

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PATERSON,

Petitioner,

-and-

Docket No. SN-2004-067

PATERSON P.B.A. LOCAL 1,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of proposals made by Paterson P.B.A. Local 1 for inclusion in a successor collective negotiations agreement with the City of Paterson. The Commission finds mandatorily negotiable sections of an article on union leave and office space and telephone use for union business. The Commission also finds mandatorily negotiable and not in conflict with Attorney General Guidelines sections of an article on departmental investigations of employee misconduct, including: providing employees under investigation with the names of complainants and all witnesses, participation in line-ups, release of confidential information that might be pertinent to an officer's defense, and an officer's right to request union representation at an investigatory interview. The Commission also finds mandatorily negotiable a maternity leave clause and an article on wages and benefits for assignments to certain divisions.

The Commission finds not mandatorily negotiable a portion of an article to the extent it requires that the Union president be placed in a non-uniformed division; a portion of an article allowing on-duty officers to conduct union solicitations of business establishments; a portion of an article requiring that no employee shall be required to submit to a blood test, breath analyzer, or any other similar examination or procedure; an article entitled Swap Rule, as worded, because it does not expressly require prior approval; a portion of a clause as worded on providing sick leave notes during an employee's absence, and a clause providing that any hospitalized officer shall have a uniformed police officer assigned until a private room is provided.

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. 2005-32

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PATERSON P.B.A. LOCAL 1,

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Appearances:

For the Petitioner, Dorf & Dorf, P.C., attorneys  
(Christopher J. Vaz, on the brief)

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

DECISION

On May 6, 2004, the City of Paterson petitioned for a scope of negotiations determination. The City seeks a determination that several articles proposed by Paterson P.B.A. Local 1 for inclusion in a successor collective negotiations agreement are not mandatorily negotiable.

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

The PBA represents all police officers, excluding superior officers. The parties' most recent contract expired on July 31, 2003. It contains several provisions that the PBA seeks to have retained in a successor contract and that the City objects are not mandatorily negotiable. The PBA has also proposed new

articles that the City maintains are not mandatorily negotiable. The PBA has petitioned for interest arbitration.

Our jurisdiction is narrow. We do not consider the wisdom of the proposals, only their abstract negotiability. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977). Further, we consider only whether they are mandatorily negotiable. We do not decide whether contract proposals concerning police officers are permissively negotiable since the employer need not negotiate over such proposals or consent to their retention in a successor agreement. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

#### Union Business and Telephone Use

Article 2 is entitled Association Security and Privileges.

The City asserts these sections are not mandatorily negotiable:

- 2.6 The Association President shall be assigned to the day tour of duty in a non-uniform division appropriate to his fulfilling the obligations of his office including but not restricted to the attending of Association meetings, the processing of grievances, and the administration of this Contract with the City and its employees. He shall not suffer any loss of wages or benefits while fulfilling the requirements of this section. The Association President shall be placed into detective status with regard to his terms and conditions of employment, but shall suffer no [loss] of wages, benefits as a consequence thereof.

- 2.7 Elected Officers of the Association shall be excused from duty at the time meetings and officers workshops held prior to the meeting are to be held, so that they are able to attend meetings of the general membership, and they shall not be required to perform any additional services to make up for time spent in attendance at such meetings. The shift commander may not unreasonably refuse to excuse an individual if remaining manpower is adequate to meet the service needs of the organizational unit of which that individual is assigned.
- 2.8 The PBA State Delegate or the alternate delegate shall be excused from duty with pay to conduct official business necessary in accordance with the duties of the office of delegate, provided that such release time does not interfere with the emergency requirements of the Police Department.
- 2.9 A maximum of four (4) members of the Association shall be designated by the Association President and shall be assigned to the day tour, and shall be excused from duty without loss of pay or benefits, to survey and distribute to the business establishments in the City of Paterson a window security shield decal. The assignment of these men shall commence in the month of January each year, and on a specific date which will be mutually decided upon between the Public Safety Director and the Association President. The duration of this assignment will end upon the completion of the survey not to exceed ten (10) weeks. This activity will be in conformance with the rules and regulations and with any directives issued by the Attorney General and/or Prosecutor's Office.
- 2.11 The City shall provide an office in the Headquarters building for the sole use of this Association's officers to administer this Contract and to execute duties of their office. The Association shall bear the full cost of furnishing said office, however, the City will provide a Division phone in the office to be used by the Association officers for official business only.

