of an intent to criticize the officers based upon a determination that the inappropriate conduct "possibly" occurred. But the Commission further finds that the question of who an employer designates to make a disciplinary determination is not mandatorily negotiable, therefore it restrains arbitration to the extent that the grievance seeks to compel the County to conduct an internal affairs investigation of the incident that prompted the disputed entries.

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. 2022-22

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Appearances:

For the Petitioner, DiNicola & DiNicola, LLC, attorneys  
(Joseph M. DiNicola, Jr, Esq., of counsel)

For the Respondent, Sciarra & Catrambone, LLC,  
attorneys (Christopher A. Gray, of counsel and on the  
brief; Frank C. Cioffi, on the brief)

DECISION

On September 6, 2021, the Salem County Sheriff's Department (Corrections) (County) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the PBA Local 400 (PBA). The grievance asserts that the County violated the parties' collective negotiations agreement (CNA) when a sergeant made a "Training/Mentoring" entry in a software system for the entire B shift due to an unsubstantiated claim of officers who used foul language and otherwise disrespected inmates during the booking process.

The County filed a brief, exhibits and the certification of its Warden, John Cuzzupe. The PBA filed a brief, exhibits and

the certification of its counsel, Frank C. Cioffi.<sup>1/</sup> The County did not file a reply brief. These facts appear.

The PBA represents all full-time, permanent and provisional County Correction Officers of the County. The County and PBA are parties to a CNA in effect from January 1, 2017 through December 31, 2020. The grievance procedure ends in binding arbitration. At Article 25, Disciplinary Procedures, the CNA states, among other things:

B. All major and minor disciplinary action shall be based upon internal affairs investigative outcomes as directed by the Salem County Sheriff's Internal Affairs policy, just cause, and shall be subjected to review. . . .

. . .

D. Minor disciplinary offenses shall be appealable.

Cuzzupe certifies that for evaluation and tracking purposes, the Salem County Sheriff's Department utilizes the Guardian Tracking System. The purpose of the system is for supervisors to document performance-related matters throughout a calendar year so that officers are made aware of their strengths and their weaknesses. Documenting the communication between supervisor and officer enables the supervisor and officer to engage in meaningful dialogue throughout the year so that a fair and

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<sup>1/</sup> Cioffi's certification lists exhibits attached thereto. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts recited in a party's brief be supported by certification(s) based upon personal knowledge.

objective performance evaluation can be completed at the end of the year utilizing the historical data in the system.

The County's exhibits include a written directive issued by the Sheriff's Office with an effective date of February 8, 2018, addressing the subject of "Performance Management for Correctional Facility Personnel." It states, in pertinent part (emphases added):

POLICY:

It is the policy of this department to implement and utilize the Guardian Tracking® System as a performance management system for documenting performance throughout the evaluation year that can be retrieved, analyzed, and utilized by the supervisor to complete comprehensive annual evaluations. The system will also provide tracking for incidents of risk and alert supervisors to provide timely interventions consistent with Attorney General Guidelines.

B. DOCUMENTATION OF PERFORMANCE (Guardian Tracking® Software)

1. The agency will utilize the Guardian Tracking® system to document all employee performance. The Guardian Tracking system is software based database that will be the centralized location for all performance related entries. Once an entry is made, the subordinate will immediately be notified via their county e-mail address to read and acknowledge the performance entry.

C. PERFORMANCE DOCUMENTATION TYPES

8. Intervention Related Categories

a. Training: Training is encouraged as a means of improving employee effectiveness and performance through positive and constructive methods.

Training and discipline are not mutually exclusive. Certain minor offenses may be handled through targeted training. Supervisors have an affirmative obligation to observe the conduct and appearance of employees and detect those instance wherein corrective action (training) may be necessary.

