

P.E.R.C. NO. 85-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PATERSON POLICE P.B.A.
LOCAL NO. 1,

Petitioner,

-and-

CITY OF PATERSON,

Docket No. SN-84-43

Respondent,

-and-

PASSAIC COUNTY PROSECUTOR,

Amicus Curiae.

SYNOPSIS

The Public Employment Relations Commission holds that a clause in the collective negotiations agreement between the City of Paterson and Paterson Police PBA Local No. 1 concerns a permissive subject of negotiations and that a dispute arising under it could be submitted to binding arbitration. The clause, as interpreted by the arbitrator to require the consent of the governmental agency which supervised recordkeeping, permitted the destruction of old records concerning remote and dead-end investigations of alleged employee misconduct which did not result in disciplinary action or the filing of charges.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PATERSON POLICE P.B.A.
LOCAL NO. 1,

Petitioner,

-and-

CITY OF PATERSON,

Docket No. SN-84-43

Respondent,

-and-

PASSAIC COUNTY PROSECUTOR,

Amicus Curiae.

Appearances:

For the Petitioner, Mark C. Rushfield, Esq.

For the Respondent, Ralph L. DeLuccia, Jr., Esq.
Corporation Counsel (Irwin H. Tessler, Assistant
Corporation Counsel, on the Brief)

For the Amicus Curiae, Joseph A. Falcone, Passaic
County Prosecutor (Dante P. Mongiardo, Senior
Assistant Prosecutor, on the Brief)

DECISION AND ORDER

On January 24, 1984, the Paterson Police PBA Local No. 1 ("PBA") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The petition seeks a determination of the negotiability of the following provision contained in a collective negotiations agreement between the PBA and the City of Paterson ("City"):

Upon the completion of an investigation which does not result in disciplinary action or the filing of charges, all records and notes of the investigation with the exception of a summary that the investigation did occur shall be removed from the files of the Internal Affairs Unit and destroyed.

An arbitrator, ruling upon a grievance, had held that this provision at least obligated the City to seek governmental agency permission to destroy such records and that the provision, as so construed, was permissively negotiable. The PBA then commenced an action to confirm this award in Superior Court and, when the negotiability question arose, the Honorable Arthur C. Dwyer, J.S.C. transferred that question to this Commission for determination. The Court has retained jurisdiction over the case pending the instant determination.

The PBA and the City have filed briefs, affidavits, and documents. In addition, the Passaic County Prosecutor ("Prosecutor") has been granted leave to appear as amicus curiae in the Superior Court and Commission proceedings and has also filed a brief. The following facts appear.

The PBA is the majority representative of the City's police officers and police chauffeurs, excluding the police chief and deputy chiefs. The parties entered a collective negotiations agreement effective between August 1, 1980 and July 31, 1982. That agreement contained a grievance procedure culminating in binding arbitration. In addition, Article 5.3 of that contract set forth certain guidelines for interrogation of police officers when questions were raised concerning their conduct as employees. Subsection 5.3.9.1 of that article is quoted in the first paragraph of this decision.

On November 17, 1982, the PBA filed a grievance on behalf of police officer Michael Mihalko. The grievance alleged that the City violated subsection 5.3.9.1 when it retained records

of investigations the Internal Affairs Unit had conducted concerning officer Mihalko. The records dated back some five years and concerned complaints Patterson citizens had filed against Mihalko. No disciplinary action was taken on any of the complaints and the Internal Affairs Unit had marked many "unfounded." The grievance sought the removal of these documents from the file of the Internal Affairs Unit.^{1/}

The grievance was denied without elaboration at the lower levels of the collectively negotiated grievance procedure. The PBA then demanded binding arbitration. On February 15, 1983, Arbitrator Herbert L. Haber conducted a hearing. The City admitted it had failed to comply with subsection 5.3.9.1, but asserted the following defenses: (1) the records were part of the disciplinary process found non-negotiable in Jersey City v. Jersey City PBA, 179 N.J. Super. 137 (App. Div. 1981) ("Jersey City"); (2) it had a managerial prerogative to maintain these records; and (3) the records were public records under N.J.S.A. 47:3-16 et seq. which could not be destroyed.

On May 16, 1983, the arbitrator issued his Opinion and Award. He ruled that the Destruction of Public Records Law, N.J.S.A. 47:3-16 et seq., precluded destruction of public records without securing the consent of the governmental agency in charge

^{1/} These files are different from employee personnel files and are located in the offices of the Chief of Police and the Internal Affairs Unit.

of supervising recordkeeping pursuant to regulations governing recordkeeping promulgated by the State Records Committee.^{2/} He also ruled, however, that the contractual provision in question was permissively negotiable so long as the City obtained governmental agency consent before destroying any records. He ordered the City to seek such consent with regards to Mihalko's records.

