

I.R. NO. 2001-2

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF PARAMUS,

Respondent,

-and-

Docket No. CO-2000-377

PARAMUS POLICE BENEVOLENT
ASSOCIATION, LOCAL 186,

Charging Party.

SYNOPSIS

A Commission Designee denies the PBA's application for interim relief on its charge that the Town unilaterally increased the administrative fee it charges outside vendors for off-duty police services. The Commission Designee finds that the PBA has not demonstrated a substantial likelihood of success on the merits, as it appears that the administrative fee is not a negotiable term and condition of employment.

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Appearances:

For the Respondent
Eric M. Bernstein, attorney

For the Charging Party
Loccke & Correia, attorneys
(Leon Savetsky, of counsel)

INTERLOCUTORY DECISION

On June 15, 2000, Police Benevolent Association, Local 186 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Borough of Paramus (Borough) committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by violating 5.4a(1), (2), (3),

(5) and (7).^{1/} The unfair practice charge was accompanied by an application for interim relief. On June 16, 2000, an order to show cause was executed and a return date was set for July 11, 2000.^{2/} At the Borough's request, the order to show cause hearing was rescheduled to July 12. The parties submitted briefs in accordance with the Commission rules and argued orally on the return date. The following facts appear.

The Borough and the Association are parties to a collective negotiations agreement covering the period January 1, 1997 through December 31, 1999. The parties have engaged in negotiations for a successor agreement, and the PBA filed for interest arbitration on March 15, 2000.

Article XLIV of the parties' contract, entitled, "Police Services", provides a procedure for outside vendors to use the

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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. (7) Violating any of the rules and regulations established by the commission."

^{2/} The PBA has also filed for grievance arbitration of the dispute. The Borough has filed a Scope of Negotiations Petition (Docket No. SN-2001-01) asking the Commission to restrain arbitration over the same issue.

services of off-duty police officers. It provides, in relevant part,

Section 1. General Police Services

A. The Borough shall, upon request, provide police services to any person conducting business within the municipality, the cost to be borne by the business requesting the police service. The police officer shall be paid by the Borough and the Borough reimbursed by the business. The police service shall be limited to service where the good and welfare and safety of the general public is involved....

B. The rate of salary for police service for all police officers shall be one and one half times the regular pay of the current schedule for a top patrolman...

C. In addition to the salary paid by the business, the Borough shall charge an additional ten percent (10%) per hour administration fee to offset any expense occurred by the Borough. The Borough shall have a right to cease service to any business who fails to reimburse the Borough within thirty (30) days after receipt of bill for service previously rendered.

The above provisions have been included in the PBA's agreement with the Borough since 1991. Notwithstanding the contractual compensation of time and one-half salary to be paid to police for such services, for approximately five to six years the practice has been to pay all police officers a flat rate of \$45 per hour. Therefore, for the past five to six years, the Borough has charged outside vendors \$45 an hour, plus a ten percent administrative fee of \$4.50, for a total of \$49.50 per hour for the services of off-duty police officers.

On or about April 25, 2000, the Borough enacted Ordinance 00-13, increasing the administrative fee for outside vendors from \$4.50 hourly to \$20 hourly. The Ordinance, which has been implemented, has the effect of imposing a total cost to the vendor for off-duty police officers of \$65 per hour.

The PBA argues that the administrative fee was negotiated into the parties' agreement, and the unilateral change in the administrative fee both has a chilling effect on negotiations and violates N.J.S.A. 34:13A-21, which prohibits unilateral changes in employee working conditions during interest arbitration. The PBA further maintains that the increase in the administrative fee causes irreparable harm by reducing the amount of off-duty work available for unit police officers. The PBA asks to have the ordinance rescinded.

The Borough concedes that it unilaterally changed the amount of the administrative fee charged to outside vendors. It argues that it had a managerial prerogative to increase the amount it charges outside vendors. Further, it argues that any impact on the use of off-duty police services is merely speculative. The Borough contends that since the administrative fee is not mandatorily negotiable, it did not have an obligation to negotiate with the PBA prior to increasing the administrative fee.

