

D.R. NO. 95-9

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matters of

TOWNSHIP OF UNION,

Public Employer,

-and-

Docket No. RO-93-16

N.J. STATE LAW ENFORCEMENT
OFFICERS ASSOCIATION, LOCAL 7,

Petitioner.

TOWNSHIP OF UNION,

Public Employer,

-and-

Docket No. RO-93-17

N.J. STATE LAW ENFORCEMENT
OFFICERS ASSOCIATION, LOCAL 60,

Petitioner.

SYNOPSIS

The Director of Representation finds that special police, while performing guard and traffic duties for private entities, are not entitled to the protection of the Act since they are employed by both the private entity and the Township as joint employers.

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Petitioner.

Appearances:

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

For the Petitioner
Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

DECISION

On July 28, 1992, the New Jersey State Law Enforcement Officers Association, Local 7, filed a representation petition with the Public Employment Relations Commission. NJSLEOA, Local 7, seeks to represent approximately 21 special police officers employed by the Township of Union.

Also on July 28, 1992, NJSLEOA, Local 60, filed a representation petition (Docket No. RO-93-17) seeking to represent approximately 9 special police superior officers in the rank of sergeant, lieutenant and captain employed by the Township of Union. However, the special police superior officer positions have been abolished by the Township. Those officers who were in the superior officer titles are now in the special police officers title. Since there are no employees subject to that petition, the petition cannot be processed. RO-93-17 is dismissed.

The petitioned-for employees are unrepresented and the petition is timely filed and supported by an adequate showing of interest.

The Township objects to the petition and refuses to consent to a representation election. It contends that (1) special police officers are not public employees within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), because they volunteer their services to the Township; and (2) the Township is not the public employer of these employees because the Township does not directly compensate them for services they perform for other public and private entities; and (3) if it is found that it is the employer, it is a joint employer with the jobs-in-blue subscribers.

On March 7, 1994, I convened a hearing to gather facts sufficient to determine if the special police officers are public employees within the meaning of the Act.

N.J.S.A. 40A:14-146.8 et seq. creates the position of special police officer within a municipality and defines the duties and responsibilities of such special police officers. Special police officers are appointed by a municipality to perform duties similar to the public safety duties performed by the municipality's regularly appointed police force. The duties are performed on behalf of the appointing municipality and under the supervision of its chief of police. N.J.S.A. 40A:14-146.9(h) and 146.14(b). All of the Township's special police officers are Class Two officers. By statute, Class Two special police officers are authorized to exercise the same powers and duties as those exercised by a regular police officer and may carry a firearm while on duty if trained and certified in its use. N.J.S.A. 40A:14-146.11 and section 14.

The special police officers appointed by the Township must undergo a background check and after appointment, undergo a psychological assessment. They must attend the police academy where they receive the same training as regular police officers, except physical training is less stringent. They then undergo a ninety-day probationary period, after which they are given year-to-year annual appointments.

By statute, the Township may revoke an appointment for cause after affording a hearing to the special police officer.^{1/} Each newly appointed special police officer is provided with a

^{1/} N.J.S.A. 40A:14-146.14(a).

uniform and a weapon by the Township.^{2/} The uniform of the special police officers is different than the uniform of the regular police.

The Township's special police officers are required to serve four hours per week without compensation. This is called "town duty" and is an assignment of a public safety and law enforcement nature. It includes such functions as controlling crowds and/or traffic at public events and patrolling Township streets in police cars. Town duty does not include time spent on court appearances, administrative duties or attendance at official meetings or training programs. Special police who fail to fulfill their four hour a week time requirement must make up all lost time. A special police officer may carry up to 20 hours of unsatisfied town duty to be added to his or her weekly obligation. However, a special police officer who accumulates more than 20 hours of unperformed town duty may be suspended or terminated by the Township. Pursuant to rules adopted by the Township's Department of Public Safety, a special police officer may not be assigned more than a total of 20 hours per week of "public safety functions."^{3/}

Special police officers who have satisfied their four hours per week of uncompensated town duty may participate in the Township's "jobs-in-blue" program. The Township has defined jobs-in-blue as:

^{2/} N.J.S.A. 40A:14-146.12.

^{3/} N.J.S.A. 40A:14-146.16(a).

