

P.E.R.C. NO. 2005-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CLAYTON,

Petitioner,

-and-

Docket No. SN-2004-066

FOP LODGE NO. 130,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Borough of Clayton for a restraint of binding arbitration of a grievance filed by FOP Lodge No. 130. The grievance contests the police chief's order banning all off-duty employment. The Commission concludes that there is no indication that any overtime was mandated, that any emergency existed, or that the City could not fill positions without suspending the opportunity to engage in off-duty work.

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.

P.E.R.C. NO. 2005-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CLAYTON,

Petitioner,

-and-

Docket No. SN-2004-066

FOP LODGE NO. 130,

Respondent.

Appearances:

For the Petitioner, Mark Cimino, attorney, on the brief

For the Respondent, Markowitz & Richman, attorneys
(Stephen C. Richman, on the brief)

DECISION

On April 30, 2004, the Borough of Clayton petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by FOP Lodge No. 130. The grievance contests the police chief's order banning all off-duty employment.

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

The FOP represents police officers. The parties' collective negotiations agreement is effective from January 1, 2001 through December 31, 2003. The grievance procedure ends in binding arbitration.

Article XXV is entitled Outside Employment. It provides:

1. All employees shall notify the Borough, in writing, of any off-duty employment other than Borough related. Police equipment and uniforms shall not be used during periods of off-duty employment except as specifically authorized by the Borough.

2. Any employee assigned to work any Board of Education or School function or affair shall be paid at the rate of Forty Dollars (\$40.00) per hour.

The agreement also contains a management rights clause recognizing the Borough's rights to take certain personnel actions, to maintain the efficiency of its operations, and to determine the method, means and personnel for conducting operations.

On July 7, 2003, the chief issued a directive concerning off-duty employment. It stated:

Effective immediately and pursuant with the authority granted in B.O. 21-2, 21-4, and others, and pursuant to N.J.R.S. 40A:14-118,

.....any and all off-duty employment authorizations are withdrawn

Due to the need to provide safety and response to the community, the need to fill short patrol shifts, staff special safety assignments such as DWI patrols, until all department and community needs are filled, no outside employment requests will be granted.

This emergency action has been and is outlined in department General Orders.

On August 5, 2003, the FOP filed a grievance alleging that the chief's order was a "Unilateral change (elimination) in off-

duty employment," violating the parties' agreement, N.J.S.A. 34:13A-5.4, and the due process and equal protection clauses of the 14th Amendment to the federal constitution. The grievance further stated, in part:

The order goes on to state generalities in support of the action and implies that the statutorily defined "state of emergency" has been declared. It is deficient in citing specifics that would support such a declaration, and also lacks any anticipated termination date, or circumstances that would trigger the alleviation of this purported emergency. As a result of the order officers have suffered loss of income (see Verizon Road Detail attached that was already approved), and will continue to suffer such losses as long as this order remains in effect.

The chief denied the grievance. He asserted that what a police officer does with his/her power is completely under department control; off-duty police employment is an extension of department liability; all conditions and requirements (including prohibiting such activity) of off-duty employment are within the chief's sole control; and off-duty work is not a condition of police officer employment. He stated that a schedule of details was being prepared and the off-duty work restriction would be lifted if all details were filled. The response concluded: "All special details, holiday foot patrols, DWI patrols, Checkpoints, etc., will be covered first and only after that will off-duty requests be approved."

At Step 2 of the grievance procedure, the public safety director advised the FOP that the ban on off-duty employment would be lifted, but there would be no reimbursement for lost wages. On September 30, 2003, the grievance was moved to Step 3, the Borough Council. The Step 3 grievance stated that no order had been issued by the chief reinstating outside employment, although one officer's request to work outside employment had been granted, and that officers were forced to suspend their off-duty jobs, some of which they had held for years. There is no response in the record from the Borough Council.

On October 28, 2003, the FOP demanded arbitration. The demand acknowledges that the Borough has rescinded the order. It seeks compensation for unit members' losses and a directive that the Borough follow the contract's procedure for seeking changes in mandatorily negotiable subjects or raise such issues during negotiations for a successor agreement. This petition ensued.

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 do not consider the merits of the grievance or any contractual defenses the employer may have.

Paterson Police PBA No. 1 v. City of 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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, 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 fire fighters, 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]

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. No preemption issue is presented.

The Borough argues that it has a non-negotiable right to administer an off-duty employment policy so as to ensure public safety. The Borough contends that the chief was unable to fill short patrol shifts or special assignments, such as DWI patrols, because officers were able to make more money off duty. The Borough states that off-duty employment resumed once all shifts and assignments were filled.

The FOP argues that the regulation of off-duty employment is mandatorily negotiable and that bans on off-duty employment interfere with police officers' rights under the 14th Amendment.

Off-duty employment provides opportunities for extra income. Several aspects of off-duty police employment are mandatorily negotiable. See, e.g., Somerset Cty. Sheriff, P.E.R.C. No. 2002-60, 28 NJPER 221 (¶33077 2002) (hourly rate of pay for road work); Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987) (hourly rate of pay for outside jobs); Hanover Tp., P.E.R.C. No. 94-85, 20 NJPER 85 (¶25039 1994) (allocation of outside employment opportunities among qualified officers); cf.

Borough of Paramus, P.E.R.C. No. 2001-57, 27 NJPER 188 (¶32062, 2001) (administrative fee is permissively negotiable).

The parties negotiated some aspects of off-duty employment, but then off-duty employment was suspended after the chief determined that it was interfering with his ability to ensure coverage of essential police functions.

A police department provides essential public safety functions. That is why a police department has a managerial prerogative to mandate overtime to meet emergent needs or to guarantee minimum staffing levels. City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). There is no indication, however, that any overtime was mandated. In addition, a police department has the right to extend the work week and workday of police officers to meet an "emergency." N.J.S.A. 40A:14-133. There is no indication that this statutory provision was invoked. Instead, off-duty work was banned until police officers agreed to fill a list of needed positions. There is no indication that those positions could not have been filled without suspending the opportunity to engage in off-duty work.

Under Paterson, the question is whether the employer could have legally agreed that it would approve outside employment requests provided it could meet its staffing needs by denying particular requests only when necessary. Such a narrow agreement would not substantially limit governmental policymaking. See

City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd NJPER Supp.2d 141 (¶125 App. Div. 1984) (employer exceeded needs of staffing emergency by imposing blanket rescision of negotiated provisions on compensatory time off and holidays). The record does not show that the employer could not have met its staffing needs by denying particular off-duty requests when necessary. Accordingly, we deny the request for a restraint of binding arbitration.

ORDER

The request of the Borough of Clayton for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz, Mastriani, Sandman and Watkins voted in favor of this decision. None opposed.

DATED: September 30, 2004
Trenton, New Jersey
ISSUED: September 30, 2004