

P.E.R.C. NO. 2006-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CHERRY HILL TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. IA-2005-086

FRATERNAL ORDER OF POLICE,
LODGE 28,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission dismisses a motion made by the Cherry Hill Township Board of Education to dismiss a Petition to Initiate Compulsory Interest Arbitration filed by the Fraternal Order of Police, Lodge 28. The Board objected to the processing of the petition on the ground that the Board was not covered by the interest arbitration statute, N.J.S.A. 34:13A-15. The Commission concludes that the Board has a public police department and that the Legislature did not intend to exclude its campus police officers from interest arbitration. The Commission remands the case to the Director of Arbitration for processing.

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 Respondent, Schwartz Simon Edelstein Celso &
Kessler, attorneys (Paul H. Green, of counsel)

For the Petitioner, Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

DECISION

On April 27, 2005, Fraternal Order of Police, Lodge 28 filed a Petition to Initiate Compulsory Interest Arbitration with respect to a unit of "school resource officers/police officers" employed by the Cherry Hill Township Board of Education. On May 9, the Board objected to the processing of the petition on the ground that the Board is not covered by the interest arbitration statute, N.J.S.A. 34:13A-15. On July 5, the FOP responded that the Board's police officers were a "police department" under N.J.S.A. 34:13A-15 and that its petition should be processed. It also contended that the Board's objection was "belated" because, when the FOP filed for interest arbitration during the last round

of negotiations, the Board participated in the selection of an interest arbitrator and a settlement was reached without the need for a formal hearing.

On July 15, 2005, the case was transferred to the Chairman pursuant to N.J.A.C. 19:16-5.2(b). The Board filed a reply brief maintaining that Lodge 28's entitlement to compulsory interest arbitration was never adjudicated; reiterating its position that boards of education are not subject to the interest arbitration statute; and contending that unit members do not perform police services. At our request, both parties submitted certifications describing the job duties of unit members. The FOP submitted the certification of Richard Bogin, one of the Board's campus police officers.^{1/} The Board submitted the certification of Michael Nuzzo, its Director of Security. No material facts are in dispute and this is the pertinent background.

Background

N.J.S.A. 18A:6-4.2 et seq. authorizes the governing body of any school or other institution of learning to appoint "policemen for the institution." Applicants for such positions must first be approved by the police chief in the municipality where the school is located, or by the Superintendent of the State Police. Approved applications are then forwarded to the school's

^{1/} This is the Board's terminology, which we will use in this decision.

governing body, which issues a commission to the candidate.

N.J.S.A. 18A:6-4.5 specifies that:

Every person so appointed and commissioned shall possess all the powers of policemen and constables in criminal cases and offenses against the law anywhere in the State of New Jersey, pursuant to any limitations as may be imposed by the governing body of the institution which appointed and commissioned the person.

Since at least 1995, the Board has appointed "campus police" pursuant to N.J.S.A. 18A:6-4.2^{2/} and it currently employs five such officers. Officers work 7:00 a.m. to 3:30 p.m. or 7:30 a.m. to 3:30 p.m., ten months per year. Four officers are assigned to the district's two high schools and one has responsibility for the district's three middle schools and all of its elementary schools. The officers assigned to the high schools patrol the facilities, while the officer assigned to the elementary and middle schools primarily makes the rounds of the district's three middle school buildings.

As required by N.J.S.A. 18A:6-4.4, campus police officers have completed a police training course at a police academy approved by the Police Training Commission. They are sworn as police officers; have access to certain restricted items such as

^{2/} The Board at one point suggests that this statute appears to be primarily directed at institutions of higher learning. However, Nuzzo certifies that campus police officers are appointed pursuant to the statutory scheme. Further, N.J.S.A. 18A:6-4.2 pertains to "the governing body of any school or other institution of learning" - language that includes boards of education.

criminal history and juvenile justice records; and complete annual firearms, domestic violence, and deadly force training as mandated by the New Jersey Attorney General's office.

The Board's "school police officer" job description states that, under the administration's supervision, an officer:

[I]s responsible for the discharge of police activities designed to provide assistance and protection for persons, to safeguard school district property, provide required services to the School District of Cherry Hill, assure observance of the laws of the Township of Cherry Hill, the State of New Jersey, rules and regulations of the School District of Cherry Hill and shall possess all the powers of policemen and constables in criminal cases and offenses against the law. [Emphasis supplied]

The underscored language incorporates N.J.S.A. 18A:6-4.5. The job description adds that, among other duties, officers apprehend, warn, cite and take into custody violators of the law; provide police protection when large sums of money are in transit; provide security and surveillance of their assigned area; and receive and investigate complaints.

