

D.U.P. No. 2006-7

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

TOWNSHIP OF UNION,

Respondent,

-and-

Docket No. CO-2006-025

PBA LOCAL 69,

Charging Party.

SYNOPSIS

PBA Local 69 filed an amended charge alleging that the Township unlawfully terminated a Jobs in Blue program, refused to provide it with the list of vendors participating in the Jobs in Blue program and surveilled the PBA and its members in retaliation for speaking out at a Township Council meeting. The Director of Unfair Practices declines to issue a complaint on the unilateral termination of the Jobs in Blue program as the Township had the managerial prerogative to do so, but will issue a complaint and notice of hearing on the allegations concerning the refusal to provide the PBA with the vendor list and the unlawful surveillance of the PBA and its members.

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Appearances:

For the Respondent,
Apruzzese, McDermott, Mastro & Murphy, attorneys
(Robert T. Clarke, of counsel)

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

DECISION

On July 22, 2005, the Union Township Patrolman's Benevolent Association Local 69 (PBA) filed an unfair practice charge with the Public Employment Relations Commission alleging that Union Township (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

^{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.

it refused to provide the PBA with a requested list of the vendors participating in the Township's "Jobs in Blue" program, and when it announced the unilateral termination of that program effective August 1, 2005. Through the Jobs in Blue Program, the Township administered the assignment of its uniformed police officers to perform off-duty police work for private vendors.

The charge was accompanied by an application for interim relief seeking to restrain the Township from terminating the program. On August 23, 2005, a Commission Designee denied the requested restraint and interim relief. Tp. of Union, I.R. No. 2006-6, 31 NJPER 259 (¶102 2005). The charge was, thereafter, assigned for regular processing. An exploratory conference was scheduled for October 26, 2005. On October 20, 2005, however, the parties informed us that an exploratory conference would not be productive and requested that we continue to process the charge.

The PBA argues that the discontinuance of the Jobs in Blue Program is a unilateral change in the terms and conditions of employment that harms its members by denying them the opportunity to do off-duty work, and has chilled negotiations for a successor agreement.

The Township argues that the Security Officer Registration Act, Chapter 134, P.L. 2004 prohibits police officers in uniform

1/ (...continued)
representative.

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.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3.

In correspondence dated December 16, 2005, I advised the parties that I was not inclined to issue a complaint on the allegation of the charge that the Township violated 5.4a(1) and (5) of the Act, by ending the Jobs in Blue program providing off-duty employment to police officers. Specifically, I found that the Township had the managerial right to decide not to provide the program and, consequently, the Township's termination of it was not negotiable. However, I further advised the parties that I intended to issue a complaint on the PBA's allegation in the charge that on June 28, 2005, the Township unlawfully refused to provide it with the requested list of vendors participating in the Jobs in Blue Program. I found that this allegation, if true, may constitute an unfair practice by the Township.

Finally, I informed the PBA that if it believed additional facts should be considered regarding the Jobs in Blue issue, an amendment to its charge stating those facts could be filed by December 28, 2005. Further, I advised both parties that if either believed any legal conclusions in the letter were wrong, a letter brief may be filed, together with proof of service upon the opposing party, by the above indicated date. Subsequently, I granted a December 20, 2005 request by the PBA for additional time to respond to my December 16, 2005 letter, and, accordingly, made any response by the parties due by January 13, 2006.

Both parties then filed timely responses. Specifically, on January 11, 2006, the PBA filed a response to my preliminary determination, along with an amendment to its unfair practice charge. In its amendment, the PBA now also alleges that the Township engaged in unlawful surveillance of the PBA and its members, in retaliation for speaking out at an August 2005 Township Council meeting, against the elimination of the Jobs in Blue program and substantial salary increases given to Township managerial employees; the PBA asks that a complaint and notice of hearing also issue on this new allegation.

Further, the PBA requests that I reconsider my December 16, 2005 preliminary determination not to issue a complaint on the original allegation in the charge concerning the Township's

decision to discontinue the Jobs In Blue Program.^{2/}

Specifically, the PBA disagrees with my legal conclusions concerning this allegation, claiming I inappropriately relied upon Laezza v. Atlantic City, 80 N.J. 225 (1979); State of New Jersey, P.E.R.C. No. 92-65, 18 NJPER 50 (¶23021 1991) and Cape May Bridge Commission, P.E.R.C. No. 92-8, 17 NJPER 382 (¶22180 1991). According to the PBA, these decisions involved an employer's decision to terminate the operation of programs and staff which were part of its normal functions, and involved duties of employees performed during regular work hours, rather than off-duty employment as in the present case.

The PBA claims the Township's decision on whether to discontinue the Jobs in Blue Program does not implicate the same managerial prerogatives, nor does it substantially limit the Township's policy-making powers, as would a determination to discontinue operations of a program which is part of the normal daily operations of the Police Department. Accordingly, the PBA asserts that the balance should weigh more heavily in favor of an off-duty program like Jobs in Blue, which intimately affects the work and welfare of Township officers, and which does not substantially limit the Respondent's ability to run the Police Department.

