

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2005-035

FOP LODGE 12,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Newark for a restraint of binding arbitration of a grievance filed by FOP Lodge 12. The grievance contests a directive requiring all police officers assigned to walking posts and traffic control to wear reflective vests. The Commission concludes that this grievance primarily involves the City's governmental policy decision to modify the uniform of certain officers, in part for the operational reasons of improving traffic control and increasing officer visibility and in part because the City believes the vests will decrease the likelihood that officers will be injured on duty and will reduce its workers' compensation costs.

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. 2005-84

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CITY OF NEWARK,

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Docket No. SN-2005-035

FOP LODGE 12,

Respondent.

Appearances:

For the Petitioner, JoAnne Y. Watson, Corporation
Counsel (Phillip Dowdell, Assistant Corporation
Counsel, on the brief)

For the Respondent, Markowitz & Richman, attorneys
(Stephen C. Richman and Charles F. Szymanski, on the
brief)

DECISION

On December 6, 2004, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by FOP Lodge 12. The grievance contests a directive requiring all police officers assigned to walking posts and traffic control to wear reflective vests.

The parties have filed briefs and exhibits. The FOP has submitted the affidavits of Jim Sharrock, undersheriff in Hudson County, and John Sisto, past president of the New Jersey State FOP. The City has submitted the affidavit of John Huegel, deputy police chief. These facts appear.

The FOP represents the City's police officers. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2004. The grievance procedure ends in binding arbitration.

On May 3, 2004, Acting Police Chief Irving Bradley, Jr. issued a memorandum relating to traffic control and walking posts, reflective vests and log sheets. It provides, in part:

Effective immediately, all police officers assigned to Walking Posts and Traffic Control Posts shall wear reflective vests.

District, N.E.S.T. and Traffic Division Commanders shall ensure police officers who were assigned vests as part of their equipment have them readily available at all times.

The Fleet Resource Supervisor shall contact the above commands to inventory the number of vests each command has to ensure a sufficient amount of vests are available for use for all personnel assigned to Walking and Traffic Control Posts. The Commander of Fleet Resources shall submit a report to the Chief of Police by May 7, 2004, indicating the results of the inventory.

On June 2, 2004, the FOP filed a grievance asserting that the memorandum was a unilateral change in the use of safety equipment in violation of several contract articles. The grievance does not challenge the portions of the memorandum pertaining to the maintenance and submission of logs and reports. The City denied the grievance and on November 16, 2004, the FOP 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 merits of the grievance or any contractual defenses the employer may have.

In Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), our Supreme Court outlined 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 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.

The City argues that it has a managerial prerogative to require officers to wear reflective vests. It relies on our case law holding that the determination of the daily police uniform is not mandatorily negotiable unless related to the health and safety of officers. The City also states that it is trying to manage its workers' compensation liability and believes that officers who wear reflective vests are less likely to be injured by motor vehicles.

The FOP counters that the reflective vest requirement is mandatorily negotiable because it significantly impacts officer health and safety. It maintains that the vests make police officers a target for criminals, citing Sharrock's and Sisto's statements that in a foot chase, particularly in a poorly lighted

area, the vests will make the officers an easier target for a shooter. Sharrock and Sisto also assert that the vests could impair officers' ability to defend themselves because weapons could catch on the vest and could be hard to retrieve if an officer's vest were too long.

In response, the City submits the affidavit of Deputy Chief Hugel who states that, by increasing traffic officers' visibility, the vests enable traffic officers to better control traffic and maintain public safety. Based on Hugel's affidavit, the City also contends that the FOP's alleged safety concerns are unfounded. Hugel states that the vests present no more of an impediment than other police garments and could be adjusted if they did not fit an individual officer. He also indicates that the vests are worn over the same area where a bullet-proof vest is worn and, because they need light to be reflective, would not make an officer more visible in the course of an alleyway pursuit. The City disputes that the vests would also make officers easier targets for violence; it reasons that they are already at risk because they wear uniforms and badges and drive marked vehicles.

In addition, the City has submitted a September 13, 2001 memorandum from a patrol officer who requested that she be issued a reflective vest after almost being hit by a motorist after helping a woman and her children cross a street. The motorist explained that he had not seen her because of her dark clothing.

The City effectively modified the uniform of officers assigned to traffic control and walking posts when it required them to wear reflective vests. Consistent with our case law concerning police uniforms, we conclude that the grievance is not legally arbitrable.