...duties of a special police nature within the Township of Union for private persons or governmental, business or commercial entities as provided for and in compliance with appropriate township ordinances and state laws, and authorized by the Director of Public Safety.
Union Township Department of Public Safety, Order 008.17.4/

In addition to special police officers, both the Township's regular police officers and Union County officers are eligible to participate in the jobs-in-blue program. When on duty, jobs-in-blue officers are under the direct supervision of the Township's police department and subject to its rules. Either an assigned superior officer or a patrol officer supervises on duty jobs-in-blue officers to ensure proper performance and adherence to Township regulations.5/

N.J.S.A. 40A:14-146.14(b) in pertinent part, provides:

A special law enforcement officer shall be deemed to be on duty only while he is performing the public safety functions on behalf of the local unit pursuant to this act and when he is receiving compensation, if any, from the local unit at the rates or stipends as shall be established by ordinance. A special law enforcement officer shall not be deemed to be on duty for purposes of this act while performing private security duties for private employers, which duties are not assigned by the chief of police, or, in the absence of the chief, other chief law enforcement officer of the local unit, or while receiving compensation for those duties from a private employer. A special law enforcement officer may, however, be assigned by the chief of police or, in the absence of the

4/ This is in conformance with N.J.S.A. 40A:14-146.14(b).

5/ Department of Public Safety, General Order 008.25.

chief, other chief law enforcement officer, to perform public safety functions for a private entity if the chief of police or other chief law enforcement officer supervises the performance of the public safety functions. If the chief of police or other chief law enforcement officer assigns the public safety duties and supervises the performance of those duties, then, notwithstanding that the local unit is reimbursed for the cost of assigning a special law enforcement officer at a private entity, the special law enforcement officer shall be deemed to be on duty.

The jobs-in-blue assignments are scheduled and posted by the assignment officer. The Township's regular police officers pick their jobs first. The special police officers then pick any jobs not chosen by the regular police, and finally, the Union County police may pick any of the remaining jobs. Depending on availability, a special police officer may be able to select more than one jobs-in-blue assignment for up to a maximum of 14 hours of duty per week. In addition, special police normally do all the work at establishments with liquor licenses. Regular officers are prohibited from working at such establishments.

Captain Joseph Golden testified on behalf of the Township that, in June 1992, a liaison of the Union County Prosecutor to the Union Township Police Department made a report as to the day-to-day operation of the police department. That report recommended the special police should come under the command of the highest ranking officer of the regular police force. The Township then enacted an ordinance directing the police division commander to take the necessary steps to make the special police answerable to him, and abolished the existing rank structure for special officers.

Either an assigned superior officer or a patrol officer supervises on duty jobs-in-blue officers to ensure proper performance and adherence to Township regulations. Jobs-in-Blue duties are normally traffic, crowd control or security. Jobs-in-blue are contracted through the police division and the rate of pay for jobs-in-blue which is established by the Township is currently \$18 per hour. Business or other subscribers who wish to use a Jobs-in-Blue officer must contact the assignment office, Sergeant Sickinger (or Anne O'Brien or Stan Kwitch). Vendors are not allowed to contact special officers individually nor can they request a particular officer (P-6, evid). Although specials performed 11% of the jobs-in-blue in 1993, of the 26 special officers, 9 did no jobs-in-blue, 7 worked less than 50 hours for the year and 9 worked over 300 hours.

All jobs-in-blue officers are paid directly by the subscriber, although in some cases, the salary is forwarded to the police department for disbursement. There is no consistent pattern as to tax deductions. Specials do not receive any fringe benefits.

Only the Police Department has a right to discipline special officers. If a subscriber is not satisfied with the conduct of or has a complaint about a particular officer, the Department investigates, and if appropriate, takes disciplinary action against the officer.

Sergeant Sickinger investigates complaints about special police officers, such as tardiness or absence, and recommends disciplinary action. The Township's regular police desk supervisor is responsible for immediately reassigning a jobs-in-blue if the assigned jobs-in-blue officer is not available. The desk supervisor then submits a report to the assignment officer.

Special officers have been disciplined and suspended for their conduct while performing jobs-in-blue duties. One officer was disciplined for taking meals while on duty at a restaurant. He was written up for a number of infractions of violation including "Gratuities" and "engaging in prohibited activities while on duty."

The Township asserts that it is not the employer of the special police officers. It argues that special officers are independent contractors. Alternatively, to the extent the specials are employees, it argues that they are employees of the jobs-in-blue subscriber. As far as the Township is concerned, the specials are simply volunteers. The Township concluded that if it is found to be the employer, the subscribers must be found to be joint employers with the Township.

The Township argues that the only work the specials do for the Township is town duty which is performed without pay. Accordingly, the specials are volunteers and not public employees. Regardless of the status of special police while doing town duty work, the specials cannot be considered volunteers while they are doing jobs-in-blue work - for which they are being paid.

Special officers are not independent contractors. The cases cited by the Township in support of this position are readily distinguishable.

In Big East Conference, 124 LRRM 1372 (1986), basketball referees claiming to be employees of the Big East Conference, signed individual contracts stating that they were independent contractors. These contracts were not with the Big East Conference, but with a separate entity, the "Basketball Officials Association" and only that Association, not the Conference, had the right to discipline. Similarly, in Cardinal McClusky Children's Services, 134 LRRM 1057 (1990), individuals claiming to be employees were, in fact, individually licensed by a City licensing agency to provide day care services in their homes. The alleged employees controlled the manner and means of the providers operation and the employer could not discipline the individuals in dispute.