Campus police officers also have traffic enforcement and crime detection responsibilities that complement and sometimes intersect with those of the Cherry Hill Township municipal police. For example, campus police officers issue school parking permits and enforce traffic regulations on school property. They also issue traffic summonses on both Board property and contiguous public roadways and assist municipal police with

traffic control when needed. Traffic summonses are processed through Cherry Hill Township Municipal Court in the same manner as those issued by Cherry Hill Township police officers.

Campus police officers have filed police reports using forms from the Cherry Hill Township police department, collected evidence, arrested and fingerprinted students, and released students to their parents' recognizance. Police reports and collected evidence are turned over to the Cherry Hill Township Police Department. According to Nuzzo, campus police do routine crime scene processing and municipal police are not called to respond to in-school incidents unless a serious crime is involved, such as a violent crime or possession of a weapon.^{3/} Bogin maintains that campus police officers function in the same way as municipal or county police who are assigned to schools as "school resource officers."

The Board does not permit campus police officers to carry firearms while at work, although they may do so when off duty. While on duty, officers are equipped with batons and handcuffs

^{3/} The FOP has submitted a November 2, 1996 memorandum from Nuzzo to school principals that directs high school principals to continue the "present practice" of simultaneously notifying both township and campus police in the event of an emergency. The memorandum also includes protocols for when middle and elementary school principals should contact municipal police and when they should call for campus police. Any factual dispute as to when municipal police are called is not material to our decision on this motion.

and wear a nameplate and metallic shield inscribed with the words "Police" and "Board of Education, Township of Cherry Hill." See N.J.S.A. 18A:6-4.8 (requiring such identification). Their I.D. cards identify them as members of the Campus Police Department.

In 1996, the Board received a Community Oriented Policing Services (COPS) grant from the United States Department of Justice to hire two campus police officers. The application identified the "agency" as the Cherry Hill Campus Police; included an IRS "law enforcement agency" identification number; and designated the assistant superintendent as "chief law enforcement executive." The Board was listed as the applicant organization and governmental entity.

Subject to N.J.S.A. 18A:6-4.3, campus police officers are hired and fired by the Cherry Hill Board of Education, as recommended by the Superintendent of Schools. They are evaluated annually by the building principal or principals with whom they work, as well as by Nuzzo, a retired Cherry Hill Police Department lieutenant and the Board's Director of Security since 1996. Nuzzo certifies that he supervises the "police aspects" of the officers' job performance. Campus police officers are members of the Public Employment Retirement System (PERS), not the Police and Fire Retirement System (PFRS). According to the FOP, complaints about an officer's conduct are handled by the

internal affairs department of the Cherry Hill municipal police department.

Analysis

We start with the threshold procedural issue of whether the Board may object to the petition. We hold that it can. The Board's participation in the selection of an interest arbitrator was not a determination of Lodge 28's rights, and we note that an employer may agree to arbitrate an ongoing negotiations dispute involving employees other than police or fire officers. N.J.S.A. 34:13A-7; City of Trenton, P.E.R.C. No. 95-13, 20 NJPER 332 (¶25173 1994).

We turn to the substance of the Board's objections.

N.J.S.A. 34:13A-16 sets forth procedures for resolving a negotiations impasse between a public fire or police department and an exclusive representative, including the right of either party to petition for binding interest arbitration. N.J.S.A. 34:13A-15 defines "public police department" as:

[A]ny police department or organization of a municipality, county or park, or the State, or any agency thereof having employees engaged in performing police services including but not necessarily limited to units composed of State troopers, police officers, detectives and investigators of counties, county parks and park commissions, grades of sheriff's officers and investigators; State motor vehicle officers, inspectors and investigators of Alcoholic Beverage Commission, conservation officers in Fish, Game and Shell Fisheries, rangers in parks, marine patrolmen; correction officers,

keepers, cottage officers, interstate escort officers, juvenile officers in the Department of Corrections and patrolmen of the Human Services and Corrections Departments; patrolmen of Capitol police and patrolmen of the Palisades Interstate Park Commission.

This definition was included in the 1977 interest arbitration legislation, L. 1977, c. 85, §2, and was not changed by the Police and Fire Public Interest Arbitration Reform Act, L. 1995, c. 425.