Absent a preemptive statute or regulation, proposals allowing paid leaves of absence and release time and use of office space and equipment for union business are mandatorily negotiable. See, e.g., Town of Kearny, P.E.R.C. No. 2002-77, 28 NJPER 264 (¶33101 2002); Town of Kearny, P.E.R.C. No. 2001-58, 27 NJPER 189 (¶32063 2001); City of Jersey City, P.E.R.C. No. 97-6, 22 NJPER 279 (¶27150 1996); Bergen Cty. Prosecutor, P.E.R.C. No. 96-81, 22 NJPER 237 (¶27123 1996); City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990); State of New Jersey, P.E.R.C. No. 86-16, 11 NJPER 497 (¶16177 1985). Proposals may specify that a union official will be assigned to the day shift to facilitate union business. Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980); City of Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (¶16184 1985). An employer, however, may use all its employees to respond to an emergency. Newark.

With respect to sections 2.6, 2.7, and 2.8, the City recognizes that paid leaves for union business are generally negotiable, but it asserts that N.J.S.A. 11A:6-12 and N.J.A.C. 4A:6-1.16 permit Civil Service jurisdictions to grant unpaid leaves and thus inferentially prohibit paid leaves. However, this statute and regulation do not apply. N.J.S.A. 11A:6-9 provides that "leaves of absence for police officer and firefighter titles shall be governed by the applicable provisions of Title 40A of the New Jersey statutes and N.J.S.A. 11A:6-10."

The City does not argue that either Title 40A or N.J.S.A. 11A:6-10 preempts negotiations so we do not consider the City's preemption argument further.

With respect to section 2.6, the City also contests the requirements that the president be placed in a non-uniformed division and in detective status. The PBA believes that wearing plainclothes allows the president to appear as an equal to management when performing union functions. We appreciate that concern, but that interest is outweighed by the employer's interest in determining the divisional assignments of its officers.<sup>1/</sup> However, the City must negotiate over the detective status proposal because it is limited to identifying the president's salary, benefits and employment conditions and does not require that any detective duties be assigned.

With respect to section 2.9, the City maintains that it cannot be required to negotiate over assigning police officers to survey business establishments and distribute window security shield decals. It cites a Division of Criminal Justice report

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<sup>1/</sup> In Local 195, IFPTE v. State, 88 N.J. 393 (1982), our Supreme Court held mandatorily negotiable a proposal that prohibited routine reassignments or transfers of Association officials or stewards, but permitted an operationally-required reassignment or transfer. That case does not, however, warrant a different result. The union officials in Local 195 had a need for continuity in an assigned shift and location that is not present in this case. The City does not challenge the negotiability of a contractual requirement that the president be assigned to the day tour and thus be available to perform union functions.

characterizing this practice as "PBA Solicitations," questioning its propriety, and recommending its discontinuance. We need not determine the legality of this practice; we need only determine whether the City may refuse to negotiate over lending its own endorsement to this practice by assigning officers for that purpose. Given its prerogative to determine how to best deploy its police officers, we hold that it may so refuse. City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998); cf. City of Perth Amboy, P.E.R.C. No. 95-11, 20 NJPER 330 (¶25171 1994) (city had prerogative to unilaterally discontinue 30-year practice of permitting on-duty police officers to participate in charitable fund drive).

With respect to Section 2.11, the City argues that requiring a public employer to provide a telephone and to pay for the PBA's official telephone calls is an unconstitutional gift and is not mandatorily negotiable. Several cases have rejected such arguments. See, e.g., Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981); State of New Jersey; Bergen Cty. Prosecutor. The City's concern that there is no contractual mechanism for ensuring that calls are limited to union business can be addressed through negotiations and goes to the wisdom of the proposal rather than its negotiability.

