

P.E.R.C. NO. 2004-6

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PATERSON,

Petitioner,

-and-

Docket No. SN-2003-39

PATERSON POLICE P.B.A. LOCAL 1  
and SUPERIOR OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the City of Paterson for a restraint of binding arbitration of grievances filed by Paterson Police P.B.A. Local 1 and the Superior Officers Association. The Commission grants the restraint of arbitration to the extent the grievances contest the City's decisions to assume administration of the off-duty employment program and to require the Public Safety Director's approval of any off-duty employment calling for police officers to perform policy-type services in police uniforms. The request is otherwise denied.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Dorf & Dorf, attorneys  
(Gerald L. Dorf, of counsel); Susan E. Champion,  
Corporation Counsel and Abed Awad, Assistant  
Corporation Counsel, on the brief

For the Respondent, Mark C. Rushfield, attorney,  
on the brief

DECISION

On February 5, 2003, the City of Paterson petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of grievances filed by Paterson Police P.B.A. Local 1 and the Superior Officers Association. The PBA and SOA seek to arbitrate a directive from the Mayor/Acting Public Safety Director prohibiting uniformed police officers from performing off-duty police jobs without his approval.

The parties have filed briefs and exhibits. The City has requested an evidentiary hearing concerning the "PBA's involvement in advertising, soliciting, and arranging for off

duty police officers' work." (Brief at 8). We deny that request because evidence on that issue is not necessary to resolve the parties' negotiability dispute. N.J.A.C. 19:13-3.6. We also deny the City's request for oral argument. These facts appear.

The PBA represents rank and file police officers employed by the City and the SOA represents superior officers. The parties' collective negotiations agreements are effective from July 31, 1998 through July 31, 2003. The grievance procedures end in binding arbitration.

On January 11, 1999, Lawrence Spagnola, the Chief of Police, issued General Order #99-2. This order provides:

1. As per Department Rule 3:9-5 all members of the Paterson Police Department (sworn and civilian), "Prior to engaging in outside employment or business, shall submit a request in writing, for permission to do so to the Chief of Police via normal channels."
2. In order to update departmental records, all members engaged in any outside employment or business involving any type of security, watchman, escort, traffic control, or investigative activities within the City of Paterson shall be administered by P.B.A. Local #1. Any such type employment or business outside the City of Paterson must be approved in writing by the Chief of Police. All members to which either applies shall submit an Official Report, through normal channels, to this office by January 31, 1999. The report shall include:
  - a. Name of the employer;
  - b. Employer's address;

- c. Location of employment if different than employer's address;
- d. Nature of work performed;
- e. Work schedule;
- f. Total hours worked per week;
- g. Amount of compensation received.

If the employment is assigned by the designated P.B.A. representative a report is not required.

- 3. The P.B.A. Representative shall submit a list of employers to this office containing all of the above information. The President of P.B.A. Local #1 shall provide the Chief of Police with a weekly report due 48 hours after the end of the period.
- 4. Individual members of this Department are not permitted to engage in any outside security, traffic control, or investigative activities not administered through the P.B.A. representative and approved by the Chief of Police.
- 5. THE REQUIRED PAPERWORK FOR OUTSIDE EMPLOYMENT WHICH HAS NOT BEEN SUBMITTED WITHIN THE 48 HOUR PERIOD SHALL RENDER THE WORK 'UNAUTHORIZED.' THE MEMBER RESPONSIBLE FOR REPORTING SAID WORK SHALL BE SUBJECT TO DISCIPLINARY CHARGES.
- 6. N.J.A.C. 13:2-23.31 prohibits police officers from working for A.B.C. licensees, unless the licensee pays the city directly for the services. This includes security, crowd or traffic control and inside or outside the licensed premises.

Section 15.0 of the police department rules and regulations is entitled Secondary Employment. This section provides:

15.1 Prohibition. Members are prohibited from engaging in outside employment or business.

- a. in places where alcoholic beverages are sold or consumed or where, by being employed, the department may be called in disrepute or department operations jeopardized; OR
- b. while on sick injured, or light duty status; OR
- c. during any period when on duty with the department; OR
- d. involving any security, traffic control, investigative activities, escort, personnel (body guard) security, or any other police type services, whether within or outside the boundaries of Paterson, which is not administered by the PBA and has the prior approval of the Chief of Police.

15.2. Registration. Prior to engaging in outside employment or business a member shall submit a request, in writing, to the Chief of Police for permission to do so.

15.3 Uniform Standards. Members who are authorized to engage in secondary employment, in uniform, are required to conform to all standards for uniforms, equipment, and personal appearance.

15.4 Department Issued Equipment. Members are prohibited from using department owned and issued equipment while privately employed unless authorized by the Chief of Police.

As the order and regulations make clear, the off-duty employment of uniformed police officers has been administered by the PBA. Off-duty work opportunities are posted on the PBA bulletin board and the department's main bulletin board. Before each month begins, officers desiring off-duty work submit a list of their days off. According to a memorandum submitted through the Office of the Chief of Police to an Assistant Corporation

Counsel, jobs are distributed as evenly as possible given the officers' available dates. The PBA sets the hourly rate for the off-duty work and the hiring business pays each officer directly. According to this memorandum, employee insurance provided by contract covers the police officers whether they are on duty or off. According to the unions, the officers are not covered by the City's workers' compensation insurance or the pension system when working off-duty.

