

P.E.R.C. NO. 2006-79

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK UNION OF INDEPENDENT
SPECIAL POLICE, LOCAL 202,

Petitioner,

-and-

Docket No. IA-2006-028

NEWARK HOUSING AUTHORITY,

Respondent.

SYNOPSIS

_____The Public Employment Relations Commission denies a motion filed by the Newark Housing Authority to dismiss a Petition to Initiate Compulsory Interest Arbitration filed by Newark Union of Independent Special Police, Local 202. The Authority sought dismissal of the petition on the grounds that the employees represented by Local 202 are not covered by the interest arbitration statute. The Commission concludes that the authority's officers perform police services within the meaning of N.J.S.A. 34:13A-15 and that under N.J.S.A. 40A:14-146.1 and N.J.S.A. 40A:146.21 officers appointed to provide protection at municipal housing projects have all the powers of police officers. Under the Commission's case law, individuals with such statutory authority are police within the meaning of N.J.S.A. 34:13A-5.3 and are entitled to interest arbitration under 34:13A-15.

_____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, Oxfeld Cohen, P.C., attorneys
(Sanford R. Oxfeld, of counsel)

For the Respondent, Dorf & Dorf, attorneys (Gerald L.
Dorf, of counsel)

DECISION

On November 17, 2005, the Newark Union of Independent Special Police, Local 202, filed a Petition to Initiate Compulsory Interest Arbitration with respect to a unit of "special police"^{1/} employed in the Security Department of the Newark Housing Authority. On November 28, the Authority moved to dismiss the petition on the ground that the employees represented by Local 202 are not covered by the interest arbitration statute, N.J.S.A. 34:13A-15. On December 8, the case was transferred to

^{1/} The recognition clause of the parties' collective negotiations agreement refers to unit members as "special police" while the Authority's job description for these employees is titled "security officer II." We refer to the Authority's "officers."

the Chairman pursuant to N.J.A.C. 19:16-5.2(b). On February 2, 2006, the Authority submitted, at our request, a brief setting forth the basis for its motion to dismiss the petition.^{2/} The Authority contends that Local 202 is not entitled to interest arbitration because the City of Newark has not enacted the type of ordinance necessary to afford Local 202 unit members the status of regular law enforcement officers; municipal police officers patrol the same areas as the housing officers represented by Local 202 and could assume their duties; and the Authority is not a "public police department" within the meaning of the interest arbitration statute because it lacks the power to levy taxes and derives virtually all of its funding from the federal government.

Local 202 responds that the Authority is a "public police department" within the meaning of N.J.S.A. 34:13A-15, regardless of whether it can levy taxes. It also contends that N.J.S.A. 40A:14-146.19, which authorizes the establishment of a housing authority police force, states that members of such a force are regular law enforcement officers. The Authority has submitted the certification of Charles Whitner, an investigator with the Authority, and Local 202 has submitted the certification of

^{2/} The Authority was granted two extensions of time to file its brief. On March 20, 2006, Local 202 filed a supplemental submission and on April 7, the Authority filed a response. We deny the Authority's request for oral argument. The matter has been fully briefed.

Darryl Johnson, an officer with the Authority and the president of Local 202. No material facts are in dispute. This is the pertinent factual and statutory background.

Background

The Authority's Security Department is headed by a Chief of Security, who reports to the Authority's assistant executive director. Authority officers patrol the grounds, buildings and other areas of the Authority's public housing residences and provide security at the Authority's main office. The "security officer II" job description states that officers provide assistance and protection to persons and property; assure observance of laws; prevent fire, theft, vandalism and disorder or damage to property and equipment; and escort or remove offenders from the premises. They also accompany payroll staff to the bank; maintain order and decorum on Authority premises; and prevent unauthorized persons from entering the grounds and buildings.

Since 1992, members of the force have been represented by the Union of Independent Special Police, Local 202, after an election ordered by the Director of Representation in a proposed unit of 42 "special police II" employees. Newark Housing Auth., D.R. No. 92-35, 18 NJPER 329 (¶23144 1992). At that time, the Authority did not dispute that the employees in the proposed unit were police employees. Ibid.

Authority police officers receive six months of training at the Newark Police Academy, along with police trainees from the cities of Newark, Orange, East Orange and other surrounding communities. Upon completing the course, they are awarded the same certificates as these trainees, although at least some Authority officers have not been trained in driving-related competencies such as hot pursuit. Authority officers are required to qualify with their weapon twice a year, in accordance with regulations governing special police officers appointed by the City.