In determining whether FOP Lodge 28 is entitled to invoke compulsory, binding interest arbitration, we consider whether: (1) the Board meets the definition of "public police department"; and (2) campus police officers are engaged in performing police services. Camden Cty., P.E.R.C. No. 85-11, 10 NJPER 501 (¶15229 1984); New Jersey Institute of Technology, P.E.R.C. No. 84-47, 9 NJPER 666 (¶14287 1983); see also Rutgers, The State Univ., P.E.R.C. No. 94-45, 19 NJPER 579 (¶24275 1995), aff'd 21 NJPER 45 (¶26029 App. Div. 1994), certif. den. 140 N.J. 276 (1995) (addressing definition of "public police department"). We answer both questions in the affirmative, and deny the Board's motion to dismiss the petition. We detail the reasons that lead to this conclusion, starting with the question of whether campus police officers are engaged in "performing police services."

N.J.S.A. 34:13A-15 does not define "performing police services" and our decisions have not done so either. Instead, we have examined the duties, responsibilities, and required training

of the employees in question, with emphasis on whether they have statutory police powers. Camden; NJIT. Our case law in this area is related to decisions considering whether employees are police for the purposes of N.J.S.A. 34:13A-5.3, providing that police generally do not have the right to join employee organizations that admit non-police. That analysis was in turn shaped by Gloucester Cty. v. PERC, 107 N.J. Super. 150, 158 (App. Div. 1969), aff'd o.b. 55 N.J. 333 (1970), where the Appellate Division held that corrections officers were "police" under 5.3 because they had the statutory authority "to act as officers for the detection, apprehension, arrest and conviction of offenders." See N.J.S.A. 2A:154-4. While our contrary ruling in Gloucester had emphasized that corrections officers were unarmed and did not exercise their statutory powers, the Court reasoned that those factors did not negate the officers' statutory duty to detect, apprehend and arrest in appropriate circumstances.

Following Gloucester, we have held that employees are "police" for purposes of 5.3 if they have the statutory authority to make arrests, even if the authority is limited to a particular class of violations. Warren Cty., P.E.R.C. No. 86-11, 12 NJPER 357 (¶17134 1986) (weights and measures officers were police because they had statutory power to arrest with respect to violations of weights and measures statutes). Conversely, we have held that a lack of statutory arrest power weighs heavily,

if not conclusively, against a finding that an employee is a police officer under 5.3. See, e.g., Mercer Cty., P.E.R.C. No. 88-85, 14 NJPER 244 (¶19090 1988) (county juvenile detention officers are not police, regardless of whether their duties are similar to those of corrections officers, because they do not have arrest power); Monmouth Cty., P.E.R.C. No. 88-10, 13 NJPER 647 (¶18244 1987), aff'd NJPER Supp.2d 169 (¶171 App. Div. 1998) (park rangers' authority to act as police officers to enforce park regulations not equivalent to arrest authority in Gloucester and Warren or to full police powers accorded to park police).

In Camden, we drew on Gloucester in holding that court attendants, whose primary duty was to maintain order in the court, were entitled to interest arbitration. We noted that the attendants were statutorily empowered to "act as officers for the detention, apprehension, arrest and conviction of offenders against the law" - authority that was virtually identical to that possessed by the Gloucester corrections officers. We then stated:

While the issue in Gloucester is somewhat different from that involved here, it cannot be seriously disputed that employees who are vested with the same powers and duties as the corrections officers in that case are "employees engaged in performing police services" within the meaning of N.J.S.A. 34:13A-15. 10 NJPER at 502.

NJIT adopted the same approach in concluding that there was "no doubt" that college police officers appointed under N.J.S.A.

18A:6-4.2 were performing police services. We emphasized the police powers accorded them by N.J.S.A. 18A:6-4.5 and noted that NJIT officers carried service revolvers and performed such functions as foot and vehicular patrol; arresting violators of the law; enforcing traffic and parking regulations; and protecting the transport of large sums of money. 9 NJPER at 667. Similarly, in Rutgers, where the employer argued that it was not a "public police department", we noted that university police appointed pursuant to N.J.S.A. 18A:6-4.2 et seq. performed most traditional police functions.

Against this backdrop, we are satisfied that, by virtue of their statutory police powers and their performance of many police functions, campus police perform police services within the meaning of N.J.S.A. 34:13A-15. In light of our case law; the centrality of N.J.S.A. 18A:6-4.5 to our analysis; and the Legislature's directive to liberally construe the statute, N.J.S.A. 34:13A-14, the Board's objections do not weigh in favor of a contrary conclusion.

