

I.R. NO. 87-16

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PENNSAUKEN,

Respondent,

-and-

Docket No. CO-87-133

GARDEN STATE F.O.P. LODGE 3,

Charging Party.

SYNOPSIS

A Commission Designee restrained the Township of Pennsauken from implementing certain provisions of an ordinance concerning off-duty employment in the security field by members of its police force. The existing collective negotiations agreement between the parties had expired and the parties were engaged in interest arbitration proceedings at the time the ordinance was passed. A provision of the ordinance sets a specific salary for such off-duty security work. Salary is a term and condition of employment and the Township could not set such salaries without negotiations with the P.B.A.

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Appearances:

For the Respondent  
Pachman and Glickman  
(Steven S. Glickman, of counsel)

For the Charging Party  
Colflesh and Burris  
(Ralph H. Colflesh, of counsel)

INTERLOCUTORY DECISION

The Fraternal Order of Police, Garden State Lodge #3 (F.O.P.) filed an unfair practice charge against the Township of Pennsauken (Township) on November 24, 1986 with the Public Employment Relations Commission. The charge alleges that the Township passed a resolution concerning off-duty employment of police officers from the Township which unilaterally alters terms and conditions of employment of unit members represented by the F.O.P. It was specifically alleged this conduct violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13-1 et seq. (Act); specifically, §5.4(a)(1) and (5).

On January 14, 1987, the F.O.P. filed an Application for an Order to Show Cause. The Order was executed and made returnable for January 30, 1987 at which time a hearing was convened. Both parties filed briefs, submitted affidavits and argued orally.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when confronted with similar applications. The moving party must show it has a substantial likelihood of success on the legal and factual allegations in the final Commission decision and it must show it will be irreparably harmed if the requested relief is not granted. Both of these standards must be satisfied before the requested relief will be granted. Furthermore, the relative hardship to the parties must be evaluated before interim relief may be granted.

The facts in this matter are not in dispute. The Township and the F.O.P. were engaged in negotiations for a successor agreement. The negotiations were not successful and the F.O.P. filed for interest arbitration under the Act. An arbitrator was named and an initial session has been held. The contract between the parties expired June 30, 1986. That agreement has a provision entitled Article XXXI, Outside Employment

A. Upon prior approval and receipt of a work permit from the Director of Public Safety, Police Officers shall be entitled to engage in any lawful activity and obtain any lawful work while off-duty. Said approval and work permit shall not be unreasonable withheld.

B. It is understood that the full-time Police

Officers will consider their position with the Township as their primary employment. Any outside employment or activity must not interfere with the Police Officer's efficiency in his position with the Township and must not constitute any conflict of interest.

C. No Police officer planning to or engaging in any outside employment or activity during their off-duty hours shall be permitted to wear the regulation uniform.

D. All outside employment shall be listed with the Chief of Police. The information provided to the Chief of Police shall include the employer's name, address and the Police Officer's work schedule.

On or about November 1, 1986, the Pennsauken Township Council passed a resolution concerning such outside employment or "moonlighting". The ordinance requires all businesses which employ unit personnel to do the following:.

1. Broker all positions through the Pennsauken Police Department;
2. Pay a rate of time and one-half the officer's regular salary rate for all time worked for the third party employer;
3. Pay a 20% surcharge over the above-stated time and one-half rate to the Township for "administrative costs";
4. Provide \$1 million of liability insurance for the acts or omissions of the officer;
5. Hold the Township harmless for the acts or omissions of the officer while he is duty.

The employer argues that it has a managerial right to take the disputed action and it was acting to bring the Township's procedures into compliance with the provision of N.J.S.A. 45:19-9(a), the Private Detective Act. The Private Detective Act

defines conduct which would make one a private detective as:

...the furnishing for hire or reward of watchmen or guards of private patrolmen or other persons to protect persons or property, either real or personal, or for any purpose whatsoever...

Accordingly, pursuant to an Attorney General's Opinion of December 1, 1977:

A "private detective or investigator" has been defined to mean any person who singly and for his own account conducts a private detective business without the aid or assistance of any employees. N.J.S.A. 45:19-9(c). However, the Act provides certain exemptions for persons acting in their official capacity:

...The term [private detective business] shall not include and nothing in this act shall apply to any lawful activity of any board, body, commission or agency of the United States of America, or any county, municipality, school district, or any officer or employee solely, exclusively and regularly employed by any of the foregoing....N.J.S.A. 45:19-9(a) (emphasis added)

It is therefore clear from this definitional section of the Act that in any instance where provision is made with a municipal police department to secure the services of a regular police officer for those purposes during his off-duty hours with remuneration channeled through the municipality, the police officer would be acting in his official capacity and would fall within the exemption to the licensing requirements of the Act.

The Township argues that the practices of outside security employment that were engaged in under the provisions of the expired contract were, in fact, unlawful and so bringing procedures in the Township into compliance with the Private Detective Act was a non-negotiable managerial obligation and not a term and condition of employment.

The Association acknowledges the existence of the Private Detective Act. It however, argues that the Town's regulation was overbroad. The Act clearly exempts persons who have a private detective license. It should be noted, however, that none of the patrolmen represented by the F.O.P. currently have a private detective license and the Board has conceded that if any patrolman receives such a license he (or she) would not be bound by the ordinance in question.


There is, however, a further deficiency in the Township's resolution. The Township has constructively made itself the employer of the moonlighting officers and is acting in a manner substantially equivalent to a contractor under the new ordinances. The resolution unilaterally establishes a salary which must be paid by the private business to a moonlighting police officer. The establishment of a salary is a term and condition of employment that must be negotiated yet the Town has failed to negotiate with the FOP over these salaries.

In Vineland PBA 266 & City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981) appeal for enforcement granted 7/15/81, mot. No. M-3982-80, the Commission held that a unilateral alteration of a term and condition of employment during the course of interest arbitration unlawfully interferes with the relative positions of the parties during that process and, in balancing the relative position of the parties, no significant harm will come to the Township or its citizens by not enforcing the salary provisions in the ordinance.

However, if the salary provisions of the ordinance are too expensive for the various outside businesses to hire security guards, the loss of income to these officers could very well have a chilling effect upon the arbitration process.

Accordingly, the Township of Pennsauken is hereby restrained from implementing the portion of the outside employment ordinance which establishes a pay rate for outside employment without first negotiating said rate with the FOP.

This is an interim order only and the matter is subject to a final decision by the Commission.

  
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Edmund G. Gerber  
Commission Designee

DATED: February 6, 1987  
Trenton, New Jersey