^{2/} The PBA notes that it obviously agrees with my preliminary determination to issue a complaint and proceed to hearing on the allegation regarding the Township's refusal to provide a list of vendors participating in the Jobs in Blue Program.

Further, the PBA believes my reliance upon City of Paterson, P.E.R.C. No. 2004-6, 29 NJPER 381 (¶120 2003) ("Paterson II") is misplaced, in that I read the case too broadly. The PBA claims the decision does not support my conclusion that the Township has a managerial prerogative to cease operations of the Jobs in Blue Program, but, in fact, supports the PBA's position. First, the PBA notes that Paterson II did not involve a municipality's decision to terminate an off-duty employment program, but only the right of the municipality to administer such a program, which is not an issue in the instant case.

Moreover, according to the PBA, the differences between the Jobs in Blue Program and the off-duty employment program in Paterson II are "distinctions which make all the difference in the world." The Union Township Jobs in Blue Program is administered by the Police Chief and he designates personnel to coordinate it; specifically, the Township maintains a list of officers willing to work the jobs, it assigns the officers, sets the pay rate, collects the fees from vendors and distributes them to participating officers. By comparison, in Paterson II, the PBA administered the off-duty employment program; opportunities were posted on the PBA bulletin board, the PBA set the hourly rate and the vendors paid officers directly. According to the PBA, these distinctions make the instant situation distinguishable from that in Paterson II.

In any event, the PBA stresses that while in Paterson II, the Commission held that an employer has the non-negotiable managerial prerogative to assume administration of its off-duty employment program, it rejected the employer's claim that it had the prerogative to exert control over all aspects of the program. The PBA claims that is essentially what it is arguing herein; specifically, while the PBA recognizes that the Township has the right to administer the program, it does not think the Township had the managerial prerogative to unilaterally terminate it. Accordingly, the PBA asserts the continuation of the Jobs in Blue Program intimately and directly affects the work and welfare of Township employees and does not significantly interfere with the Township's governmental policymaking functions. Thus, it requests that the Director issue a complaint and notice of hearing on its allegation involving the termination of the Jobs in Blue Program, along with all other allegations in its amended charge.

Also, on January 13, 2006, the Township responded to my December 16, 2005 preliminary determination, requesting that I reverse my decision to issue a complaint on the PBA's allegation that, on June 28, 2005, the Township refused to provide it with a requested list of vendors participating in the Jobs in Blue Program. Specifically, while the Township acknowledges that it generally is obligated to provide information relevant to a union's obligation to perform its representational duties, the

Township, nevertheless, claims the information sought by the PBA is irrelevant to the instant dispute concerning the applicability of the "Security Officers Registration Act," P.L. 2004, C.134 and the Township's managerial right to terminate the Jobs in Blue Program. According to the Township, the PBA failed to allege any issue in negotiations, contract administration or litigation of the instant charge, which would have made its request for the vendors list relevant; thus, as the Director found with regard to the rest of the PBA's charge, this allegation should also be dismissed.

I have reviewed the parties' submissions in response to my December 16, 2005 letter and hereby find as follows:

The PBA represents the Township's police officers and detectives. The most recent collective agreement between the parties 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.

On June 28, 2005, the PBA requested that the Township provide it with a list of vendors participating in the Jobs in Blue Program. The Township refused to provide the list to the PBA believing that it already had the information.

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.

ANALYSIS

The PBA maintains that the Township violated 5.4a(1) and(5) of the Act by ending the Jobs in Blue 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 that 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 prerogative.

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 a managerial prerogative.

Whether the above Security Act prohibits the Township's Jobs in Blue Program or not, I find 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,^{3/} policy decisions about how such a program will be administered are generally within the employer's managerial prerogative.^{4/} More importantly, the Commission has not found that an employer is obligated to negotiate over the very existence of such a program.

^{3/} 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).

^{4/} 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).

The Township cites City of Paterson, P.E.R.C. No. 2004-6, 29 NJPER 381 (¶120 2003), ("Paterson II") in which the Commission addressed a municipality's unique policy concerns over operating such 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 Supreme 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 its 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.

I reject the PBA's claim that I improperly relied on Laezza, State of New Jersey and Cape May Bridge Commission in

reaching my conclusion that the employer had the managerial prerogative to discontinue the Jobs in Blue Program. These cases all stand for the proposition that a public employer has the non-negotiable managerial prerogative to cease operations and services it provides, which is what occurred in the present case when the Township decided to cease providing Jobs in Blue. I do not find the present case is distinguishable from those cases, because it involves off-duty employment. The decision to cease the Jobs in Blue Program implicates the same managerial prerogative and policy-making powers involved in the discontinuation of an employer's normal daily operations. Accordingly, I find the Township's decision to cease providing the Program predominately involves a governmental policy determination over the Township's existence, organization, size and services it provides, and that negotiations with the PBA over the decision would significantly interfere with those policy determinations.^{5/}

Further, despite the PBA's belief to the contrary, I find that Paterson II supports my decision. While the PBA claims that the distinctions between the off-duty employment program in

^{5/} Similarly, in City of Salem, P.E.R.C. No. 2006-46, 31 NJPER 405 (¶160 2005) and Borough of Belmar, P.E.R.C. No. 2003-52, 29 NJPER 30 (¶10 2003), the Commission found that grievances filed over the employment of on-duty police officers to what had been extra-duty assignments was a managerial prerogative and, therefore, not arbitrable despite an extra-duty agreement on the use of officers.