- b. Performance counseling: Counseling is indicated where personal actions or job performance are in conflict with basic law enforcement practice and agency written directives. Certain first offenses are sufficiently minor in nature and may be handled by supervisors by documenting the counseling session guardian tracker under the appropriate category. . . . There are no appeal rights for guardian tracker entries except as may exist under applicable collective negotiations agreements.
- c. Internal Affairs: Referral to internal affairs unit for investigation and potential discipline that can only be imposed by the Warden. The final disposition notice regarding discipline shall be filed in the employee personnel file and entered under the "Confidential" umbrella in Guardian Tracking.

The PBA's exhibits include a Salem County Correctional Facility "Personnel Early Intervention Policy," with an effective date of July 7, 2015, which provides, among other things, that the County's Chief Administrator shall establish a Professional Standards Committee to: (1) review incident reports posted in the Guardian Tracking system; (2) make conclusions about the incident reports; and (3) notify shift supervisors of those findings and conclusions.

Cuzzupe certifies that Guardian Tracker entries are not disciplinary in nature, and that while negative entries were once used for promotional purposes they are no longer part of the promotional point system. The entries are not printed out and put into the employee's permanent employment record.

Cuzzupe also certifies that as it relates to the matter at hand, there was an allegation of inappropriate language and disrespectful behavior being used against and in front of inmates by booking officers. While the incident was never substantiated, the B shift supervisor felt that a communication with his shift was appropriate and he memorialized that counseling in a Guardian Tracking entry dated October 16, 2019. Cuzzupe certifies that the entry was put in as a neutral entry as "Training/Mentoring" which is not used for promotional or bidding positions. The record contains seven Guardian Tracking entries, each entitled "Incident Report" and each directed at a different officer (including J.A., A.W., C.G., J.C., N.H., K.M. and C.U.). The content of each entry is identical, and states:

**Training/Mentoring****For:** Officer [...]**Occurred:** 9/13/2019**By:** Trull, Jeffrey (101844)**Entered:** 10/16/2019

I Sgt Trull and Lt Emel both spoke to the entire B-shift booking department about a situation that was brought to our attention. We spoke to them about officers possibly having inappropriate communications between themselves and also between them and inmates. Officers cannot play loud

music, use profanity and be disrespectful [sic] everyone is to remain professional at all times. We also spoke about the expectations of the officers on how property is collected and how it must be labeled for everyone coming into the facility. All officers are expected to treat all inmates with the respect that officers expect in return.

On October 21, 2019, the PBA filed a grievance alleging "[i]mproper use of the guardian tracking system," stating, in pertinent part:

On 10/16/2019 Sgt Trull entered a training and mentoring guardian tracker entry on all of B shift booking officers. He said that he spoke to all officers about "possibly" having inappropriate communications between themselves and between them and the inmates.

. . .

There are no definitive facts that this actually happened and to put guardian trackers in an officers personnel file relying solely on an unsubstantiated allegation is both damaging to Officer morale and goes against the intent of the guardian tracker system as a whole.

If said event is investigated by IA [(Internal Affairs)] and found to be factual then a guardian tracker entry would be a good way to remediate those actions. ...

. . .

It is the PBA's believe [sic] that the guardian tracker is not being used in the correct manner and these entries should be removed from the officers file until the IA investigation is complete. And only put in their file if there are substantiated claims of wrongdoing ...

On November 4, Cuzzupe denied the grievance at Step 2, noting that the verbiage in the "Training/Mentoring" entry is a reminder to "treat all inmates with the respect that the officers expect

in return.” On November 8, the Sheriff denied the grievance at Step 3. On November 26, the PBA filed a Request for Submission of a Panel of Arbitrators. This petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass’n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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.

Arbitration is permitted if the subject of the grievance 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 PBA'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. We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

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). 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.

The County contends that the disputed Guardian Tracking entries memorialized a conversation that a shift supervisor had with his shift regarding being respectful to each other as well as inmates. As such, the County argues, it constituted an evaluative, non-disciplinary counseling which is non-arbitrable.

