

I.R. NO. 2005-3

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF FORT LEE,

Respondent,

-and-

Docket No. CO-2004-319

FORT LEE PBA LOCAL NO. 245,

Charging Party.

SYNOPSIS

A Commission Designee denies a request to restrain the Borough of Fort Lee from hiring class one specials to perform traffic control in the area surrounding the western terminus of the George Washington Bridge. The PBA claimed the Borough was required to negotiate with it over specials performing PBA unit work. The Designee held that there was insufficient evidence to conclude that the Borough would use specials in a manner inconsistent with the statute authorizing their use, and that a determination could not be made in interim relief whether the special's statute preempted the rights under our Act.

The Designee, however, suggested this application may be refiled based upon how the Borough actually implements the employment of specials.

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Appearances:

For the Respondent,
DeCotiis, Fitzpatrick, Cole & Wisler, LLP
(J. Sheldon Cohen, of counsel)
(Susan E. Volkert, on the brief)

For the Charging Party,
Loccke & Correia, P.A.
(Merick H. Limsky, of counsel)

INTERLOCUTORY DECISION

On April 16, 2004, Fort Lee PBA Local No. 245 (PBA) filed an unfair practice charge with the Public Employment Relations Commission alleging that the Borough of Fort Lee (Borough) violated 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee

^{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; (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."

Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The PBA alleged that on or about March 25, 2004, the Borough passed an ordinance unilaterally creating the position "special law enforcement officer" (specials) to substitute class one specials for police officers performing certain traffic enforcement duties. The PBA further alleges that the Borough's purpose is to save money by replacing officers performing "police work" with specials who are civilians.

In accordance with N.J.A.C. 19:14-1.6(c), an exploratory conference was conducted in this matter by a Commission staff agent on June 8, 2004. The case was not resolved at that time and a complaint was issued on August 3, 2004, scheduling a pre-hearing conference for October 13, 2004. An answer to the complaint was filed on August 13, 2004.

On September 15, 2004, the PBA filed an application for interim relief. An Order to Show Cause was executed on September 20, 2004, scheduling a return date for October 13, 2004. The parties submitted briefs, affidavits and exhibits in support of their respective positions and argued orally on the return date.

The PBA argues that the Borough's unilateral decision to hire and use specials for traffic control violates the Act because it is shifting work exclusively performed by police officers to non-unit specials primarily for economic reasons. The PBA also alleged that a safety hazard may be created by

requiring police officers to work with unarmed and lesser trained specials. The PBA seeks an order restraining the Borough from implementing its ordinance hiring and employing specials.

The Borough opposes the requested restraint. It argues that it has a managerial prerogative to hire the specials and implement its ordinance; no police officers have lost their positions; it has complied with the statute authorizing the hiring of specials; specials are being hired for public safety considerations; and, that the PBA has not met the requirements for interim relief.

The following facts appear:

The Borough employs approximately 74 regular full-time rank and file police officers who are represented by the PBA. Since the western end of the George Washington Bridge falls within the Borough, it is responsible for providing most of the police, fire and emergency services, which includes traffic control, for the bridge and surrounding area. As a result of the national tragedy that occurred on September 11, 2001, and its aftermath, the Borough's responsibility to provide the above services has increased, and it has created an emergency management group consisting of volunteers and paid specials to enhance its ability to manage traffic and crowd control.

On at least two occasions in 2004, the Borough and PBA met to discuss the employment of specials to assist in traffic

enforcement. No agreement was reached. Subsequent to those meetings, the Borough, on or about March 25, 2004, passed an ordinance providing for the employment of specials as authorized by N.J.S.A. 40A:14-146.11 et seq. That ordinance provides in pertinent part:

The Mayor, with the consent of the Council, may appoint, from time to time, part-time Class One Special Law Enforcement Officers (currently defined in N.J.S.A. 40A:14-146.11) as authorized by and in accordance with New Jersey Statutes (currently N.J.S.A. 40A:14-118 and 146.10 et seq.), as may be later amended, for terms not exceeding one year. The said Class One Special Law Enforcement Officers shall possess and exercise all the powers and duties provided by said statutes, to the extent authorized by the Chief of Police, during their term in office, but shall not be considered or continued as regular members of the Police Department. They shall not be entitled to tenure or to the benefits of a Classified Employee in the Civil Service and shall enjoy only that hourly pay and/or benefits as the Mayor and Council may grant.

Article II, Section 1, B of the parties collective agreement retains for the Borough the right to hire all employees. That provision provides:

To hire all Employees and subject to the provisions of law, to determine their qualifications and conditions for continued employment, and to promote and transfer Employees.

No grievance has been filed regarding the Borough's actions.

On or about August 15, 2004, the Borough announced it would begin hiring class one specials and would send them to the police academy for training.

The parties agree that no police officer jobs or positions have been lost or eliminated as a result of the Borough's decision to hire specials. No officers have been transferred, reassigned or had their salary reduced as a result of the Borough's decision, nor does the Borough intend to reduce its regular police force because it has hired specials.

Police Director Hart has certified that specials will be employed on a part-time basis only, no more than twenty hours per week, and will not be retained for more than one year. The specials will not carry firearms or perform duties requiring the use of firearms, will not participate in regular patrol activities, and have only limited arrest authority. But the record does not show whether the Borough intends to employ specials on a daily or intermittent basis.

Specials will not receive health insurance, but will receive worker's compensation and liability insurance coverages that are provided to regular police officers. They will only be paid an hourly wage.

The PBA claims the specials have not undergone the same background checks as police officers. The Borough claims the

specials have undergone background investigations equivalent to those of officers.

