

I.R. NO. 90-4

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BUTLER,

Petitioner,

-and-

Docket No. SN-89-87

BUTLER POLICE ASSOCIATION,

Respondent.

SYNOPSIS

A Commission Designee declines to issue a restraint of arbitration. The Butler Police Association sought to arbitrate the denial of a grievance of an order of the Chief of Police to a patrolman to put gas in a police car used primarily by the Chief. This assignment is non-police work, does not place limitations on the governmental mission of providing police services and is not an illegal subject of arbitration.

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Appearances:

For the Petitioner  
Grotta, Glassman & Hoffman, Esqs.  
(Judith S. Miller, Esq.)

For the Respondent  
Loccke & Correia, Esqs.  
(Michael J. Rappa, Esq.)

INTERLOCUTORY DECISION

On June 22, 1989, the Borough of Butler ("Borough") filed a Scope of Negotiations Petition with the Public Employment Relations Commission ("Commission") seeking to permanently restrain the Butler Police Association ("BPA") from arbitrating a grievance of an order of the Chief of Police to a patrolman to put gasoline in a police car that is primarily used by the Chief. On July 11, 1989, the Borough filed an application that the Commission enter an interim order temporarily restraining this arbitration.

On July 20, 1989, I conducted a hearing on the application for interim relief. Both parties appeared, argued orally and had the opportunity to file briefs.

Pursuant to Englewood Bd. of Ed. v. Englewood Teachers Assn., 135 N.J. Super 120, NJPER 34 (App Div. 1975), the Commission has the authority to restrain an arbitration in order to prevent unnecessary litigation where it reasonably appears that the subject matter of the arbitration may be nonarbitrable.

The facts are not in dispute. On January 27, 1989, the Chief of Police of the Borough of Butler, Gerald J. Napoleone, ordered Patrolman Michael Schmeidhauser to put gasoline in police car 336. The Chief estimates that he uses car 336 80% of the time. Schmeidhauser, president of the BPA, refused the order and received a five day suspension. His suspension is now on appeal to the Borough business administrator, pursuant to the Borough's own procedures of minor disciplinary action under Civil Service rules.

On January 27, 1989, Patrolman Schmeidhauser filed a grievance contending that the order does not fall within the Department of Personnel (formerly Civil Service) job description for a patrolman and is therefore an improper or illegal order. The grievance was denied by the Borough. The BPA then filed for arbitration. The demand for arbitration states the nature of the dispute is a "Vehicle Maintenance Grievance". The Borough brought this action to restrain the arbitration.

At the outset of this analysis, I stress the boundaries of the Commission's scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts. [78 N.J. at 154]

Accordingly, I only determine whether the Borough can legally object to this grievance. I do not determine whether it had a contractual right to issue the order to Schmeidhauser to gas up the Chief's car.

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 fire fighters.<sup>1/</sup> 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

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<sup>1/</sup> The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

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. [Id. at 92-93; citations omitted]

Accordingly, this grievance is arbitrable if it concerns either a mandatory or permissive subject for negotiations.

The Borough argues that the parties could not legally agree to a provision limiting the Chief's authority to assign duties. Such an agreement would significantly interfere with the mandate of N.J.S.A. 40A:14-118, which provides that chiefs of police "exercise, and discharge the functions, powers and duties of the force" and "prescribe the duties and assignment of all subordinate and other personnel".

In State Supervisory Employees Ass'n., 78 N.J. 54 (1978), the Supreme Court held that statutes setting or controlling a particular term or condition of employment pre-empt negotiations. The Court cautioned that "...the word 'set' [refers] to [a] statutory or regulatory provision which speaks in the imperative and leaves nothing to the discretion of the public employer". 78 N.J. at 80. To the extent such statutes permit an employer some measure of discretion, they do not preempt negotiations. See also Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91

N.J. 18 (1982); University of Medicine & Dentistry and American Association of University Professors, P.E.R.C. No. 86-148, 12 NJPER 532 (¶17200 1986); University of Medicine & Dentistry and American Association of University Professors, P.E.R.C. No. 85-106, 11 NJPER 290 (¶16105 1985), recon. den. P.E.R.C. No. 86-7, 11 NJPER 245 (¶16158 1985), aff'd App. Div. Dkt. No. A-11-85T7 (4/14/86).

Since N.J.S.A. 40:14-118 grants full discretion of the day-to-day operation of the police department and therefore discretion over terms and conditions of employment this statute cannot preempt negotiations.


In a previous matter involving these same parties, Borough of Butler, P.E.R.C. No. 87-21, 13 NJPER 292 (¶18123 1987), the Commission held that maintenance of police vehicles, beyond simply checking fluid levels and tire pressure, is non-police work and mandatorily negotiable. The Commission relied on its earlier decision Byram Tp. Bd. of Ed. and Byram Tp. Ed. Assn., P.E.R.C. No. 76-27, 2 NJPER 143 (1976) aff'd 152 N.J. Super. 12 (App. Div. 1977), where it held that teacher assignments of custodial functions, outside of normal housekeeping assignments, which are unrelated to student safety, security and control, constitute a mandatorily negotiable term and condition of employment.

In Mercer County Park Commission, P.E.R.C. No. 81-43, 6 NJPER 491 (¶11250 1980), the Commission held that patrolmen checking the oil of their own assigned vehicles when maintenance employees are available is permissively negotiable. It also held that an order requiring patrolmen to change flat tires on their vehicles

while on patrol is a daily housekeeping assignment (implicating relatively minor work load assignment) and is permissibly negotiable. See also Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-6, 10 NJPER 494 (¶15224 1984).

Here, filling patrol car 336 with gasoline is non-police work and does not place limitations on the governmental mission of providing police services. It is not necessary here to decide if this assignment is a mandatory or permissive subject of negotiations. It is a proper subject of arbitration.

The Application for interim relief is denied.

  
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Edmund G. Gerber  
Commission Designee

DATED: July 21, 1989  
Trenton, New Jersey