The PBA argues that the County used the Guardian Tracking software to record unsubstantiated allegations against certain officers, which is detrimental to those officers' promotional opportunities as well as the overall morale and efficient operation of the facility. The PBA contends that despite the entries being labeled "Training/Mentoring," the Guardian Tracking system still considers them to be acts of discipline. The PBA further argues that the County fails to demonstrate that arbitration of the grievance would interfere with governmental policy. The PBA contends it is the County who is failing to adhere to its own policies, including by not establishing a Professional Standards Committee to review the challenged Guardian Tracker entries.

In Town of Guttenberg, P.E.R.C. No. 2005-37, 30 NJPER 477 (¶159 2004), we held that arbitration of a grievance challenging the issuance of letters discussing a police officer's absenteeism would not substantially limit the employer's policy goal of monitoring and verifying employee use of sick leave, because "[t]he language of the letters, their context, and their placement in the employee's personnel file indicate an intent to criticize [him] for taking too much sick leave." In Tp. of Plainsboro, P.E.R.C. No. 2009-26, 34 NJPER 380 (¶123 2008), we restrained arbitration of a grievance challenging a document that notified a police officer of performance deficiencies and a performance improvement plan (PIP) specifying that he must endeavor to increase his selective enforcements and motor vehicle stops. We found that the documents did not criticize the officer for past conduct, and that the PIP "neither note[d] a failure to improve nor impose[d] discipline."

Here, the disputed Guardian Tracker entries discuss "officers possibly having inappropriate communications between themselves and also between them and inmates," and state that "[o]fficers cannot play loud music, use profanity and be disrespectfull [sic] everyone is to remain professional at all times." We find that the entries may be appealed through arbitration as a form of minor discipline. Such language is indicative of an intent to criticize the subject officers for

such inappropriate conduct, based upon a determination that the conduct "possibly" occurred on September 19, 2019. As such, it is more in the nature of a written reprimand for past conduct. Whether the County had just cause to issue the Guardian Tracking entries is a determination for the arbitrator. Ridgefield Park.

The County certifies that the Guardian Tracking entries are not printed out and put into the employee's permanent employment record. But we find that this fact alone does not establish that they are non-disciplinary, given the critical language and the context of the entries, including their issuance after an incident of reportedly inappropriate conduct. Guttenburg, supra. The PBA has an interest in challenging whether the County had just cause to issue the disputed entries, given that they could potentially be relied upon to justify more severe discipline for future similar infractions under principles of progressive discipline.

We also reach this conclusion in light of the County's own 2018 written directive discussing the Guardian Tracking system, which acknowledges that "[t]raining and discipline are not mutually exclusive," that "[c]ertain minor offenses may be handled through targeted training," and further that "[c]ertain first offenses are sufficiently minor in nature and may be handled by supervisors by documenting the counseling session guardian tracker under the appropriate category." We find that

the County has not shown that arbitration would significantly interfere with the exercise of inherent or express management prerogatives, given that the County's own policy has factored in the possibility that Guardian Tracking entries may be treated as "minor" or "first" offenses.

However, we restrain arbitration to the extent that the grievance seeks to compel the County to conduct an IA investigation of the incident that prompted the disputed Guardian Tracking entries. The employer's interest in investigating alleged wrongdoing by employees is substantial. Univ. of Medicine and Dentistry of New Jersey, P.E.R.C. No. 2010-45, 35 NJPER 461 (§152 2009). While minor disciplinary review procedures are mandatorily negotiable, *who* an employer designates to make a disciplinary determination is not. Bor. of Sayreville, P.E.R.C. No. 98-58, 23 NJPER 631 (§28307 1997). Here, the County's policy designates supervisors as having the authority to handle certain minor first offenses through training or counseling via the Guardian Tracking system. The policy further states that only the Warden may refer a matter to IA for investigation. Those determinations are not negotiable.

#### ORDER

The request of the Salem County Sheriff's Department (Corrections) for a restraint of binding arbitration is denied, in part, and granted, in part.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: November 23, 2021

Trenton, New Jersey