The City refused to comply with the arbitrator's award and the PBA filed a petition to confirm the award in Superior Court. When the City and the amicus curiae contested the negotiability of the contractual provision, Judge Dwyer transferred that question to this Commission for its determination. He has retained jurisdiction of the case pending that determination.^{3/}

2/ N.J.S.A. 47:3-17 provides:

No person shall destroy, sell or otherwise dispose of any public record, archives or printed public documents which are under his control or in his care or custody, whether or not they are in current use, without first having advised the Bureau of Archives and History in the Department of Education of their nature, and obtained the written consent of that bureau; which consent may be given by said bureau only if the same is in conformance with regulations governing the granting thereof which shall be made and promulgated by the State Records Committee established by section six of this act.

The Bureau of Records Management Services in the Department of Education has succeeded the Bureau of Archives and History.
3/ The Commission has held that it will not process scope of negotiations petitions filed after the completion of arbitration proceedings unless proceedings to vacate, modify, or confirm an award have been initiated in the Superior Court and the Court has transferred the matter to the Commission for determination. In re Ocean Twp. Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983).

The City contends that the contract clause is neither mandatorily nor permissively negotiable since it allegedly affects the disciplinary process and since it allegedly contravenes public policy favoring the maintenance and confidentiality of police personnel records; that there is no statutory authority permitting such a contractual provision; and that the files of the Internal Affairs Unit are not subject to destruction under N.J.S.A. 47:3-16.

The PBA contends that subsection 5.3.9.1 is mandatorily negotiable or, in the alternative, at least permissively negotiable; that the clause does not involve any questions of discipline; that in any event N.J.S.A. 34:13A-5.3 would make the clause mandatorily negotiable even if it did relate to discipline; and that subsection 5.3.9.1, as construed by the arbitrator, is consistent with laws concerning the maintenance and destruction of public records.

The amicus curiae contends that the contractual provision is neither mandatorily nor permissively negotiable because it violates public policy concerning the maintenance of police department records; requires the destruction of a law enforcement agency's confidential investigation reports; and concerns a non-negotiable disciplinary matter under Jersey City.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), the Supreme Court, quoting from In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975), 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, in the instant case, we do not consider the merits of the arbitration award. Instead, we focus solely on the abstract question of the negotiability of section 5.3.9.1, as construed in the arbitration award to require the City to seek governmental agency permission to have the grievant's records destroyed.

There are three possible categories for any proposals made in collective negotiations between police and fire department employees and their public employers: (1) mandatorily negotiable, (2) permissively negotiable, and (3) illegal. Employers must negotiate over proposals in the first category during initial or successor contract negotiations and any agreement reached through negotiations may be enforced through contractual grievance procedures. By contrast, a public employer is not required to negotiate over any proposal or subject which is permissive rather than mandatory in nature. Thus, in Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) ("Paterson"), the Supreme Court stated:

The distinguishing feature of the permissive category is that neither party is required to negotiate with respect to any such subject. The employees may propose

an item from the permissive category, but the employer may simply refuse to discuss that subject at any time before an agreement is reached. The employees may not insist on that item to the point of impasse or pursue interest arbitration with regard to the item unless the employer consents. See In re City of Newark and Superior Officers' Ass'n, PERC No. 81-27, 6 NJPER 11222 (1980). If an agreement is reached with respect to a permissive item, however, or if such an item is included in the parties' agreement pursuant to interest arbitration, then the item is a valid and enforceable term of the agreement subject to the dispute resolution procedures of the agreement. On this question we fully agree with PERC's consistent characterization of the permissive category. See In re City of Paterson, PERC No. 80-16, 5 NJPER 110189 (1979); In re City of Newark and I.A.F.F., Local 1860, PERC No. 80-111, 6 NJPER 11068 (1980); In re State of New Jersey and State Troopers NCO Ass'n, PERC No. 79-68, 5 NJPER 10089 at p. 162 (1979); In re Bridgewater Raritan Regional Bd. of Ed., supra, 3 NJPER at 24.

Also, a permissive item remains in effect only during the term of the agreement. The public employer is free to delete any permissive item from a successor agreement by refusing to negotiate with respect to that item. Its inclusion in an existing agreement does not convert such an item into a mandatory subject. In re City of Newark and I.A.F.F., Local 1860, supra. Id. at 88.

Finally, a public employer may not negotiate over an illegal proposal and any agreement on such a proposal may be subsequently invalidated if a dispute arises concerning its enforceability.

In Paterson, the Supreme Court set forth the following tests for determining the negotiations category to which a particular subject belongs:

[F]irst, 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 an inconsistent term in their agreement. State Supervisory Employees, supra, 78 N.J. at 81. 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. Woodstown-Pilesgrove, supra, 81 N.J. at 591. 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 policy-making 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. Id. at 92-93.

A contractual provision mutually agreed to by the parties may be the subject of binding arbitration if it is either mandatorily or permissively negotiable. See In re Town of West New York, P.E.R.C. No. 82-54, 7 NJPER 594 (¶12265 1981).

