

P.E.R.C. NO. 93-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
TOWNSHIP OF NUTLEY,

Petitioner,

-and-

Docket No. SN-92-98

NUTLEY PBA LOCAL 33,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by a sergeant represented by Nutley PBA Local 33. The grievance contests the inclusion in the sergeant's personnel file of a memorandum a captain had written disapproving a lieutenant's too favorable evaluation of the sergeant. The evaluation, like all others, had been forwarded to the captain for his review as bureau commander. The Commission concluded that the memorandum was predominately evaluative rather than disciplinary.

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Appearances:

For the Petitioner, Ruderman & Glickman, attorneys
(Mark S. Ruderman, of counsel; Scott A. Eskwitt on the
brief)

For the Respondent, Abramson and Liebeskind, consultants
(Arlyne Liebeskind, on the brief)

DECISION AND ORDER

On April 27, 1992, the Township of Nutley petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by a sergeant represented by Nutley PBA Local 33. The grievance contests the inclusion in the sergeant's personnel file of a document which the Township characterizes as evaluative and Local 33 characterizes as disciplinary.

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

Local 33 represents the Township's patrol officers and sergeants. The parties have entered into a collective negotiations agreement covering 1990, 1991, and 1992. The grievance procedure

ends in binding arbitration.

On September 10, 1991, Lieutenant Louis Marone issued a performance evaluation report concerning the performance of Sergeant Salvatore Cetrulo as a desk officer. Marone rated Cetrulo as either standard or strong in all categories and praised him highly in the narrative section. Under "over-all evaluation," Cetrulo was rated outstanding.

Performance evaluation reports contain a line for the bureau commander to indicate that he or she has read and approved the report. Captain Paul Mascolo is the commander of the patrol bureau. The evaluation of Cetrulo was thus forwarded to him for review.

On October 15, 1991, Mascolo wrote a memorandum disapproving Marone's evaluation of Cetrulo. The memorandum noted that on September 20, Mascolo and Cetrulo had discussed how Cetrulo could improve his performance and meet department expectations and that Cetrulo's performance had since improved. In Mascolo's view, Marone had not accurately evaluated Cetrulo in all categories and had committed these rating errors:

The employee was rated to the standards of the rater and not those of the Department.

The employee was rated in terms of general impressions rather than on the basis of specific traits.

The rater believes the Department has treated the employee unfairly, and has taken this into consideration when evaluating the employee.

The memorandum's last paragraph stated:

The rater must guard against the tendency to rate either higher those that "subscribe to the same platform" as the rater, or rate lower those that disagree with the rater's own particular philosophy. A bias either way should be guarded against as it destroys the validity of ratings.

This memorandum was attached as a cover letter to Marone's evaluation and placed in Cetrulo's personnel file.

On November 12, 1991, Cetrulo filed a grievance. He asserted that placing the cover letter in his personnel file violated a contractual clause protecting officers against unjust reprimands and adverse evaluations without just cause.

On November 15, 1991, the police chief denied the grievance. Cetrulo appealed to the Mayor who also denied the grievance. Local 33 demanded arbitration, characterizing the issue to be arbitrated as "letter of reprimand in [personnel] file." This petition ensued.

The parties agree that if Mascolo's memorandum is predominantly evaluative, then this dispute is not arbitrable; but if that memorandum is predominantly disciplinary, then this dispute is arbitrable. They further agree that Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt. No. A-2053-86T8 (10/23/87), sets the standards for distinguishing between evaluations and reprimands. That case states:

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. [Id. at 826]

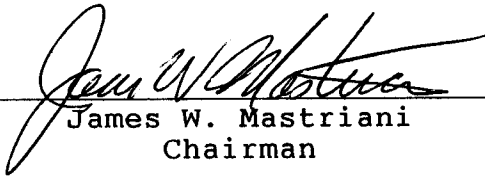
We agree with the Township that Mascolo's memorandum is predominantly evaluative. Sergeant Cetrulo received a formal evaluation report from Lieutenant Marone which rated his performance as outstanding. The report was forwarded to the commander of the patrol bureau for his review. Captain Mascolo wrote his memorandum because he did not agree with all of Marone's conclusions and the memorandum was included in Cetrulo's personnel file to reflect the captain's evaluative judgment that Cetrulo had been rated too highly. We reject Local 33's argument that the memorandum should be viewed as strictly an evaluation of Lieutenant Marone's evaluative skills. That the memorandum may also be viewed as an evaluation of Marone does not negate the evaluative nature of the memorandum with respect to Cetrulo. The memorandum does not contain any warnings or

make any accusations of misconduct. Under all the circumstances, we conclude that the memorandum is predominantly evaluative and we restrain arbitration.

ORDER

The request of Nutley Township for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Regan and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision.

DATED: December 17, 1992
Trenton, New Jersey
ISSUED: December 18, 1992