While the Authority's security force is an autonomous department separate from the City of Newark's police department, Authority officers begin their shifts by signing in with that department; do roll call with incoming City police officers; and are inspected by a sergeant from the City police force. Authority officers are authorized to carry weapons in the City but are prohibited by Authority regulations from carrying weapons or exercising police powers outside the City. They are required to carry the police department's radio, but assist the police only when requested to do so and only after the Authority's security dispatcher has been notified. In its brief, Local 202 states that, in July 2005, one of its members was shot and killed when he and his partner approached a car outside of Weequahic High School.

With respect to the qualifications for the position, the job description states that officers are required to possess or be eligible to receive a permit as a "Special Police Officer as provided in N.J.S.A. 40A:14-146." N.J.S.A. 40A:14-146 in fact includes three statutory schemes that authorize the appointment of individuals to perform duties similar to those of municipal police officers, without those individuals being hired as members of a municipality's regular police department. All of these enactments have a common thread: after receiving mandatory police training, the individuals have statutory police powers. See N.J.S.A. 40A:14-146.1 (empowering cities of the first class to hire "security officers" to patrol, among other institutions, housing projects in the municipality; such officers have "all the powers conferred by law on police officers or constables in the enforcement of the laws of this State, and the apprehension of offenders"); N.J.S.A. 40A:14-146.19 et seq. (allowing cities of the first class with a population over 270,000 to establish, by ordinance, a housing authority police force whose officers "shall have all the powers conferred by law on police officers in the enforcement of the laws of this State or municipal ordinances, including the power to apprehend offenders"); N.J.S.A. 40A:14-146.9 and N.J.S.A. 40A:14-146.11a(2) (authorizing a municipality to hire "special law enforcement officers" to temporarily or intermittently perform duties similar to those

regularly performed by members of the municipality's police force; "class two" special law enforcement officers may use a firearm and "shall be authorized to exercise full powers and duties similar to those of a permanent, regularly appointed full-time police officer").

N.J.S.A. 40A:146-1 and N.J.S.A. 40A:146.19 also address organizational aspects of a housing authority's security or police force. N.J.S.A. 40A:146-1 requires that the force be established as a separate unit of the city's police department. N.J.S.A. 40A:146-19 allows the city to establish the force either as a separate department or as a division of the city's police department. It specifies that the force is to be funded by the housing authority, which may request reimbursement from the municipality for a portion of the costs associated with appointing, training and compensating a housing authority police force.

We need not determine definitively what statute the City of Newark relied upon in establishing the Authority's security force because, under each statutory scheme, the individuals must receive police training and have statutory police powers.^{3/}

3/ The DOP job description for a local unit security officer, which is similar but not identical to the job description submitted by the Authority, cites N.J.S.A. 40A:14-146.1 as the statutory authorization for the position and also quotes from that statute in describing the police powers of the officers. Appointment of the Authority's officers pursuant
(continued...)

Those circumstances, coupled with the duties of the Authority's officers, are the salient points for our analysis.

Analysis

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.

3/ (...continued)
to this statute would be consistent with the pre-1992 establishment of the force, since N.J.S.A. 40A:14-146.1 was enacted in 1985 while N.J.S.A. 40A:146.19 was adopted in 1997. We note as well that the special law enforcement officer statutes generally limit those employees to a 20-hour work week, while the parties' agreement establishes a 40-hour work week for full-time officers.

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 Local 202 is entitled to invoke interest arbitration, we consider whether: (1) the Authority meets the definition of "public police department" under N.J.S.A. 34:13A-15; and (2) Authority special police officers are engaged in performing police services. Cherry Hill Bd. of Ed., P.E.R.C. No. 2006-39, 31 NJPER 364 (¶146 2005), app. pending App. Div. Dkt. No. A-002262-05T5; 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 (¶14289 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 Authority's motion to dismiss the petition. We detail the reasons that lead to this conclusion, starting with the question of whether the Authority's special 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. Cherry Hill; Camden; NJIT. As we explained in Cherry Hill, our case law 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. Our 5.3 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.

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. 86-111, 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 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); Monmouth Cty., P.E.R.C. No. 88-10, 13 NJPER 647 (¶18244 1987), aff'd NJPER Supp.2d 169 (¶170 App. Div. 1988).