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).

Pursuant to N.J.S.A. 40A:14-118, a municipality may hire special police officers. Class one special police officers may perform traffic and crowd control duties as defined by N.J.S.A. 40A:14-146.11(a)(1) as follows:

Class One. Officers of this class shall be authorized to perform routine traffic detail, spectator control and similar duties. If authorized by ordinance, Class One officers shall have the power to issue summonses for disorderly persons and petty disorderly persons offenses, violations of municipal ordinances and violations of Title 39 of the Revised Statutes. The use of a firearm by an officer of this class shall be strictly prohibited and no Class One officer shall be

assigned any duties which may require the carrying or use of a firearm.

In Belmar Policeman's Benevolent Ass'n v. Belmar, 89 N.J. 255 (1982), the New Jersey Supreme Court held that specials should be used in emergencies, may not be employed full time or hired as a subterfuge to avoid hiring regular police. The Court explained:

. . . there may be occasions when special police officers may properly work full time, part-time, or on a continuous basis. They may be designated to perform some or all of the same duties as the regular police. They may be authorized to carry weapons and to make arrests. Their appointments may not exceed one year and they may be discharged at any time without cause. However, special police may not be employed on a full time annual basis as a subterfuge to avoid hiring regular police, though they may be employed part-time to supplement the regular police force--the part-time consisting of a day or a segment of the year. More appropriately, special police should be used for emergencies, both anticipated and unexpected. They can be used as well to supplement or augment the regular force during the summer crunch at the seashore or on a particular weekday night when stores regularly remain open for shopping. Generally they should be assigned when feasible to less sensitive areas. The pattern of employment of special police should fall within this general framework, subject of course to the individual having received satisfactory training for the function to be performed. It is the obligation of the municipalities to see to it that the special policemen are qualified for their job. Id. at 269-270.

The PBA's argument here is that specials were hired to do PBA bargaining unit work, and to save money, presumably by not

paying regular officers overtime to do extra traffic control. It also argued that safety considerations were raised by requiring police officers to work with unarmed and insufficiently trained specials. The PBA, relying upon the unit work standards established by the Court in City of Jersey City v. Jersey City PBA, 154 N.J. 555 (1998), argues it has met the interim relief requirements.

The Borough, relying upon Local 195, IFPTE, 88 N.J. 393 (1982), as well as Jersey City, argues that neither interim relief requirement has been met.

Having considered the parties submissions and oral argument, I find the PBA has not satisfied the requirements for interim relief.

Based upon the record currently before me, the PBA has not established irreparable harm. No police officers will lose their positions as a result of the use of specials, and there is no evidence proving officers will lose overtime. A dispute exists regarding how extensive background checks were or need to be for specials, and the PBA's concerns raised over the safety of officers who will be working with unarmed and presumably lesser trained specials cannot be resolved in this forum.

Certainly, the performance of traffic and crowd control is PBA unit work. But that alone does not establish a substantial likelihood of success here. Before even considering the unit

work standards discussed in Jersey City, a determination must be made whether the negotiability requirements established in Local 195 have been met. Those requirements follows:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
88 N.J. at 404-405.

Although the first requirement has been satisfied, for interim relief purposes I cannot conclude that the second and third Local 195 requirements have been met. The Borough's hiring and appointment of specials was done pursuant to the statutory authority of Title 40A. No cases have been presented to me, nor am I aware of any, that hold that our Act preempts the Title 40A statutes relied upon by the Borough to hire the specials here, and interim relief is not the forum within which to consider that issue. Consequently, I find an issue exists over the second Local 195 requirement. The statutory authority relied upon by

the Borough to hire the specials may partially preempt the right of the PBA to protect its unit work.

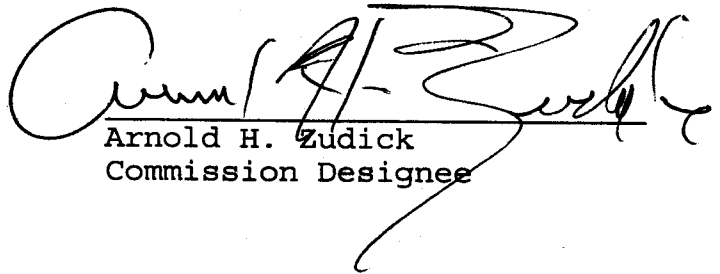
Similarly, an issue still exists regarding the third Local 195 requirement. The Borough's intent to use specials in traffic emergencies occasioned by events at the western terminus of the George Washington Bridge and surrounding area may be a governmental policy consideration that preempts the negotiability of the unit work issue for specials. I cannot resolve that issue in interim relief. Based upon the limited record before me the Borough may be complying with the requirements for the use of specials established by Belmar. I note, however, that one reason I must conclude that the PBA has not established a substantial likelihood of success on the merits of its charge is because there is insufficient evidence before me at this time explaining how the Borough intends to use the specials. Title 40A and Belmar suggest their use is for emergent circumstances. To the extent the Borough intends to use specials on a regular daily basis rather than intermittently, may necessitate a review to determine whether the Borough's use is more a subterfuge for the hiring of regular police officers rather than for emergent circumstances. In that event, the Act may be considered as having preempted Title 40A, and the balancing of harms may be sufficient to justify, absent negotiations, the grant of interim

relief. The PBA may refile this application based upon how the Borough implements the employment of specials.

Accordingly, the interim relief requirements have not been met. This case will be returned to the hearing examiner for a plenary hearing.

ORDER

The application for interim relief is denied.



Arnold H. Zudick
Commission Designee

Dated: October 15, 2004
Trenton, New Jersey