

P.E.R.C. NO. 2005-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF DENVILLE,

Petitioner,

-and-

Docket No. SN-2004-64

P.B.A. LOCAL 142,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of Denville for a restraint of binding arbitration of a grievance filed by P.B.A. Local 142. The grievance alleges that three Township police officers lost an overtime opportunity when the police chief permitted two police officers from another municipality and a school board security guard to work a security detail. Applying the negotiability balancing test to the unusual facts of this case, the Commission concludes that the Township's decision to enter into a contract permitting Rockaway Township and school to provide a portion of the security services and not to provide more than seven of its own police officers was a governmental policy decision not subject to mandatory negotiations.

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, Scarinci & Hollenbeck, LLC,
attorneys (Richard M. Salsberg, on the brief)

For the Respondent, Cohen, Leder, Montalbano & Grossman
(Bruce D. Leder, on the brief)

DECISION

On April 26, 2004, the Township of Denville petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local 142. The grievance alleges that three Township police officers lost an overtime opportunity when the police chief permitted two police officers from another municipality and a school board security guard to work a security detail.

The parties have filed briefs and exhibits. The Township has filed the certification of its police chief. The PBA has submitted the affidavit of its president.^{1/} These facts appear.

^{1/} One party submitted evidence of a settlement offer of the
(continued...)

The PBA represents all members of the police department, excluding the chief. The Township and the PBA are parties to a collective negotiations agreement effective from January 1, 2002 through December 31, 2005. The grievance procedure ends in binding arbitration.

Rockaway Township adjoins Denville. The Rockaway Township Planning Board scheduled a meeting for December 15 in the auditorium of the Morris Knolls High School, which is located in Denville Township. The board was expecting an overflow crowd that could not be accommodated in its facility.

The Rockaway police chief contacted the Denville chief to discuss having Rockaway pay for having Denville police officers cover the event. The Denville chief and his staff determined that ten officers would be needed. An overtime roster was posted and ten Denville officers agreed to work the detail. In the meantime, the Denville chief spoke with the school board administrator who said that he would be assigning one school security officer to cover the event. The Denville chief then spoke with the Rockaway Township administrator who offered two Rockaway police officers to work the event. With the school security guard and the two Rockaway officers, the chief decided

1/ (...continued)
underlying grievance. The other party objected. In light of our holding, we need not consider the admissibility or substance of the settlement offer.

that only seven Denville officers were needed to work the detail. The last three officers on the overtime list were removed.

On December 16, 2003, the PBA president wrote to the chief and grieved the removal of the three officers from the overtime detail. According to the PBA president, the chief told him that Rockaway objected to the cost of ten Denville officers. The president is unaware of any circumstances where Denville officers have been replaced by other police officers or non-police officers for regular duty, overtime duty, or off-duty use by outside contractors.

On December 17, 2003, the chief denied the grievance. He stated, in part:

On December 4th or 5th I spoke with Rockaway Township Business Administrator, Steve Levinson. We talked about the event and he stated that he wanted to hire 5 Denville Officers to cover it. I advised him that our plan called for 10 officers. He was concerned about the expense to his township and I emphasized the need to have enough manpower for traffic, security, and in case a problem developed.

In the end we agreed to a strength of 10 officers to be filled by 7 Denville Officers, 2 Rockaway Township Officers (on duty), and the one officer from the Morris Knolls security. On December 5 the original sign up list was updated to reflect the contract agreement. The last three Denville officers on the list were deleted. Rockaway Township submitted a purchase order for the hiring of 7 Denville Officers.

The next week, you met with me and during our conversation you stated that the Denville

Officers did not want the Rockaway Township Officers there and would be willing to work the detail with just 7 Denville Officers. I declined this because of safety reasons and felt we should stick to 10. You also stated that the officers might decide not to work the detail. You further stated that a special PBA meeting would be held to discuss the issue.

In reading your letter, your grievance seems to rest on the statement: "The three officers were not dropped due to the detail using less manpower but were replaced by other officers from another jurisdiction to offset the cost." From this your demand follows that the three dropped officers should be compensated.

The issue as I see it is; does the contractor have the right to hire Denville officers and also provide security of his own? On a road job, is it permissible to have flagmen and also police officers hired? My contention is that the Chief of Police has the authority to accept or decline a contract agreement of this kind. Furthermore, manpower and staffing levels are clearly a managerial prerogative of the Chief of Police.

On March 9, 2004, the PBA demanded arbitration. 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 contractual merits of the grievances or any contractual defenses the Township 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 Township argues that its decision was one of subcontracting police services and, as such, the exercise of a non-negotiable managerial prerogative. The Township further argues that the crux of the grievance is dissatisfaction with the chief's decision to allow non-Township employees to cover the Rockaway event, rather than Denville officers on an overtime basis.

