

I.R. No. 2006-6

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF UNION,

Respondent,

-and-

Docket No. CO-2006-025

PBA LOCAL 69,

Charging Party.

SYNOPSIS

A Commission designee declines to restrain a municipality from terminating its "Jobs in Blue" program, which provides off-duty uniformed police to private vendors for a fee. The town argued that the Security Officers Registration Act, about to go into effect, renders the program illegal and thus preempts the union's contractual right to the Jobs in Blue work. The town also asserts a managerial prerogative to unilaterally discontinue the program.

The Commission designee found that PBA has not demonstrated that it would likely prevail on the merits of its charge since the decision about whether the employer should continue to provide the service is a governmental policy decision not subject to negotiations.

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Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy, attorneys, (Robert T. Clarke, of counsel; Joel G. Scharff, of counsel on the brief)

For the Charging Party, Zazzali Fagella, Nowak, Kleinbaum & Friedman, (Paul L. Kleinbaum, of counsel)

INTERLOCUTORY DECISION

On July 22, 2005, the Union Township Patrolman's Benevolent Association Local 69 filed an unfair practice charge with the Public Employment Relations Commission alleging that Union Township violated 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} when it announced its intention to discontinue the "Jobs in Blue" program, in which the Township administered the assignment of

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

off-duty police work to private vendors, effective August 31, 2005.

The charge was accompanied by an application for interim relief pursuant to N.J.A.C. 19:14-9.2, asking that the Township be restrained from discontinuing the program. The application was accompanied by an affidavit from Local 69's President David Dougherty and a letter brief. The Association argues that the discontinuance of the jobs in blue program irreparably harms the employees who will lose the opportunity to do the off-duty work and it will chill negotiations which have just begun for a successor contract. PBA also maintains that the jobs will be irreparably lost if the vendors must now go elsewhere for uniformed security.

The Township filed a letter brief in response, along with a supporting affidavit from Township Administrator Frank Bradley on August 12, 2005. It denies that it committed an unfair practice. It acknowledges that it intends to discontinue the Jobs in Blue program effective August 31. It argues that the Security Officer Registration Act, Chapter 134, P.L. 2004 prohibits police officers in uniform from working off-duty jobs for compensation by private contractors. Thus, the Township argues, the statute renders the contract provision concerning off-duty employment illegal and unenforceable. In addition, the Township argues that it has a managerial prerogative to discontinue the program.

On August 18, 2005, the parties argued orally before me. The following facts appear:

PBA Local 69 represents the Township's police officers and detectives. The PBA's most recent collective agreement covered the period January 1, 2000 through December 31, 2003. The parties are in interest arbitration for a successor agreement.

The parties agree that for many years, the Township has operated a "Jobs in Blue" program to supply local private businesses with off-duty police officers. Police officers wear their Township police uniforms and carry their service weapons when performing these jobs. The Township maintains a list of police willing to work the duties, it assigns the jobs, it sets the compensation rate the private vendors pay, it collects the checks from the vendors, and it distributes the checks to its police officers. The vendors' checks are made payable to the individual officer who worked the job. In 2004, the Union Township police officers worked 7473 such off-duty jobs, earning at least \$820,200 in compensation.

The PBA's expired agreement provides at Article XXII,

The Township agrees that the existing "work in Blue" program, as authorized by ordinance, shall be continued during the term of this Agreement.

The Security Officers Registration Act, C. 134, P.L. 2004, was enacted August 31, 2004, and effective August 31, 2005. That Act provides at Section 2:

For purposes of this section, a law enforcement officer shall be deemed to be in the actual performance of his duties if the law enforcement officer is in uniform, . . . is performing public safety functions on behalf of and as assigned by his chief of police or the chief law enforcement officer of his law enforcement agency and is receiving compensation, if any, from his law enforcement agency at the rates or stipends as are established by law. A law enforcement officer shall not be deemed to be in the actual performance of his duties, for the purposes of this section, if the law enforcement officer is performing private security functions or activities for a private employer while receiving compensation for those duties from the private employer, and a law enforcement officer shall not wear his uniform. . . while performing private security functions or activities for a private employer.

By letter of July 11, 2005, the Township advised participating vendors that the Township would no longer be participating in the Jobs in Blue program because the new statute prohibits police officers in Township uniform from serving as private security officers. On July 12, Acting Police Chief Andrew Giordano issued a memo advising police officers that the Township was terminating the "Jobs in Blue" program effective July 31, 2005.

The PBA filed a grievance, which was denied at step 1. The PBA is pursuing the grievance. This unfair practice charge and interim relief application ensued. The Township agreed to postpone the program termination date to August 31 to provide an opportunity for this matter to be heard.

ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The PBA maintains that the Township violated 5.4a(1) and(5) of the Act by ending a program to provide off-duty employment to police officers. It claims that the Township's action unilaterally ended a long-standing term and condition of employment and repudiated a term of the parties' collective agreement. It asserts that, to the extent the Township argues statutory preemption, it has misread the provisions of the Security Officers Registration Act.

The Township contends that the Act prohibits privately compensated officers from performing security work in a police uniform. Thus, the Township argues that effective August 31, 2005, it is not legally permitted to continue the Jobs in Blue program. It further alleges that it has a non-negotiable right

to terminate the program because the decision to provide such public services is a policy-making one.