Paterson II and the instant Jobs in Blue Program are "distinctions that make all the difference in the world," I do not believe they make any real difference. Paterson II holds that an employer has the managerial prerogative to assume administration of an off-duty employment program and to require the employer's approval of any off-duty employment calling for police officers to perform police type services in police uniforms. Accordingly, I believe the case supports my conclusion herein that the Township has the non-negotiable right to decide to terminate its off-duty employment program, "Jobs in Blue", which also involved police officers performing police type services in police uniforms.

In this matter, the Township has unilaterally determined to discontinue the service of providing its uniformed officers for off-duty police work for private vendors. While the issue of compensation derived from the off-duty work intimately and directly affects the work and welfare of police officers, 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. I, therefore, find that the Township has a managerial right to decide not to provide the Jobs in Blue Program to the public. Consequently, the termination of the Township's Jobs in Blue Program is not negotiable. Accordingly,

I refuse to issue a complaint on this allegation of the amended charge.

A public employer generally has a statutory duty to provide information relevant to representational duties. In re UMDNJ, 144 N.J. 511 (1996); State of New Jersey, (OER), P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), recon. den., P.E.R.C. No. 88-45, 13 NJPER 841 (¶18233 1987), aff'd NJPER Supp. 2d 198 (¶177 App. Div. 1988). A refusal to supply relevant information is an unfair practice and violates N.J.S.A. 34:13a-5.4a(5). See, State of New Jersey (Dept. of Higher Ed.), P.E.R.C. No. 87-149, 13 NJPER 804 (¶18187 1987).

Here, the PBA alleges that on June 28, 2005, the Township refused to provide it with the list of vendors participating in the Jobs in Blue Program, which was prior to the Township's announcement of its termination of that program. According to the Township, it did not have to provide the PBA the information requested because the information had no relevance to the Security Officers Registration Act or to the Township's managerial right to terminate the Jobs in Blue Program. However, as we held in State of New Jersey (OER):

In Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981), relying on federal precedent, we held that an employer must supply information if we find a probability that the information is potentially relevant and that it will be of use to the union in carrying out its statutory duties. Id. at 236. Relevance in this context is determined under a

discovery-type standard, not a trial-type standard, see NLRB v. Acme Industrial Co., 385 U.S. 432, 437, 64 LRRM 2069 (1967), and therefore "a broad range of potentially useful information should be allowed the union for the purpose of effectuating the bargaining process." Proctor & Gamble Manufacturing Co. v. NLRB, 603 F.2d 1310, 1315, 102 LRRM 2128 (8th Cir. 1979). The rationale underlying this discovery policy is to enable the majority representative to have sufficient information to evaluate the merits of an employee's claim.

In light of the above, I find that the PBA's allegation that the Township unlawfully refused to provide it with the requested list of vendors on June 28, 2005, if true, may constitute an unfair practice by the Township. Therefore, I am issuing a complaint and notice of hearing on this allegation under separate cover so that the parties have an opportunity to fully and fairly litigate that issue. N.J.A.C. 19:14-2.1.

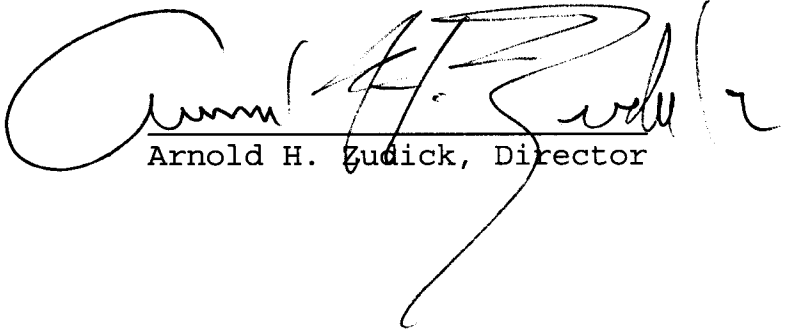
Finally, that complaint and notice of hearing will include the PBA's January 11, 2006 amendment to its charge, alleging that the Township engaged in unlawful surveillance of the PBA and its members, in retaliation for speaking out at an August 2005 Township Council meeting against the elimination of the Jobs in Blue Program and substantial salary increases given Township managerial employees. N.J.A.C. 19:14-2.1.

ORDER

The PBA's allegation in its amended charge that the Township unlawfully unilaterally terminated its Jobs in Blue

Program involving off-duty employment is dismissed. A complaint and notice of hearing will issue on the PBA's remaining allegations regarding the Township's refusal to provide the PBA with a requested list of vendors participating in the Jobs in Blue Program, and the Township's alleged unlawful surveillance of the PBA and its members, in retaliation for speaking out at an August 2005 Township Council meeting.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: April 10, 2006
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by April 24, 2006.