In December 2000 and January 2001, newspaper articles alleged that Paterson police officers had engaged in "double dipping" - being paid for off-duty work by school boards and other employers while being on duty at the police department. The Office of the Passaic County Prosecutor investigated the articles' allegations.

On May 2, 2001, the Acting County Prosecutor, Boris Moczula, sent a memorandum to all Passaic County police chiefs. Citing the newspaper reports, he advised the chiefs that in order to comply with Attorney General directives, their municipalities must assume a direct and primary role in administering their officers' secondary employment involving police-related activities and must control both the assignment of jobs and the issuance of paychecks. He added that this secondary employment procedure would also promote public confidence in an area too often subject to claims of favoritism and improper conduct and

noted that the Division of Criminal Justice concurred with his conclusion.

On December 12, 2001, the Acting Prosecutor issued his findings and recommendations concerning the articles' allegations. The investigation revealed no evidence of a pervasive scheme to defraud educational institutions or the City and no evidence of any criminal intent or purpose and it found that the scope of the problems was narrower than reported. But the Acting Prosecutor did find several incidents where on-duty police officers were paid by outside employers for hours of off-duty work they did not do. He recommended that the officers be ordered to repay the outside employers.

The Acting Prosecutor's report noted investigative difficulties caused by record keeping deficiencies. These deficiencies included: departmental leave and attendance time sheets that did not list the actual hours worked or the times signed in or out; time sheets submitted to outside employers that did not always accurately identify the officers at work, especially given informal switching of off-duty security shifts; and billings that were submitted to outside employers before shifts were actually worked. The report recommended that billings not be submitted until each officer certifies that he or she has done the off-duty work; that informal leaves be eliminated; and that each officer receive a monthly printout of

the officer's attendance and leaves so that errors could be quickly corrected.

At the end of his report, the Acting Prosecutor wrote that directives from the Attorney General required that the City assume the primary and direct role over its officers' secondary employment - specifically that it assign all duties, issue all paychecks, and keep records of all secondary employment. The report concluded that allowing the PBA to continue its role in assignments and billing would violate the Attorney General's directives. The Acting Prosecutor therefore requested confirmation that the City would formally institute specific procedures to comply with those directives; he sent the Division of Criminal Justice a copy of his report.

Jose Torres is both the Mayor and Acting Public Safety Director. On September 16, 2002, Torres issued a memorandum to Spagnola entitled "Outside Work Program." The memorandum states:

Effective immediately, no member of the Police Department is to work for private persons or corporations in any activity which requires their identity as a Police Officer to achieve the goals of the employer without approval of the Public Safety Director.

Any off-duty assignment which is not made equally available to all Police personnel will not be approved by the Police Director.

The administration is in the process of instituting a work program for off-duty Police Officers. Any member who violates this directive will be subject to the Police Department's progressive discipline policy.



Attached is a sheet of off-duty assignments that you have previously approved. This list shall be posted and made available to all Police personnel.

On September 24, 2002, Torres issued a new memorandum. It stated:

The [original] memo was not meant to prohibit police officers from off duty work. It clearly directs that you post all available off-duty positions so that all police personnel may have a fair and equal chance to apply for same.

The PBA and the SOA filed unfair practice charges alleging that the City violated the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when Torres issued the September 16 memorandum without prior negotiations with the majority representatives. The unions also sought interim relief. After a telephone conference call on September 27, the parties agreed that the interim relief requests would be withdrawn and the status quo would be maintained while the charges were processed. The City, however, reserved the right to direct the chief to post jobs, even though the PBA would continue to fill the jobs as it did before the September 16 memorandum.

The unions also filed grievances asserting that the September 16 memorandum violated contractual clauses maintaining benefits and requiring discussion before major working conditions are changed. The City denied the grievances and the unions demanded arbitration. The demands identified the grievances to

be arbitrated as the September 16 memorandum immediately terminating the authority of police officers to engage in off-duty assignments and stating the City's intention to institute a work program for off-duty police officers.

On February 5, 2003, the City petitioned for a scope of negotiations determination. It seeks a restraint of binding arbitration of the grievances. The parties have agreed to have the unfair practice charges held in abeyance pending this decision.

On April 30, 2003, the Deputy Director of the Division of Local Government Services filed a complaint with the Acting Director of the State's Division of Criminal Justice, Law Enforcement. The complaint stated that by allowing the PBA to administer the off-duty employment program, the City was violating the Department's Local Finance Notice CFO 2000-14, Attorney General Formal Opinion 1977-23,<sup>1/</sup> and the investigative findings and recommendations of the Passaic County Prosecutor. Attached to the letter was a memorandum. This memorandum asserts that the volume of off-duty employment in Paterson approaches 100,000 hours and \$2.5 million in billed services and that the City's financial integrity is called into question by having the

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<sup>1/</sup> The PBA argues that Attorney General Formal Opinion 1978-11 substantially revises Opinion 1977-23.