In determining employer status, the Commission looks to the control of labor relations; i.e., who controls the hiring, firing, work schedule, promotions, discipline, evaluations, vacations, hours of work and scheduling, wages, benefits, funding and expenditures. The source of funding for salaries will not by itself determine who is the employer. See generally, County of Morris, P.E.R.C. No. 86-15, 11 NJPER 491 (¶16175 1985); Ocean County Prosecutor, D.R. No. 82-29, 8 NJPER 60 (¶13024 1981); Bonnie Bray Child Care Counselors Assn., D.U.P. No. 80-7, 5 NJPER 457 (¶10231 1979); Newark Housing Development and Rehabilitation, D.R. No. 80-2, 5 NJPER 328 (¶10175

1979); Bergen County Freeholders Bd. v. Bergen County Prosecutor, D.R. No. 78-34, 4 NJPER 104 (¶4047 1978), P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), aff'd 172 N.J. Super 363 (App. Div. 1980); Mercer Freeholder Bd. and Mercer County Prosecutor, P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), aff'd. 172 N.J. Super 411 (App. Div. 1980); Mercer County Superintendent of Elections, D.R. No. 78-37, 4 NJPER 147 (¶4069 1978), aff'd P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978); Passaic County Board of Chosen Freeholders, D.R. No. 78-29, 4 NJPER 8 (¶4006 1977); Cape May County Guidance Center, D.R. No. 78-19, 3 NJPER 350 (1977); and ARA Services, Inc., E.D. No. 76-31, 2 NJPER 112 (1976).

Contrast State of New Jersey (Racing Commission I), D.R. No. 91-35, 17 NJPER 357 (¶22165 1991); and State of New Jersey (Racing Commission II), D.R. No. 92-19, 18 NJPER 153 (¶23072 1992).

Here, much of the responsibility for the effectuation of labor relations and personnel decisions for these employees lies with the Township. The Township appoints and removes special police officers, sets the number of hours they may work, provides direct supervision over the performance of their duties, establishes rules for their conduct, sets disciplinary standards, and imposes penalties. The Township determines the specific duties that the special police officers will perform when on jobs-in-blue duty. Moreover, the Township sets the hourly rate of compensation for jobs-in-blue. Significantly, N.J.S.A. 40A:14-146 14(b) provides that special officers are "on duty" when performing public safety

functions for a private employer if the work was assigned by the department's chief law enforcement officer.

The Township furthers its mission of providing police services to the community by having their special officers perform jobs-in-blue duty. They are in uniform and in the public eye.

But, unlike Morris, etc., the subscribers have direct contact with the specials. They often pay the specials directly and, in general, have some degree of control. They direct their assigned jobs-in-blue officer to a specific duty location, if the subscriber is unhappy with the performance of an officer, it can recommend that the officer no longer be assigned to that subscriber.

In Domanoski v. Borough of Fanwood, 237 N.J. Super. 452 (App. Div. 1989), it was found that, for the purposes of determining worker's compensation liability, an off-duty regular patrolman doing jobs-in-blue type work is a joint employee of both the municipality and the subscriber. It was specifically found that the benefit derived from a uniformed officer doing jobs-in-blue goes to both the municipality and the subscriber. Given the mutual benefit both the Township and subscribers derive from jobs-in-blue and the shared control of labor relations, I find that the Township is a joint employer of these special officers with the respective subscribers.

N.J.S.A. 34:13A-5.1(a) limits the jurisdiction of the Commission to matters of public employment. N.J.S.A. 34:13A-3(c) defines public employers:

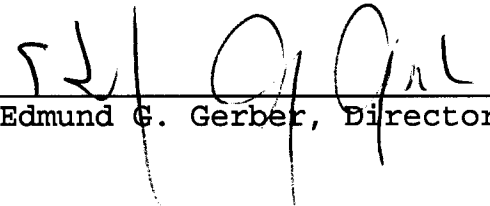
...the State of New Jersey, or the several counties and municipalities thereof, or any other

political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service.

The subscribers overwhelmingly do not meet this definition. Accordingly, this petition is outside the jurisdiction of the Commission^{6/} ARA Services, Inc., E.D. No. 76-31, 2 NJPER 112 (1976); Delaware Bay Port Authority v. P.E.R.C., 112 N.J. Super. 160 (App. Div. 1970).

Accordingly, the petitions are dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Edmund G. Gerber, Director

DATED: November 7, 1994
Trenton, New Jersey

^{6/} Having found the Commission has no jurisdiction here, it is not necessary to determine if the special police have sufficient regularity of employment.