

P.E.R.C. NO. 2003-52

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BELMAR,

Petitioner,

-and-

Docket No. SN-2003-2

BELMAR POLICEMEN'S BENEVOLENT  
ASSOCIATION, LOCAL NO. 50,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Borough of Belmar for a restraint of binding arbitration of grievances filed by the Belmar Policemen's Benevolent Association, Local No. 50. The grievances assert that off-duty police officers should have been assigned to road work projects performed by outside contractors. The Commission holds that the PBA may not challenge the chief's decisions to assign an on-duty officer or not to require the presence of an off-duty officer around construction projects.

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.

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BELMAR,

Petitioner,

-and-

Docket No. SN-2003-2

BELMAR POLICEMEN'S BENEVOLENT  
ASSOCIATION, LOCAL NO. 50,

Respondent.

Appearances:

For the Petitioner, Apruzzese, McDermott, Maestro & Murphy, P.C., attorneys (Arthur R. Thibault, Jr., on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys (Charles E. Schlager, Jr., on the brief)

DECISION

On July 9, 2002, the Borough of Belmar petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of grievances filed by the Belmar Policemen's Benevolent Association, Local No. 50. The grievances assert that off-duty police officers should have been assigned to road work projects performed by outside contractors.

The parties have filed briefs, exhibits and certifications. These facts appear.

The PBA represents patrol officers, detectives, sergeants, lieutenants and captains. The parties' collective

negotiations agreement is effective from January 1, 2000 through December 31, 2003. The grievance procedure ends in binding arbitration.

Article XIII, Overtime, Section C.3 provides:

The Borough agrees to adopt an ordinance that will raise Private Employment of Off-duty Police Personnel to a rate of thirty-five dollars (\$35.00) per hour. The ordinance will be the same as Ordinance No. 5-2.6 except for the rate change. The Borough will receive four dollars (\$4.00) per hour for handling fees.

Ordinance 5-2.6, Section a., provides:

a. Policy. Members of the Police Department shall be permitted to accept employment as safety or security personnel for private employers only during off-duty hours and at such times as will not interfere with the efficient performance of regularly scheduled or emergency duty for the Borough.

Any person or entity wishing to employ off-duty police shall first obtain the approval of the Chief of Police, which approval shall be granted, if such employment would not be inconsistent with the efficient functioning and good reputation of the Police Department, in the opinion of the Chief, and would not unreasonably endanger or threaten the safety or health of the officer or officers who are to perform the work.

#### Paving Project

On November 6, 2001, the PBA's grievance chairman wrote to the police chief about paving work in several locations. His letter stated, in part:

On October 29, 2001 a private contractor was employed by the Borough to patch black top at several locations in town. . . . It has been past practice to employ off-duty police personnel to work as safety or security personnel to assist with traffic in such situations, however you

reassigned the officer scheduled to work Post 8 to assist with traffic at the construction site.

It is my understanding that this company will be returning to make further repairs in town. With this in mind I would like to clarify your position in this matter. If you would agree that this has been the past practice and that when the contractor returns to complete the work that the assignment will be filled by an off-duty officer in accordance with borough ordinance 5-2.6 then no further action needs to be taken. If you disagree with this position and do not plan on filling that assignment with an off-duty officer then please consider this step two of the grievance process as it is the position of the Belmar Policeman's Association that this is a violation of contract Article XII[I] paragraph C.3 and the past practices associated with it.

On November 7, 2001, the chief wrote that it has always been the practice to assign police officers to perform duties in their job descriptions and directing traffic is one of those duties. He further stated that he would be happy to meet with the PBA to discuss how construction jobs are developed and that "just because someone opens up a street somewhere in the Borough of Belmar, this does not automatically guarantee . . . overtime for construction work."

On November 26, 2001, the chief advised the PBA that the Mayor and Council had denied the grievance on the grounds that "the issuance of overtime is a strict managerial prerogative issue." He further stated that who receives overtime and in what order has been negotiated and will continue unless the PBA wishes to reopen negotiations.

On December 9, 2001, the PBA demanded arbitration. The demand describes the grievance to be arbitrated as "the PBA and its members assert that the Borough violated the Collective Bargaining Agreement and the practice of the parties when they assigned an on-duty police officer and failed to allow off-duty police officers to work an outside job."