For example, while the Board emphasizes that campus police are not armed while on duty, that factor is not determinative in light of Camden and the Court's analysis in Gloucester. Similarly, we are not persuaded that unit members fall outside N.J.S.A. 34:13A-15 because "school security guards" are not among the listed titles in the statute. The Board itself has

characterized these employees as "campus police officers" or "school police officers" in its job description and federal grant applications. In any case, N.J.S.A. 34:13A-15 states that "employees performing police services" includes "but is not necessarily limited to" the listed titles, thus indicating that other positions may be encompassed within the definition. NJIT; see also Assembly Labor Industry and Professions Committee, Statement to S. 482 (December 6, 1976) (section was intended to delineate the "principal titles" covered by the statute).

The Board also urges that the policy reasons underlying the interest arbitration statute - to prevent strikes by critical public safety employees and recognize the life-threatening dangers they face - do not pertain to these employees, who do not face the same dangers or have the same responsibilities as municipal or university police officers. It stresses that, in Rutgers, the Appellate Division commented that the functions and responsibilities of university police were "virtually indistinguishable" from any other local police force. 21 NJPER at 46.

For the purposes of this decision we accept that campus police officers' scope of responsibility is not identical to that of municipal or Rutgers University police. But this does not foreclose the unit from petitioning for compulsory interest arbitration where N.J.S.A. 34:13A-15 lists many positions whose

law enforcement responsibilities are more specialized than those of municipal or Rutgers University officers. We also note that in 1991, the Legislature expressed its view that campus police are comparable to other police when it amended N.J.S.A. 18A:6-4.5 and 4.8 to give them police powers and the right to carry firearms "at all times", instead of, as before, during the performance of their duties and en route to and from work. See Statement to Assembly No. 3559, Assembly County Government Committee (bill provides "parity" for campus officers).

Nor is interest arbitration foreclosed because campus police are not among the eligible titles listed in the PFRS statute. N.J.S.A. 43:16A-1(2)(a)(I) defines a "policemen" as an individual required to carry firearms while on duty, a condition not present in N.J.S.A. 34:13A-15 and one which Gloucester decided against imposing in the related context of N.J.S.A. 34:13A-5.3. Finally, we are not persuaded that campus police officers fall outside the ambit of N.J.S.A. 34:13A-15 because they are not mentioned in the statutes authorizing the creation of municipal and county police forces. N.J.S.A. 18A:6-4.2 sets forth a comparable statutory scheme for the appointment of police at educational institutions.

We turn next to the second prong of our analysis: whether this board of education, defined as a public employer under N.J.S.A. 34:13A-3.3(c), has a public police department within the meaning of the interest arbitration statute.

N.J.S.A. 34:13A:-15 defines a "public police department" as "[a]ny police department or organization of a municipality, county or park, or the State or any agency thereof, having employees engaged in performing police services." In Rutgers, we observed that this language was susceptible to two readings. One reading, urged by the university in Rutgers, is that an employer is not subject to the statute, even if it has a police department, unless it is a municipality, a county, a park, the State or any agency thereof. Under a second interpretation, the statute applies to two types of entities: first, all "police departments" and second, "any organization" of a municipality, county, park, the State or any agency thereof that, while not a police department, has "employees performing police services." We observed that under this construction, the interest arbitration statute would apply to Rutgers' police department, regardless of whether Rutgers was a State agency. 19 NJPER at 579.

Rutgers found this latter reading preferable, reasoning that it explained why the language following "organization" was added. It also commented that "performing police services" would be redundant if it referred back to both "police department" and "organization." Nevertheless, we assumed for purposes of the decision that Rutgers' interpretation was correct, and we held

that Rutgers was a State agency for purposes of the interest arbitration statute.

Rutgers is pertinent here, where the Board also contends that it is not subject to N.J.S.A. 34:13A-15 because the statute does not mention boards of education.

As one basis for our decision, we reiterate Rutgers' conclusion that the statute applies to all public "police departments", even if they are located within, for example, public school systems or universities. Under this construction, this unit can fairly be said to constitute a police department given that it is comprised exclusively of employees who have full police powers; are required to have police training; perform many police functions; and are supervised in part by a Director of Safety who is a retired police lieutenant. The campus police unit is not unlike a force of several officers in a small municipality that reports directly to a Director of Public Safety - a member of the governing body - rather than a police chief. See N.J.S.A. 40A:14-118 (authorizing municipality to create a police force as a department, division, bureau, or other agency; making appointment of police chief discretionary; and requiring promulgation of governance rules by an appropriate authority). We note that the campus police were described as a "department" in the DOJ grant application, a term also used on officer I.D. cards. Thus, the Board's "police department" is covered by the

interest arbitration statute and the Board's motion must be denied for that reason.