In City of Trenton, P.E.R.C. No. 79-56, 5 NJPER 112 (¶10065 1979), recon. den. P.E.R.C. No. 79-95, 5 NJPER 234 (¶10131 1979), aff'd in part, rev'd in part NJPER Supp.2d 84 (¶65 App. Div. 1980), we held that by their very appearance, police officers may act as a deterrent to crime and that, therefore, a police officer's uniform, including garments, footwear and headgear, relates to the manner and means of delivering police services and as such is not mandatorily negotiable. Trenton added that to the extent uniform proposals relate to health and safety they may be mandatorily negotiable, but the Appellate Division reversed this portion of our holding as premature and inconsistent with the then-prevailing law concerning the obligation to negotiate over the impact of non-mandatorily negotiable subjects. In subsequent cases, we have stated that police uniforms are not mandatorily negotiable unless related to officer health and safety. See, e.g., Essex Cty. Sheriff's Dept., P.E.R.C. No. 2000-79, 26 NJPER 202 (¶31082 2000); Borough of Butler, P.E.R.C. 87-121, 13 NJPER 292 (¶18123 1987); Hunterdon Cty., P.E.R.C. No. 83-46, 8 NJPER 607 (¶13287 1982). However, our cases do not disclose a uniform clause that was held to be mandatorily negotiable because of its

impact on safety and, further, we have never found that the uniform prescribed by a public employer was mandatorily negotiable by virtue of a majority representative's safety-related objections. Indeed, in the one case where a majority representative challenged a uniform directive on such grounds, we restrained arbitration of the grievance. See City of Elizabeth, P.E.R.C. No. 92-106, 18 NJPER 262 (¶23109 1992).

Within this framework, this grievance primarily involves the City's governmental policy decision to modify the uniform of certain officers, in part for the operational reasons of improving traffic control and increasing officer visibility and in part because the City believes the vests will decrease the likelihood that officers will be injured on duty and will reduce its workers' compensation costs. Given the governmental policy determination inherent in the initial establishment of uniform requirements, the City's decision to modify the uniform for the above reasons does not convert the topic into a mandatorily or permissively negotiable issue because of the FOP's disagreement with the City's safety assessment. In this vein, Elizabeth is instructive.

As in this case, the grievance in Elizabeth did not seek to enforce contractual safety measures or guarantees. Instead, it challenged the employer's determination that, consistent with national fire standards, protective trousers or "bunker pants" increased firefighters' safety and should be required. Some

firefighters believed the bunker pants resulted in "overprotection" and an inability to gauge danger, and they sought to opt-out of the requirement. The FMBA cited a report on protective clothing that allegedly supported this position. The City disagreed, maintaining that the report showed that, in those instances where employees felt "overprotected," protective hoods had been involved. We agreed with the City on the latter point; stated that employers have a responsibility to provide a safe and healthful work environment; and noted that some, but not all, unit members disagreed with the employer's determination. We stated that we were unable to conclude that the grievance would promote employee safety and found instead that it sought to prevent the City from implementing a measure to increase employee safety.

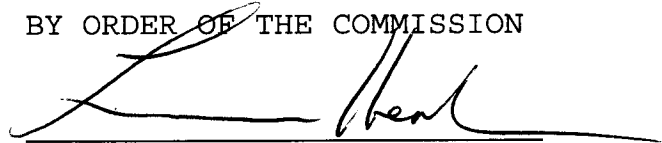
A similar analysis pertains here. The City has cited substantial reasons for its belief that the reflective vests will increase employee safety and the grievance is aimed at preventing the City from implementing a safety measure rather than seeking additional safety protections. South Brunswick Tp., P.E.R.C. No. 86-115, 12 NJPER 363 (¶17138 1986), cited by the FOP, supports the proposition that the provision of protective (armored) vests promotes employee safety but does not address whether a grievance challenging the employer's determination to require vests as part of a police uniform is legally arbitrable. In this case, that determination is intertwined with the City's governmental policy

determination that the vests will promote public as well as officer safety by making officers more, rather than less, visible. Accordingly, under all the circumstances of this case, we hold that arbitration would substantially limit the City's decision to require reflective vests as part of the police officer uniform for walking posts and traffic control.

ORDER

The City of Newark's request for a restraint of binding arbitration is granted.

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. None opposed. Commissioner Mastriani was not present.

DATED: June 30, 2005
Trenton, New Jersey
ISSUED: June 30, 2005