Water Main Replacement

On December 27, 2001, the PBA president sent another letter to the chief. This letter stated:

Over the past two weeks there has been an outside contractor replacing a water main on 15th avenue. As a part of the project several roads have been closed and traffic has been diverted. In previous letters the Belmar Policeman's Association has informed you of its position that when an outside contractor closes roads and diverts traffic to work in the street then a police officer must be employed to ensure traffic safety or that the contractor must place flagmen at the appropriate places. I have personally been to this construction area and found that there was no police presence or flagmen at the location.

The Belmar Policeman's Association has previously filed a grievance on this very issue . . . and both you and the mayor and council denied that grievance. Therefore, unless you have an objection to the contrary we will just add this grievance to the already existing grievance that has been filed. . . .

On January 2, 2002, the chief responded that this second grievance appeared to have nothing to do with the first grievance. He asked for clarification.

On January 5, 2002, the PBA responded that both grievances involve the chief's refusal to allow off-duty officers to work outside jobs as provided in Article XII[I], Schedule B and associated past practices.

On January 7, 2002, the chief responded that the Borough rejected both grievances and that overtime assignment is a management prerogative that will not be negotiated. In neither case did an outside contractor request to employ any off-duty officers at work sites.

On January 9, 2002, an arbitrator was appointed to hear the grievances. This petition ensued. The employer seeks a ruling on the negotiability of this issue:

Whether the employer must always assign an off-duty police officer, instead of an on-duty police officer, to work traffic detail on a construction job that may once have been distributed as a "side job" or "outside job."

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

Thus, we do not consider the contractual merits of this grievance or any contractual defenses the Borough 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. Compare Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981) with Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson outlines the steps of a scope of negotiations analysis for police officers 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]

Because this case involves grievances, arbitration will be permitted if the subject is at least permissively negotiable. See Middletown Tp. and Middletown PBA, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). No preemption arguments have been made.

In Hopatcong Bor., P.E.R.C. No. 91-60, 17 NJPER 62 (¶22208 1990), we held that the following contract language was not mandatorily negotiable:

All requests for services of police officers while off duty that may be addressed to the public employer shall be forwarded to the police department for posting. The public employer agrees to require a police officer on all contracting jobs done within the Borough where there is a road opening involved. Any time there is a road opening or significant street repair as determined by the Chief of Police or his designee, the Borough agrees to require as a condition of the letting of the job that the contractor agreed [sic] to provide at least one (1) police officer to provide public safety and security at the location of the work site.

The public employer further agrees that all monies received from such contracting work shall be paid through the Borough's payroll process at the officer's overtime rate and the law enforcement officer while so employed shall be treated in all respects as an employee of the public employer. [Emphasis supplied]

We concluded that the provision significantly interfered with the determination of governmental policy because it directed the employer to make certain public safety and security assignments.

Because this case raises the issue of permissive negotiability, an issue not considered in Hopatcong, we will



consider the context of each grievance in deciding whether enforcement of the alleged agreement would substantially limit governmental policymaking powers.

#### Paving Project

We hold that the PBA may not challenge the chief's decision to assign a police officer to direct traffic around the paving project. Enforcement of an alleged agreement not to deploy an on-duty police officer would substantially limit governmental policymaking powers. We are not prepared to find that the chief cannot decide when an on-duty officer will be assigned to a public safety post. See West Paterson Bor., P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000); Town of West New York, P.E.R.C. No. 99-14, 24 NJPER 430 (¶29198 1998); Lopatcong Tp., P.E.R.C. No. 91-15, 16 NJPER 479 (¶21207 1990).

#### Water Main Replacement

We also hold that the PBA may not challenge the chief's decision not to require the assignment of an off-duty police officer during the water main repair. The contractor did not request that the employer provide an off-duty officer and the Borough did not interfere with an officer's ability to secure outside employment. The Borough simply did not affirmatively require a contractor to secure an off-duty officer. The fact that a Borough ordinance may require the use of an officer in certain circumstances does not make that issue arbitrable. The PBA seeks to have the Borough require a public safety presence and we hold that doing so would substantially limit governmental policymaking powers.

ORDER

The request of the Borough of Belmar for a restraint of binding arbitration of both grievances is granted.

BY ORDER OF THE COMMISSION



Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani, Ricci and Sandman voted in favor of this decision. Commissioner Katz was not present.

DATED: January 30, 2003  
Trenton, New Jersey  
ISSUED: January 31, 2003