

P.E.R.C. NO. 91-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HOPATCONG,

Petitioner,

-and-

Docket No. SN-90-70

PBA LOCAL 149 (HOPATCONG UNIT),

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of three provisions in a collective negotiations agreement between PBA Local 149 and the Borough of Hopatcong. The Commission finds a provision relating to drug testing based on probable cause and a provision which requires contractors to provide at least one police officer on all contracting jobs where there is a road opening to be not mandatorily negotiable. The Commission finds a provision relating to personnel files to be mandatorily negotiable.

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Appearances:

For the Petitioner, David A. Wallace, attorney

For the Respondent, Loccke & Correia, attorneys
(Michael J. Rappa, of counsel)

DECISION AND ORDER

On May 3, 1990, the Borough of Hopatcong petitioned for a scope of negotiations determination. The Borough seeks a determination that three provisions in its collective negotiations agreement with PBA Local 149 (Hopatcong Unit) are not mandatorily negotiable.^{1/}

Both parties have filed briefs. These facts appear.

The PBA represents the Borough's patrol officers, sergeants, lieutenants and captains. The most recent collective negotiations agreement expired December 31, 1989. The parties are

^{1/} Two other issues are no longer in dispute.

in interest arbitration proceedings. The PBA seeks to have three provisions in the last agreement included in the successor agreement.

This scope of negotiations determination will consider only whether the provisions are mandatorily negotiable. It is the Commission's policy not to decide whether contract proposals, as opposed to contract grievances, concerning police and firefighters are permissively negotiable since the employer has no obligation to negotiate over such proposals or to consent to their submission to interest arbitration. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (12265 1981).

Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) outlines the steps for determining whether a contract proposal is mandatorily negotiable:

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. [87 N.J. at 92-93; citations omitted]

Article 4, paragraph B concerns drug testing:

No employee covered by this agreement shall be subjected to any urinalysis or blood screening unless one of the two (2) circumstances exist: (1) Where the employer has probable cause to suspect that there is a job-related individualized impact with respect to the specific employee being tested. (2) Where the urinalysis or blood testing is done as part of a bona fide annual physical examination which is done for the entire Police Department.

The Borough asserts that the decision whether and when to test police for drug use "simply cannot be found to fall anywhere on the balancing scale other than the management prerogative side." It contends that once drug testing is found not mandatorily negotiable, it will consider the impact of constitutional restrictions and controlling rules, regulations or guidelines of state and federal agencies in implementing its program. It relies on IFPTE, Local 194A, AFL/CIO-CLC v. Burlington Cty. Bridge Commission, 240 N.J. Super. 9 (App. Div. 1990), which upheld the constitutionality of drug testing of interstate bridge operators as part of an annual physical examination.

The PBA asserts that the provision is intended to prevent random drug testing. It relies on Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 216 N.J. Super. 461 (App. Div. 1987), which held that a directive mandating that all members of the police narcotics bureau be subjected to urine testing for drug abuse without probable cause or reasonable individualized suspicion violated the New Jersey Constitution. See also Attorney General's Revised Law Enforcement Drug Screening Guidelines, effective 8/1/90 (current law enforcement employees should undergo screening whenever

there is individualized reasonable suspicion to believe officer is unlawfully using drugs).

Fraternal Order recognized that a public employer has an important interest in assuring that its police abstain from drug use because drug use can impair job performance and put the public at risk. 216 N.J. Super. at 472. But it also recognized that mandatory urine testing involves a highly intrusive procedure which carries a variety of consequences and risks for the persons tested. Ibid. It weighed the public need against the private intrusion and found that the "reasonable individualized suspicion test fairly accommodates the legitimate interest of employee privacy without unduly restricting the public employer's opportunity to monitor and control the use of drugs by its employees." Id. at 473. This constitutional balancing test closely parallels the negotiability balancing test we must apply.

Fraternal Order and Local 194A also held that drug testing as part of a bona fide health checkup is not constitutionally objectionable. 219 N.J. Super. at 469 n.6; 240 N.J. Super. at 24-25; see also Allen v. Passaic Cty., 219 N.J. Super. 352, 381 (Law Div. 1986). Employees have a lower expectation of privacy as to such testing and thus the testing is only minimally intrusive. 240 N.J. Super. at 17.

We are required to balance the employer's interest in detecting drug use that impairs performance and puts the public at risk against the employees' interests in privacy and autonomy.