The PBA argues that the Township is required to arbitrate the loss of overtime compensation for the three officers. It contends that subcontracting decisions based on fiscal considerations are mandatorily negotiable and the three Denville officers were replaced by other officers to save money.

The Township disagrees with the PBA's assertion that the Denville officers were "replaced" by Rockaway officers and a security guard. It further argues that the chief's decision did not save Denville any money since Rockaway paid for the coverage.

The parties' dispute is not over subcontracting. Subcontracting typically involves a public employer's decision to contract with an individual or some other employer to provide a government service. The public employer pays a fee to the subcontractor to provide the service rather than compensation to its public employees to provide the same service. In this case, Denville did not pay Rockaway to provide any security personnel.^{2/} It was Rockaway that paid Denville for seven police officers to supplement the two officers provided by Rockaway and the security guard provided by the school. Any cost savings in this case went to Rockaway, not to Denville.

Nor does this case permit application of the unit work doctrine. Employees have a recognized interest in seeking to negotiate over preservation of unit work. City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998); State of New Jersey (Div. of Fish, Game and Wildlife), P.E.R.C. No. 94-107, 20 NJPER 232 (¶25115 1994). Use of other employees to perform unit work intimately and directly affects unit employees, even if no

2/ Paterson State-Operated School Dist., P.E.R.C. No. 2001-42, 27 NJPER 99 (¶32038 2001), aff'd 28 NJPER 290 (¶33108 App. Div. 2002), a case the PBA relies on, is distinguishable. That case involved the employer's decision to assign overtime work to a subcontractor's employee rather than to its own employee to save the employer money. In this case, the employer did not pay for the overtime detail and the question is not over allocation of overtime work. The question is whether the PBA can have a say in determining the size and makeup of a security detail that Rockaway Township paid for.

layoffs take place. In many unit work cases, the employer transfers the work to other employees to save money. However, this is not a typical unit work case because no work was transferred to other Denville employees and Denville did not save any money by permitting Rockaway to provide two police officers and the school to provide a security guard. Allowing such coverage under the circumstances of this case poses no threat to the PBA's ability to invoke the unit work doctrine in other contexts.

Our cases involving the use of volunteers are instructive, but also not applicable. See State of New Jersey (Div. of Fish, Game and Wildlife) and cases cited therein. Cases involving volunteers can involve a cost savings for the employer, but do not involve the use of employees assigned and paid for by other public employers.

What this case does involve is the negotiations and contractual relationship between two municipal neighbors seeking to cooperate in meeting an unusual demand. In entering this relationship, Denville was acting as a governmental entity, not as an employer. Applying the negotiability balancing test to the unusual facts of this case, we conclude that the Township's decision to enter into a contract permitting Rockaway and the school to provide a portion of the security services and not to provide more than seven of its own police officers was a

governmental policy decision not subject to mandatory negotiations or binding arbitration. See Belmar Bor., P.E.R.C. No. 2003-52, 29 NJPER 30 (¶10 2003) (union could not challenge employer's decisions to assign an on-duty officer and not to require the presence of an off-duty officer around construction projects). The employees' interest in negotiating over the exclusion of Rockaway police officers and the school security guard from the security detail does not outweigh the employer's interest in deciding what level of police services it will provide and whether to permit another township and a school board to provide their own security services within Denville. We note that this case does not appear to involve any regular loss of overtime work.

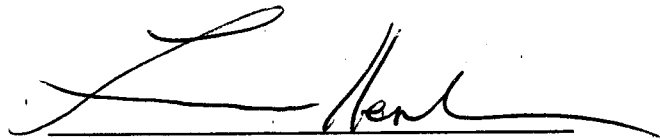
Paterson requires that we continue our analysis to decide whether arbitral enforcement of an alleged agreement to require the exclusive use of Denville police officers for the meeting of the Rockaway Planning Board would place substantial limitations on government's policymaking powers. In other words, we must determine if such an agreement would be permissively negotiable and therefore legally arbitrable. The answer is no. Requiring the Township to have conditioned its agreement with Rockaway on the exclusive use of Denville police officers for a Rockaway meeting would substantially limit Denville's ability to make this

governmental policy determination on how best to cooperate with its neighboring municipality.

ORDER

The request of the Township of Denville for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

A handwritten signature in black ink, appearing to read "L Henderson", written over a horizontal line.

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz, Mastriani and Watkins voted in favor of this decision. None opposed. Commissioner Sandman was not present.

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