Nevertheless, as in Rutgers, we will also carefully consider, as an alternative ground for our ruling, whether the Board is subject to the statute under a reading that assumes that a public employer with a police department must also be a "municipality, county, park, State, or any agency thereof" to be covered by the statute.

A school board is not a "state agency" in the sense of, e.g., the Department of Corrections, and it is also a legal entity that is distinct and separate from the municipality in which it is located. Otchy v. Elizabeth Bd. of Ed., 325 N.J. Super. 98, 109 (App. Div. 1999), certif. den. 163 N.J. 79 (2000); N.J.S.A. 18A:10-1; N.J.S.A. 18A:11-2. However, in a broader sense, a board is an instrumentality of the State obligated to provide for the educational needs of the district's children and charged with implementing the State constitutional mandate to provide a thorough and efficient education. Durgin v. Brown, 37 N.J. 189, 199 (1962); Hamel v. State of New Jersey, 321 N.J. Super. 67, 76 (App. Div. 1999). A local board is a "creature of the State" that may exercise only those powers granted to it by the Legislature either expressly or by necessary and fair implication. Atlantic City Ed. Ass'n v. Atlantic City Bd. of Ed., 299 N.J. Super. 649, 655 (App. Div. 1997), certif. den. sub

nom. Keyport Teachers' Ass'n v. Keyport Bd. of Ed., 152 N.J. 192 (1997), citing Fair Lawn Ed. Ass'n v. Fair Lawn Bd. of Ed., 79 N.J. 574, 579 (1979).

Given these well-accepted principles; the directive to liberally construe the interest arbitration statute, N.J.S.A. 34:13A-14d; the grant of police powers to campus police; and the Court's affirmance of Rutgers, we think the critical inquiry is whether the Legislature intended to exclude from interest arbitration those campus officers who are appointed by boards of education rather than universities or colleges. We conclude that it did not. NJIT is instructive on this point.

In that case, we found that the institution had a public police department; rejected the employer's argument that only taxing authorities were subject to the statute; and cited New Jersey Inst. of Technology v. City of Newark, 164 N.J. Super. 516 (App. Div. 1978), for the proposition that while the State had a considerable role in the management and operation of the institution, NJIT was "essentially an instrumentality of the City of Newark as part of its school district." 9 NJPER at 666. We rejected Newark's argument that NJIT was therefore not a State agency, declining to read the term "agency" so narrowly. 9 NJPER at 667 n.3. A similar analysis pertains here. The Board is indisputably a governmental body exercising State-conferred powers and implementing a State constitutional mandate,

regardless of whether it is a State agency or instrumentality for all purposes. Contrast Rutgers, 21 NJPER at 46 (Court noted that Rutgers was a private entity for some purposes and a public body for others); accord Fine v. Rutgers, 163 N.J. 464 (2000).

We recognize that the Legislature could have chosen to separately list boards of education as employers under N.J.S.A. 34:13A-15, just as it did in N.J.S.A. 34:13A-3.3c. However, we do not think that omission signals an intent to exclude units such as these from the statute, given that school districts - like universities and state colleges - would not likely be the employers most evidently in the Legislature's mind when it enacted impasse procedures for police and fire employees. Further, if we are to liberally construe the interest arbitration statute so as to achieve its purposes, we discern no rationale for excluding police officers appointed by the Board where they have full statutory police powers; they perform duties that might otherwise be performed by municipal or county officers assigned to the schools; and the Board does not assert that applying the statute to these officers would interfere with its educational mission. See Rutgers (police officers do not provide educational services and the terminal procedure of interest arbitration would not interfere with the university's educational mission).

For the foregoing reasons, we deny the Board's motion to dismiss the interest arbitration petition and remand the case to the Director of Arbitration for processing.

ORDER

The motion of the Cherry Hill Board of Education to dismiss the interest arbitration petition is denied. The case is remanded to the Director of Arbitration for processing.

BY ORDER OF THE COMMISSION

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

ISSUED: November 22, 2005

Trenton, New Jersey