In Camden, we drew on Gloucester in holding that, by virtue of their statutory arrest powers, court attendants were engaged in performing police services under N.J.S.A. 34:13A-15. We reached this conclusion even though their primary duty was to maintain order in court and they did not carry weapons while on duty. In Cherry Hill, we found that unarmed school district police officers were performing police services because they had statutory arrest powers and performed many traditional police functions such as traffic enforcement and crime detection and investigation. See also NJIT (concluding that there was "no doubt" that college police officers were performing police services, given both their statutory police powers, N.J.S.A. 18A:6-4.5, and the fact that they carried service revolvers; performed foot and vehicular patrol; arrested violators of the law; and enforced traffic and parking regulations).

Against this backdrop, we are satisfied that the Authority's officers perform police services within the meaning of N.J.S.A. 34:13A-15. They patrol the Authority's numerous public housing residences; are armed while on duty; remove offenders from Authority premises; and respond to calls from the Newark police department. N.J.S.A. 40A:14-146.1 and N.J.S.A. 40A:14-146.21 state that officers appointed to provide protection at municipal housing projects have all the powers of police officers. See also N.J.S.A. 40A:14-146.11a(2) (class two special law

enforcement officers have full police powers). Under our case law, individuals with such statutory authority are police within the meaning of 5.3 and entitled to interest arbitration under N.J.S.A. 34:13A-15.

The Authority's objections do not favor a contrary conclusion. The Authority focuses on the following paragraphs of N.J.S.A. 40A:14-146.19, which describe some of the requirements of an ordinance establishing a housing authority police force pursuant to N.J.S.A. 40A:14-146.19.

The ordinance shall provide for the maintenance, regulation and control of the force either as a separate department or as a division or unit of the municipal police force; a line of authority relating to the force's police function; the promulgation and adoption of rules and regulations by the appropriate authority designated in N.J.S. 40A:14-118 for the government of the force and the discipline of its members; the appointment of such members, officers and personnel as the governing body may deem necessary; the fixing of their compensation; the prescription of their powers, functions and duties; and such other matters as the governing body shall deem necessary for the effective government and operation of the force. If the housing authority police force is established as a separate department, the appropriate authority for the force shall be the same as the appropriate authority designated for the police force established pursuant to N.J.S. 40A:14-118.

Notwithstanding any other provision of law to the contrary, housing authority police officers appointed pursuant to this act shall be deemed regular law enforcement officers.

The Authority contends that because it has not enacted an ordinance to incorporate its security force into the municipal police force as permitted by N.J.S.A. 40A:14-146.19, the members of the force cannot be deemed "regular law enforcement officers" within the meaning of the underscored language.

We agree with Local 202 that housing authority police are deemed to be regular law enforcement officers regardless of whether they are in an autonomous department or a division of the municipal police force. The underscored language is set forth in a separate paragraph, which refers back to the preceding paragraph that describes each of the alternative methods of establishing a housing authority police force. Thus, if the Authority's officers were appointed pursuant to N.J.S.A. 40A:14-146.19, they are regular law enforcement officers under that statute. And even if they were not technically appointed under that statute, as we noted earlier, N.J.S.A. 40A:14-146.1 and N.J.S.A. 40A:146.11a(2) separately confer full police powers on officers such as those employed by the Authority and entitle them to interest arbitration.

The Authority also contends that one of the policy reasons underlying the interest arbitration statute -- to avert the threat to public safety that would occur in the event of a strike by critical public safety employees - does not pertain to housing authority police. Relying on a Pennsylvania Supreme Court

decision, Philadelphia Housing Authority v. Commonwealth of Pennsylvania, Pennsylvania Labor Relations Board, 499 A.2d 294 (Pa. 1985), the Authority urges that it is not necessary to afford housing police the right to interest arbitration, because the City's police force could protect public safety if Local 202's members went on strike.

We decline to adopt this approach in considering whether Authority officers are performing "police services" under N.J.S.A. 34:13A-15. First, the language that the Authority relies on in Philadelphia Housing Authority is dicta: the Court's analysis and holding in that case centered on whether the Philadelphia Housing Authority was a public employer under the Pennsylvania statute.^{4/} Second, in deciding whether employees are encompassed within N.J.S.A. 34:13A-15, we focus on their duties and responsibilities. NJIT, 9 NJPER at 667 n.4. In NJIT, we commented that it was "irrelevant" whether or not a unit's duties were assumed or assumable by others. Ibid., see also Cherry Hill (holding that school district police officers were performing police services, even though the record showed that

^{4/} The Court concluded that housing authorities were not among the enumerated entities within the definition of "public employer" under the Pennsylvania interest arbitration statute. By contrast, the Authority does not argue that it is not a public employer within the meaning of our Act, and we have held that it is. See Newark Housing Auth., H.E. No. 82-66, 8 NJPER 455 (¶13213 1982), rev'd on other grounds, P.E.R.C. No. 83-68, 9 NJPER 24 (¶14012 1982).

municipal officers were also called upon to respond to incidents at district schools).