Procedures for Interviewing Officers Accused of Misconduct

Section 5 is entitled Police Officers' Rights. Section 5.3 is entitled Guidelines for Interrogation of Members of the Department. The City asserts that the underlined provisions are not mandatorily negotiable:

- 5.3.6 The employee shall be informed of the nature of the investigation before any questioning commences, including the name of the complainant and all witnesses. The names and the addresses of the complainants and/or witnesses need not be disclosed if sufficient information to reasonably apprise the employee of the allegations is otherwise provided. If it is known at the initial contact, an employee being questioned shall be informed whether he is the target of a criminal investigation or a witness.
- 5.3.9.1 Upon the completion of an investigation which does not result in disciplinary action or the filing of charges, upon the approval of the Chief of Police, all records and notes of the investigation with the exception of a summary that the investigation did occur shall be removed from the files of the Internal Affairs Unit and destroyed. In no event shall such records or notes, including any complaint, be placed in an employee's personnel file.
- 5.7 In case of an allegation brought against an employee, an employee shall not be required to participate in any "line-up" or "show-up" for the purpose of allowing any complainant or witness to view their person, unless the employee is provided for all legal protection as provided by law.
- 5.11.1 No employee shall be required to submit to a pathometer, polygraph or other lie detector test, blood test, breath analyzer, or any other examination,



procedure or test of a similar purpose.  
Such test may be given if requested by  
the employee or if required by law.

The PBA has proposed the following new sections:

- 5.3.9.3 All information concerning an Internal Affairs Investigation, including but not limited to the existence of such an investigation, shall be kept strictly confidential and shall not be disclosed to any person except the Director of Public Safety, the Chief of Police, those investigators in the Internal Affairs Division directly involved in the investigation, the police officer(s) subject to the investigation, the Association President and such representatives of the Association as shall be designated by the Association President for purposes of receiving such information and the Commanding Officer and supervisory officer(s) of the officer(s) subject to the investigation unless the disclosure of such information to other persons is required by law.
- 5.3.9.4 The Association shall be notified of the identity of any police officer who is or may be the subject of an Internal Affairs Investigation, whether involving potential administrative or criminal charges, at or before the time that such notice is provided to the police officer who is or may be the subject of an Internal Affairs Investigation. An Association representative shall be notified a reasonably sufficient time in advance and be permitted to attend any interview, meeting or discussion held with a police officer who is or may be the subject of an Internal Affairs Investigation where the subject of the interview, meeting or discussion has a reasonable likelihood of being allegations concerning the police officer which are a subject of the Internal Affairs Investigation.

We emphasize that these proposals are limited to establishing procedures for departmental investigations of suspected employee misconduct and cannot be construed as applying to criminal investigations of possible crimes committed by employees. Employees cannot negotiate for greater protections in criminal investigations than the procedural rights accorded citizens. Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985). Given that distinction, we have held that proposals establishing procedures for departmental investigations of employee misconduct are mandatorily negotiable unless a statute or regulation preempts negotiations or a particular proposal would significantly interfere with a governmental policy determination. See, e.g., Passaic Cty., P.E.R.C. No. 2003-96, 29 NJPER 297 (¶91 2003); Franklin Tp.

The City asserts that N.J.S.A. 40A:14-181 preempts negotiations. That statute provides:

Every law enforcement agency shall adopt and implement guidelines which shall be consistent with the guidelines governing the "Internal Affairs Policy and Procedures" of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreement.

The City argues that the provisions and proposals in dispute specify procedures that are inconsistent with those promulgated by the Division of Criminal Justice on behalf of the Attorney

General (AG Guidelines) and thus required to be adopted pursuant to N.J.S.A. 40A:14-181. We will examine each disputed procedure to ascertain whether any conflict exists.

With respect to section 5.3.6, the City asserts that this provision conflicts with the AG Guideline (11-16) requiring agencies to accept anonymous reports and instructing agencies to inform officers being investigated of the subject of the investigation. We discern no conflict between the section and the guideline. Section 5.3.6 does not prohibit an investigation based on an anonymous source nor does it mandate disclosure of complainants and witnesses in all instances. Instead, the clause assures officers that they will be given enough information to be reasonably apprised of the allegations against them. Such an assurance is consistent with due process and is not inconsistent with the guidelines.