PBA rather than the police administration oversee the off-duty employment program.

The City has also submitted an excerpt from a document entitled, "Management Review of the Paterson Police Department" issued by the New Jersey Division of Criminal Justice. It instructs the City to adopt an ordinance, policies and procedures relating to secondary police employment, including the establishment of accounts and procedures for handling payments to the City and City payments to officers who work secondary jobs. The unions contend that there "is nothing establishing what the document is," and maintain that it has no legal effect. The unions repeat their position that whatever policies are adopted must first be negotiated.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

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.

Thus, we cannot consider the contractual merits of these grievances or any contractual defenses the employer may have.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

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]

Arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER

Supp.2d 130 (§111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers.

Under all the circumstances of this case, we hold that the City's policymaking powers would be substantially limited if it was prohibited from administering the off-duty employment system or requiring the approval of the Public Safety Director before off-duty employment is performed. However, other issues such as the rates, fees, and allocation of off-duty opportunities remain negotiable despite the City's right to administer the system and require approval.

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. See City of Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (§16184 1985); contrast Montclair Tp., P.E.R.C. No. 90-39, 15 NJPER 629 (§20264 1989). See also Division of Local Government Services, Local Finance Notice 2000-14 (taking position that police officer

cannot act as a police officer unless paid directly through a municipality's payroll system).

In Orange Tp., we held that an off-duty employment proposal was not mandatorily negotiable. That proposal called for the off-duty employment of police officers to be jointly administered by the PBA president and the Director of Police (or their designees). We concluded that the proposal would unduly delegate managerial authority because it would call for joint administration of the initial approval of outside employment.

While Orange Tp. did not consider whether the proposal at issue was permissively negotiable, the circumstances of this case persuade us that the City has a non-negotiable right to take control of administering the off-duty employment system. Alleged abuses have been reported and investigated, and the Acting Prosecutor has demanded that the City assert control over billing and assignments and has raised the possibility of intervention by the Division of Criminal Justice if it does not. How to respond to the alleged abuses and the Acting Prosecutor's report is a policymaking issue of public importance. Ridgefield Park at 163-164. Moreover, the designation of the proper managerial authority for approving off-duty assignments is also a policymaking matter that cannot be determined through the negotiations process. Compare Borough of Sayreville, P.E.R.C. No. 98-58, 23 NJPER 631 (¶28307 1997) (employer has a prerogative

to decide who will conduct pre-discipline hearings); Upper Saddle River Bd. of Ed., P.E.R.C. No. 88-58, 14 NJPER 119 (¶19045 1987) (employer has prerogative to determine who will recommend increment withholdings). The City thus has a non-negotiable right to determine that the Public Safety Director rather than the Chief of Police should exercise the managerial authority to approve or disapprove assignments.

For these reasons, we will restrain arbitration of the grievances to the extent they contest the City's decisions to assume administration of the off-duty employment system and to require approval of employment by the Public Safety Director. Given this holding, we do not consider whether the Private Detective Act, N.J.S.A. 45:19-9, and the Attorney General Formal Opinions construing that act prohibit the PBA's continued role in administering the system and making assignments. We also do not consider the City's argument that the PBA's role jeopardizes the off-duty police officers' eligibility under the pension laws for accidental death and disability benefits and thus raises a non-negotiable pension issue.

The directive issued by the Mayor/Acting Director of Public Safety states that his approval will be required for off-duty assignments as police officers and that to be approved, off-duty assignments must be made available to all police officers. The directive also states that the "administration is in the process

of instituting a work program for off-duty Police Officers"; but does not specify any features of that program. In its brief, however, the City asserts a non-negotiable prerogative to establish all the features and procedures of an off-duty employment system. That position sweeps beyond our precedents and the problems that have been alleged in this case. See Somerset Cty. Sheriff, P.E.R.C. No. 2002-60, 28 NJPER 221 (¶33077 2002) (hourly rate of pay for road work is mandatorily negotiable); Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987) (hourly rate of pay for outside jobs is mandatorily negotiable); Hanover Tp., P.E.R.C. No. 94-85, 20 NJPER 85 (¶25039 1994) (allocation of outside employment opportunities among qualified officers is mandatorily negotiable); Borough of Paramus, P.E.R.C. No. 2001-57, 27 NJPER 188 (¶32062 2001) (administrative fee is permissively negotiable). We therefore will limit our restraint of arbitration to the issues we have held to be non-negotiable.


#### ORDER

The request of the City of Paterson for a restraint of binding arbitration of the grievances filed by Paterson Police P.B.A. Local 1 and the Superior Officers Association is granted to the extent the grievances contest the City's decisions to assume administration of off-duty employment program and to require the Public Safety Director's approval of any off-duty



employment calling for police officers to perform police-type services in police uniforms. The request is otherwise denied.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners DiNardo, Katz, Mastriani, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

DATED: July 24, 2003  
Trenton, New Jersey  
ISSUED: July 25, 2003