We first consider whether a specific statute or regulation prohibits the City from seeking the consent of the Bureau of Records Management Services to destroy the records in question. Under State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80, (1982), a statute or regulation does not preempt negotiation over a term or condition of employment unless it speaks in the imperative and leaves no discretion to the public employer. See also Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982); Council of N.J. State College Locals v. State Bd. of Higher Ed., 91 N.J. 18 (1982). We are aware of no statute or regulation removing all discretion from the City to ask governmental agency consent to destroy old records which did not result in disciplinary action or a charge.

N.J.S.A. 47:3-17 prohibits the destruction of public records without first obtaining the consent of the governmental agency supervising recordkeeping and without conformance with the regulations of the State Records Committee. In February, 1983, the State Records Committee adopted a "Local Police Schedule." Items No. 36-00 et seq. concern incident report files and provide for the destruction of such files after the passage of certain periods of time, depending upon the nature of the incident.^{4/}

By contrast to this statute specifically permitting the destruction of public records upon obtaining the consent of the agency supervising records management, we see no statute or regulation specifically requiring the maintenance of old incident reports concerning dead-end investigations of employee conduct. The parties have argued about the applicability of the Right-to-Know-Law, N.J.S.A. 47:1A-1 et seq., but no provision of that law requires indefinite maintenance of public records or overrides the provisions of the Public Records Destruction Act.^{5/} Accordingly,

^{4/} In an affidavit, the PBA's attorney asserts that the records analyst for the supervising governmental agency informed him that Item No. 36-03 of the Local Police Schedule would most likely govern disposition of the instant records. That item covers non-criminal matters, excluding drunk driving. It provides for destruction of records after two years. We note these allegations without passing any judgment upon whether the Bureau would consent to the destruction of Mihalko's records or whether this item is in fact applicable.

^{5/} We specifically need not decide such issues as whether the instant records are technically "public records" under either the Right to Know Law or the Public Records Destruction Act or whether or not they are confidential and privileged from disclosure under the Right to Know Law. The dispositive point, which the amicus curiae recognizes (brief, p. 3), on the preemption issue is that no statute or regulation either prohibits or compels destruction of these records and the employer has discretion over that decision. Under State Supervisory, that discretion may be exercised through the collective negotiations process if the matter is mandatorily or permissively negotiable.

we hold that no statute or regulation specifically preempts a contractual provision permitting destruction of old records of dead-end investigations so long as the employer obtains the consent of the governmental agency supervising recordkeeping.

We next consider whether, as the arbitrator found, the contractual provision is at least permissively negotiable, and thus arbitrable, under Paterson. We believe it is.

The instant provision, as interpreted by the arbitrator, has several features which limit interference with the City's policy-making powers. First, the clause only pertains to investigations of a police officer's conduct as an employee, not as a citizen. Second, the clause only applies if an investigation has been completed and the employer has made an unfettered and unilateral determination not to take disciplinary action or file charges.^{6/} Third, the City is permitted to retain a summary of the investigation. Fourth, the provision apparently does not affect the placement of information in personnel files. Fifth, no records may be destroyed without the consent of the Bureau of Records Management Services and until the passage of such time as the State Records Committee has deemed appropriate for the disposition of such records. Finally, inasmuch as the clause was permissively negotiated, the City could unilaterally determine whether to negotiate the continuation of the clause in any subsequent


^{6/} The preconditions that the investigation must have been completed and that no disciplinary action have been taken eliminate any contention that this clause implicates the City's power to make disciplinary determinations. Consequently, we see no need to consider the application of the recent amendment to N.J.S.A. 34:13A-5.3 concerning discipline. We also note that allegations of remote incidents not leading to disciplinary charges are not admissible in disciplinary proceedings. See West New York v. Bock, 38 N.J. 500 (1962).

agreement^{7/} We disagree with the Prosecutor's characterization that the City was "forced" to request destruction of Mihalko's records. The City was not obligated either to negotiate over or agree to this clause. Indeed, its very agreement to this clause indicates a belief that the clause did not substantially limit its policy-making powers.

Given all these circumstances, we do not believe that this contract provision, as interpreted by the arbitrator, can be said to place substantial limitations on the City's governmental policy-making powers. Under Paterson, therefore, the City was free to choose to negotiate, as it did, over such a permissively negotiable clause and to have such a clause included in the contract.

The Superior Court has retained jurisdiction to confirm, modify, or vacate the arbitration award. Therefore, we will issue no order.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hupp, Graves, Wenzler, Suskin, Newbaker, and Butch voted for this decision. None opposed.

DATED: Trenton, New Jersey
September 19, 1984
ISSUED: September 20, 1984

^{7/} Following the termination of its 1980-1982 agreement, the City had the right to delete unilaterally the instant permissively negotiable clause. Thus, all that is in issue now is whether the City must abide by its agreement in the 1980-1982 agreement insofar as it affects the pre-1982 records of one employee against whom no disciplinary action was taken or charges filed.