Conclusory statements that negotiated agreement on drug testing would significantly interfere with the exercise of a management prerogative are not sufficient to eliminate the subject of drug testing from the collective negotiations arena.

We believe that this public employer has a managerial prerogative to conduct the type of drug testing permitted by Fraternal Order and Local 194A and these employees have a correlative right to negotiate over contractual protections against the invasion of privacy and autonomy prohibited by Fraternal Order. The disputed provision requires that the employer have probable cause to suspect job-related individualized impact of drug use. Fraternal Order permitted testing based on individualized suspicion that, although reasonable, did not rise to the level of probable cause. Balancing the parties' interests, we conclude that the provision's probable cause requirement significantly interferes with the employer's prerogative to test when it has reasonable individualized suspicion of drug use by police. See 216 N.J. Super. 467. The provision is therefore not mandatorily negotiable.

Article 18 is entitled "Police Services":

All requests for services of police officers while off duty that may be addressed to the public employer shall be forwarded to the police department for posting. The public employer agrees to require a police officer on all contracting jobs done within the Borough where there is a road opening involved. Any time there is a road opening or significant street repair as determined by the Chief of Police or his designee, the Borough agrees to require as a condition of the letting of the job that the contractor agreed [sic] to provide at least one

(1) police officer to provide public safety and security at the location of the work site.

The public employer further agrees that all monies received from such contracting work shall be paid through the Borough's payroll process at the officer's overtime rate and the law enforcement officer while so employed shall be treated in all respects as an employee of the public employer.

The Borough claims that this provision interferes with its managerial right to decide whether or not to assign a police officer to a particular task at a particular time. It does not contest the negotiability of the provision's compensation component. The PBA claims that the provision concerns outside employment and not assignments while on duty.

This provision mandates that the employer require contractors to provide at least one police officer on all contracting jobs where there is a road opening. Even though the police officers may be off duty and the monies paid may come from the contractors, the provision directs the employer to make certain public safety and security assignments. That direction significantly interferes with the determination of governmental policy and is therefore not mandatorily negotiable.

Article 20 is entitled "Personnel Files":

A. A separate personal history file shall be established and maintained for each employee covered by this Agreement; personal history files are confidential records and shall be maintained in the office of the Chief of Police.

B. Any member of the Police Department may by appointment review his personnel file but this appointment for review must be made through the Chief of Police or his designated representative.

C. Whenever a written complaint concerning an officer or his actions is to be placed in his personnel file, a copy shall be made available to him, and he shall be given the opportunity to rebut it if he so desires, and he shall be permitted to place said rebuttal in his file.

D. All personal history files will be carefully maintained and safeguarded permanently, and nothing placed in any file shall be removed therefrom.

The Borough asserts that the article's confidentiality requirement is inconsistent with Executive Order No. 11 (11/15/79). That order declares public a public employee's name, title, position, salary, payroll record, length of service in the instrumentality of government, date of separation from government service and the reason therefor, and the amount and type of pension he is receiving. Ex. Order No. 11, section 2(a). The PBA asserts that Article 20 concerns information not addressed by the Executive Order such as written complaints against officers and their rebuttals. It states that the article is mandatorily negotiable to the extent it is consistent with State law.

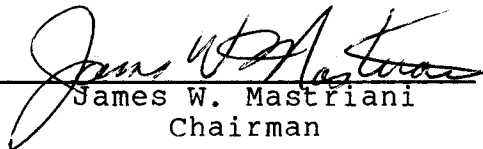
In Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985), we found not mandatorily negotiable a portion of a proposal that would limit the number, type and content of personnel files. In light of that holding, section A's requirement that the employer establish a confidential personal history file would not prevent the employer from maintaining other files containing the public information covered by Executive Order No. 11. Sections B, C and D concern police officers' rights to examine their personnel files,

rebut complaints placed in those files, and have their files securely maintained. These provisions do not significantly interfere with any managerial prerogative. Franklin Tp. Article 20 is therefore mandatorily negotiable.

ORDER

Article 4, paragraph B is not mandatorily negotiable. Article 18's requirement that the Borough require contractors to provide at least one police officer on all contracting jobs where there is a road opening is not mandatorily negotiable. Article 20 is mandatorily negotiable.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
December 17, 1990
ISSUED: December 18, 1990