The analysis in NJIT governs here. Because N.J.S.A. 34:13A-15 by its terms encompasses police employees who work for municipalities, counties and the State, a unit's entitlement to interest arbitration is not negated simply because its members' duties could be assumed by others. That circumstance is inherent in the statutory scheme, in the sense that officers employed by, e.g., a county or the State, could be called upon to respond to incidents in municipalities that had their own police force - and vice versa.

For the foregoing reasons, we conclude that the Authority's special police perform police services within the meaning of N.J.S.A. 34:13A-15.

We turn to the second prong of our analysis: whether the Authority is a public police department within the meaning of N.J.S.A. 34:13A-15. 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." The Authority falls within the literal ambit of this definition, and it does not contend otherwise. As we explained in Rutgers and Cherry Hill, under one reading of the statute, a public employer is subject to the statute if it has a police department. Under a

second and more restrictive reading, an employer is covered only if it has a police department and is also a "municipality, county, park, State, or any agency thereof." The Authority is subject to the statute under either of these readings. It has a department comprised of police employees - a "police department" - and it is an agency of the city of Newark. See N.J.S.A. 40A:12-17 (housing authority is a body corporate and politic and an agency of the municipality that created it).

In contending that it is not subject to the interest arbitration statute, the Authority focuses on N.J.S.A. 34:13A-16g's requirements that the arbitrator consider the limitations imposed by the CAP law, N.J.S.A. 40A:4-45.1 et seq., and the financial impact on the governing unit, its residents and taxpayers. See N.J.S.A. 34:13A-16g(1) and (6). It urges that the Legislature did not intend for housing authorities to be bound by an interest arbitration award given that these entities are funded almost entirely by the U.S. Department of Housing and Urban Development (HUD), and cannot levy taxes to fund an award.

We have rejected the position that only employers with taxing authority are subject to the interest arbitration statute. NJIT. We reasoned that the law sets forth no such limitation and that imposing it would run counter to the legislative directive to liberally construe the statute. NJIT, 9 NJPER at 666; N.J.S.A. 34:13A-14a. We reaffirm that analysis here. While the

Authority states that it is dependent on federal funding, it has not argued or shown that that circumstance eliminates its ability to budget monies to fund an award or deprives it of all control over salaries or other benefits for employees. Cf. Association of Retarded Citizens, P.E.R.C. No. 94-57, 19 NJPER 593 (¶24287 1993) (non-profit entity's dependence on State funding, and State's role in approving salaries, did not make State a joint employer or make negotiations between ARC and majority representative futile; ARC's economic circumstances could be considered in negotiations). We add that we and the courts have stressed the requirement that interest arbitrators consider the financial impact and public interest criteria, together with the other statutory factors, in arriving at an interest arbitration award. Hillsdale PBA Local 207 v. Borough of Hillsdale, 137 N.J. 71 (1994); Essex Cty. and Essex Cty. Sheriff, P.E.R.C. No. 2005-52, 31 NJPER 86 (¶41 2005); Cherry Hill Tp., P.E.R.C. No. 97-119, 23 NJPER 287 (¶28131 1997). That guidance and direction would apply with equal force to any award issued with respect to Local 202 and the Authority. Thus, an arbitrator would be required to carefully consider evidence and arguments about the Authority's ability to fund an award, including any contention that it was less able than other governmental entities to raise money for that purpose. Should the Authority believe that its arguments and evidence were not fully considered, it could appeal

the award to us, and the award's implementation would be stayed pending our decision. See N.J.S.A. 34:13A:16f(5) (b); Essex Cty. In these circumstances, we do not think the Legislature intended to exclude from interest arbitration housing authority police or security officers who have statutory police powers and are employed by an entity that meets the definitional requirements of the statute.

For the foregoing reasons, we deny the Authority's motion to dismiss the interest arbitration petition.

ORDER

The motion of the Newark Housing Authority 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, Fuller, Katz and Watkins voted in favor of this decision. None opposed.

ISSUED: April 27, 2006

Trenton, New Jersey