N.J.S.A. 34:13A-5.3 requires an employer to negotiate with the majority representative before changing employees' working conditions. Thus, it would be an unfair practice to repudiate the provisions of an existing agreement during negotiations or interest arbitration, provided the provision at issue is negotiable. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981) establishes the negotiability test for 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. [87 N.J. at 92-93; citations omitted]

Here, the Township maintains that the subject matter - off-duty assignments to uniformed police paid by an outside vendor - is preempted by statute and is a managerial prerogative as well.

Whether the revised statute prohibits the Township's Jobs in Blue program or not, it appears that the Township has a managerial prerogative to cease operation of the program. While the Commission has found that the amount of compensation, the assignment procedures, and even the administrative fees charged to vendors are all negotiable components of an off-duty work program,^{2/} policy decisions about how such a program will be administered are generally within the employer's managerial prerogative.^{3/} More importantly, the Commission has not found that an employer is obligated to negotiate over the very existence of such a program.

The Township cites City of Paterson, P.E.R.C. No. 2004-6, 29 NJPER 381 (¶120 2003), ("Paterson II") in which the Commission

^{2/} The amount of compensation for off-duty police work is negotiable, as is the hourly rate paid by outside vendors to police officers. Tp. of Montclair, P.E.R.C. No. 91-13, 16 NJPER 449 (¶21194 1990); Tp. of Mine Hill, P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987); Tp. of Pennsauken, I.R. No. 87-16, 13 NJPER 164 (¶18073 1987). The allocation of outside employment opportunities among qualified police officers is generally mandatorily negotiable. Hanover Tp., P.E.R.C. No. 94-85, 20 NJPER 85 (¶25039 1994).

^{3/} See Dover Tp., I.R. No. 98-21, 24 NJPER 299 (¶29142 1998), aff'd P.E.R.C. No. 98-164, 24 NJPER 358 (¶29171 1998), (employer's policy of requiring outside vendors to make up-front payments held not negotiable); Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (16184 1985) (sharing administration of off-duty police jobs program with the police union would unduly delegate managerial authority).

addressed a municipality's unique policy concerns over operating such an off-duty police employment. There, the Commission observed,

Preliminarily, we stress that the off-duty employment at issue is limited to police-type services performed by police officers in police uniforms. Since the officers act as police officers and appear to be police officers, such employment implicates a police department's concern for its integrity and reputation. The City's policymaking interests in regulating that type of outside employment are thus more powerful than its interests in regulating other types of outside employment.

The Commission found in Paterson II that the City had a non-negotiable right to assert control over the administration of the police off-duty employment program.

A public employer generally has a managerial right to decide which services it wishes to provide, as well as how to organize and deploy its workforce. In Laezza v. City of Atlantic City, 80 N.J. 255, 267 (1979), the Court observed,

Municipal officials retain discretion to diminish the size of the workforce and limit areas in which personnel will be deployed, inasmuch as these decisions 'unquestionably are predominately managerial functions' which cannot be delegated to an arbitrator not accountable to the public at large.

In State of New Jersey, P.E.R.C. No. 92-65, 18 NJPER 50, (¶23021 1991), the Commission held that an employer's decision to cease operations is not mandatorily negotiable. While the Commission recognized in that matter that the union had a legal and practical role to play in addressing severable issues arising

from the employer's decision, it said that the union's role cannot extend to negotiating about the decision to cease operations itself.

Further, in Cape May Bridge Comm., P.E.R.C. No. 92-8, 17 NJPER 382 (¶22180 1991), the Commission found that the employer's decision to discontinue its maintenance operation and layoff its employees was an exercise of managerial prerogative. It noted that the decision predominately involved a governmental policy determination over the employer's existence, organization, size, and services provided and that arbitration over the decision to cease operations would significantly interfere with those policy determinations.

Similarly, an employer has a managerial right to decide whether to use public employees or private subcontractors to provide services. Local 195, IFPTE v. State, 88 N.J. 393 (1982). Further, it has the right to decide the size of its workforce, and to reduce its workforce when it makes that policy decision. Local 195. Based upon the above, I find that a public employer's decision about what services to provide to the public is at the very heart of its policy-making concerns.

In this matter, the Township has determined to discontinue the service of providing uniformed, off-duty police to private vendors. While the issue of compensation derived from the off-duty work intimately and directly affects the work and welfare of police, requiring the Township to operate such a program would

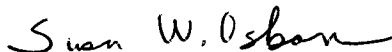
significantly interfere with the exercise of its inherent managerial prerogatives and also would substantially limit its policymaking power. It appears that it has a managerial right to decide not to provide the Jobs in Blue service to the public. Therefore, it appears that the continuation of the Township's Jobs in Blue program is not negotiable.

Based upon the above, I find that the PBA has not demonstrated a substantial likelihood of success in prevailing on the merits of its charge. Accordingly, interim relief must be denied.

Accordingly, based upon the above facts and analysis, I issue the following:

ORDER

The Charging Party's application for interim relief is denied.



Susan Wood Osborn
Commission Designee

Dated: August 23, 2005
Trenton, New Jersey