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 it has a substantial likelihood of success on the merits. It argues that the Borough unilaterally changed terms and conditions of employment during the pendency of interest arbitration when it increased the administrative fee. The PBA asserts that the change affects the amount of off-duty work available for police, and therefore, is a mandatory subject of negotiations. It cites 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); and Tp. of Montclair, P.E.R.C. No. 91-13, 16 NJPER 449 (¶21194 1990).

N.J.S.A. 34:13A-5.3 states, in relevant part, the following:

Proposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

A public employer may violate its 5.3 obligation to negotiate in two separate ways: (1) repudiating a term and condition of employment it had agreed would remain in effect throughout the contract's life, and (2) implementing a new rule concerning a term and condition of

employment without first negotiating in good faith to impasse or having a contractual defense. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985).

It is well established that the unilateral alteration of terms and conditions of employment during the course of collective negotiations causes a chilling effect upon those negotiations because such action frustrates the statutory objective of establishing working conditions through bilateral negotiations. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978). Indeed, the Commission has granted injunctive relief in situations where terms and conditions of employment have been unilaterally modified during the course of collective negotiations or interest arbitration. See Harrison Tp., I.R. No. 83-3, 8 NJPER 462 (¶13217 1982); Nutley Tp., I.R. No. 99-19, 25 NJPER 262 (¶30109 1999). Moreover, N.J.S.A. 34:13A-21 expressly prohibits any change in terms and conditions of employment while the parties are engaged in the interest arbitration process.

Here, however, it does not appear that the PBA has established that the administrative fee, although included in the parties' expired contract, is a negotiable term and condition of employment.

In Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police and firefighters. The Court stated:

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]

None of the cases cited by PBA deal specifically with the negotiability of the administrative fee. In Mine Hill Tp., the Commission found that the amount to be paid to police officers for off-duty work is a negotiable term and condition of employment. That amount is considered compensation. Similarly, in Montclair Tp., the Commission found that a contract proposal to increase the hourly rate paid by outside vendors to police officers for off-duty work is an economic item for interest arbitration, notwithstanding that the funding is from outside the municipal coffers. Again, that case centered on the amount of compensation police officers are paid. In Pennsauken Tp., the Township was restrained from implementing that portion of a resolution which

unilaterally set a pay rate for police performing off-duty work. It is noteworthy that in Pennsauken, only the compensation component was restrained, not the portion of the resolution setting a twenty percent fee to cover administrative costs.

However, the administrative fee component which a municipality charges the outside vendor is not compensation to police officers - it is a fee paid to the municipality, presumably for running the program. In 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), the Commission Designee found that the municipality's policy in administering the program of off-duty police work, by requiring outside vendors to make up-front payments, was not negotiable. It appears that the administrative fee is part of the employer's administration of the program and not part of police officer compensation. Therefore, while the administrative fee may have an impact on the amount of services the Borough's off-duty police will be asked to provide, that alone does not appear to make the issue negotiable.^{3/}

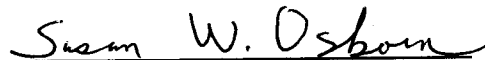
Accordingly, I find that the PBA has not demonstrated a substantial likelihood of prevailing in a final Commission decision on its allegations, a requisite element to obtain interim

^{3/} The Borough contends that it needed to increase the administrative fee - from \$4.50 to \$20 - in order to fully fund the program without direct taxpayer expense. The legitimacy of the Township's claim that it needs such an increase is not appropriately before me.

relief.^{4/} This case will proceed through the normal unfair practice processing mechanism.

ORDER

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


Susan Wood Osborn
Commission Designee

DATED: August 1, 2000
Trenton, New Jersey

^{4/} The PBA has also alleged a violation of 5.4a(1), (2), (3) and (7) of the Act. However, it has not asserted facts supporting these alleged violations nor has it addressed such matters in its brief. Accordingly, I will not address these additional allegations.