With respect to section 5.3.9.1, the City argues that this section conflicts with the records retention schedule in the AG Guidelines. We need not answer this contention because the PBA has responded that this section is permissively rather than mandatorily negotiable under City of Paterson, P.E.R.C. No. 85-34, 10 NJPER 565 (¶15264 1984). Thus, the City may insist that this section not be included in a successor contract. We add, however, that the AG Guidelines specify (11-46) that when a complaint has a disposition of exonerated, not sustained, or

unfounded, an employee's personnel file cannot mention the complaint.

With respect to section 5.7, the City asserts that this section conflicts with a portion of the AG Guidelines (11-33) allowing lineups without probable cause. The AG's discussion adds that a lineup must be constructed so as not to be unfairly suggestive. We discern no conflict between the section and the guideline. The section does not prohibit lineups; instead, it permits them so long as the employee has received all protections provided by law. The guidelines do not approve or require lineups where such protections are not provided. We stress that we are simply requiring negotiations over the issue of ensuring that employees receive the procedural protections required by law.

With respect to section 5.11.1, the City asserts that this section conflicts with a portion of the AG Guidelines (11-28) stating that "police officers who are the subjects of internal investigations may be compelled to submit to various physical tests or procedures to gather evidence" and specifying that such tests include breath and blood samples. Orders to undergo such tests "must be reasonable and relevant to the investigation at hand." The section and the guidelines conflict because the section bans blood and breath tests unless requested by the employee or required by law. Further, we have held that such

broad prohibitions are not mandatorily negotiable. See, e.g., Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993).

With respect to the proposed section 5.3.9.3, the City contends that this section is inconsistent with the portion of the AG Guidelines discussing the limited release of confidential information (11-46). We do not discern the conflict alleged. If the Association is representing an officer being investigated, it may be proper under the guidelines and the proposed section to provide the officer and the Association with the information pertinent to the officer's defense. For example, the AG Guidelines state that if charges are brought against an officer, the officer should receive a copy of internal investigation reports that will be used as evidence. These reports could presumably also be released to the union official or attorney representing the officer at the hearing.

With respect to proposed section 5.3.9.4, the City asserts that this section conflicts with a portion of the AG Guidelines (11-42) recognizing an accused officer's right to request union representation at an investigatory interview that may result in discipline. The PBA states that the proposed section would not compel an objecting police officer to accept the PBA's attendance or representation, but it would give the officer the opportunity to make an informed choice before foregoing representation. We discern no conflict between the section and the regulation. That

the guidelines permit employees to request representation does not mean that they prohibit majority representatives from being informed of interviews and asking the officers whether they wish to have or forego representation. We also note that the guidelines and our case law concur that a union representative cannot obstruct an interview. State of New Jersey (Dept. of Law and Public Safety), P.E.R.C. No. 2002-8, 27 NJPER 332 (132119 2001).

### Swaps

Section 7.1.4 is entitled Swap Rule. It provides:

In the event that an employee requests a specific additional day off, and the manpower within his/her own squad has already reached a minimum manpower level for that day, then that employee will have the benefit of a "swap" with another employee of the opposite platoon within the same division. A Departmental Swap Form will be submitted to both Commanding Officers recording the change at least three (3) working days prior to the anticipated swap date.

The City argues that this section is not mandatorily negotiable because it does not expressly require the department's prior approval before a swap is made. The PBA asserts that this recent clause has not been implemented yet, but the parties understood the chief's approval would be required. We hold that the present clause, as worded, is not mandatorily negotiable

because it does not expressly require approval. See, e.g., Union Tp., P.E.R.C. No., 87-119, 13 NJPER 289 (¶18121 1987).

Sick and Maternity Leave

Section 17 is entitled Sick and Injured Leave. Section 17.2 provides:

A physician's note shall not be required if an employee has been on Sick Leave unless there is a personal request made, during the employee's absence by the Chief of Police or his designee.

The parties agree that this clause is not mandatorily negotiable to the extent it would prevent the employer from demanding a physician's note after an officer returned from sick leave.

Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). The PBA states that it may seek to have the clause reworded to ensure that a police officer who has returned to work will not be docked or penalized for having to use non-sick time to get a doctor's note at that point. We hold that Section 17 is not mandatorily negotiable as worded.

Section 18.1 is entitled Maternity Leave. It provides:

An employee, with one (1) year or more of service, shall be granted maternity leave without pay, for eighteen (18) months duration from the time of pregnancy but no longer than nine (9) months after the birth of the child and shall be returned to duty without loss of seniority and longevity provided she notified the Division after six (6) months of leave that she intends to return. Longevity and seniority however,

shall not accrue during such leave. The Police Surgeon/City Physician, after consultation with the employee's physician shall determine when the employee is no longer able to properly perform her duties, and also to perform her duties when she requests to return. The employee, at her sole discretion, may use Vacation Leave, Personal Leave or other eligible leave before being taken off the payroll. Such time shall be part of the eighteen (18) months. Upon return from such maternity leave, the employee shall be returned to service in the same rank, but not necessarily the same assignment.

The City argues that this section is preempted by the federal Family and Medical Leave Act and the State Family Leave Act to the extent leave time shall also be counted against the statutory 12-week entitlement and by N.J.A.C. 4A:6-1.1(a)(2) to the extent an unpaid leave extends beyond one year without compliance with that regulation's approval procedures. We reject these preemption arguments. Lumberton Tp. Bd. of Ed., P.E.R.C. No. 2002-13, 27 NJPER 372 (¶32136 2001), aff'd 28 NJPER 427 (¶33156 App. Div. 2002), makes clear that the family leave statutes do not prohibit negotiated clauses providing for longer leaves than those mandated by statute. And, as we have already held, Civil Service regulations such as N.J.A.C. 4A:6-1.1(a)(2) do not govern leaves of absence for police officers and firefighters. N.J.S.A. 11A:6-9.



Wages

Section 29 is entitled Wages. Section 29.7.1 provides:

All employees assigned to the following divisions shall receive the same wages, benefits and other terms and conditions of employment as are received by employees who are assigned as Detectives in the details: Internal Affairs Division, Vice and Narcotics Division, Special Investigations Division, Investigative Support Division, Chiefs Administrative Office, Criminal Investigation Division and the Juvenile Division.

The City argues that this provision interferes with its prerogative to establish and change the table of organization. The SOA responds that this section addresses wage and benefit issues only and does not require that employees be identified as detectives or assigned any detective duties, or prohibit eliminating or consolidating any divisions. We hold that the provision is mandatorily negotiable because it expressly addresses wages and benefits. Should the provision be retained in a successor contract and should the PBA seek to arbitrate a contention that the clause applies in a different context, the City may file a new scope petition.

Hospital Assignments

The PBA has proposed a new Section 22.2 entitled Uniformed Security for Hospitalized Police Officers. The proposal states:

Any sworn police officer hospitalized in a local hospital, St. Joseph's Hospital, Paterson or Wayne and Barnert Hospital shall

have a uniformed police officer assigned for his protection until that time the officer is provided with a private room.

This proposal is not mandatorily negotiable because, on balance, the employees' interests in negotiating for such assignments to address their safety concerns are outweighed by the City's interests in determining how to best deploy its police officers given its staffing levels. Jersey City.

ORDER

The following provisions and proposals are mandatorily negotiable:

Sections 2.6 (except to the extent it mandates assignment of the PBA president to a non-uniformed division), 2.7, 2.8, and 2.11;

Sections 5.3.6, 5.7, 5.3.9.3, and 5.3.9.4, as limited to departmental investigations of suspected employee misconduct;

Section 18.1; and

Section 29.7.1.

The following provisions and proposals are not mandatorily negotiable:

Sections 2.6 to the extent it mandates the assignment of the PBA president to a non-uniformed division;

Section 2.9;

Section 5.11.1;

Section 7.1.4;

Section 17.2; and

Section 22.2.

BY ORDER OF THE COMMISSION

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

Lawrence Henderson  
Chairman

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

DATED: November 23, 2004  
Trenton, New Jersey  
ISSUED: November 24, 2004