

P.E.R.C. NO. 2007-50

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY JUDICIARY
(CUMBERLAND VICINAGE),

Petitioner,

-and-

Docket No. SN-2007-023

PROBATION ASSOCIATION OF NEW JERSEY
(CASE-RELATED PROFESSIONAL UNIT),

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies, in part, the request of the State of New Jersey Judiciary (Cumberland Vicinage) for a restraint of binding arbitration of a grievance filed by the Probation Association of New Jersey (Case-Related Professional Unit). The grievance challenges an unwritten dress code that prohibits the wearing of jeans, sneakers, baseball caps or sports jerseys while working in the Cumberland County office. Based on the limited record, the Commission declines to restrain arbitration over PANJ's uniformity, notice and selective enforcement challenges to the unwritten dress code. The Commission does not determine whether the employer has a managerial prerogative to prohibit the wearing of jeans, sneakers, baseball caps or sports jerseys while working because the record is insufficient to allow a balancing of the parties' interests. If a dispute should arise over the negotiability of a dress code after the arbitrator addresses the contractual claims, the Judiciary may refile its petition enabling the parties to develop a full record.

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, Melissa P. Marschner, Staff
Attorney, Office of Counsel to the Administrative
Director, on the brief

For the Respondent, Mark Cimino, attorney, on the brief

DECISION

On November 16, 2006, the State of New Jersey Judiciary (Cumberland Vicinage) petitioned for a scope of negotiations determination. The Judiciary seeks a restraint of binding arbitration of a grievance filed by the Probation Association of New Jersey (Case-Related Professional Unit). The grievance challenges an unwritten dress code that prohibits the wearing of jeans, sneakers, baseball caps or sports jerseys while working in the Cumberland County office. The dress code does not apply to field work or to the two other County offices or any other of the 15 vicinages. Based on the limited record presented, we decline

to restrain binding arbitration over PANJ's uniformity, notice and selective enforcement challenges to the unwritten dress code.

The parties have filed briefs and exhibits. The Judiciary has filed the certification of its Vicinage Assistant Chief Probation Officer, Glendon W. Bell. PANJ has filed the certification of its First Vice-President, Peter Tortoreto. These facts appear.

PANJ represents probation officers as well as certain other employees. The parties' collective negotiations agreement is effective from July 1, 2004 through June 30, 2008. The grievance procedure ends in binding arbitration.

On October 31, 2005, Mary Ann Garcia filed a grievance claiming that management had implemented a dress code without statewide negotiations. The grievance was not resolved at Step 1.

On November 29, 2005, a step 2 hearing was held before the Vicinage Chief Probation Officer ("VCPO"). At the hearing, PANJ argued that the requirement that employees dress professionally amounted to imposing a dress code. The grievant stated that she was coached three times about wearing blue jeans in the office and told that she would receive a verbal warning and be sent home to change if she wore blue jeans again. The Judiciary objected that the grievance did not allege a specific contractual violation. Bell stated that he did not implement a dress code,

but merely required staff to "dress professionally." The record does not indicate how or if the dress code was disseminated. The VCPO officer denied the grievance.

On July 17, 2006, a Step 3 hearing was held. Three senior probation officers testified that in late October 2005, they learned that they could no longer wear jeans, sneakers, baseball caps or sports jerseys in the office. They testified that they were told that they would be sent home on State time for their first infraction and on their own time for subsequent infractions. Garcia testified that the dress code is unevenly applied. Tortoreto testified that dress code policies differ from vicinage to vicinage. He stated that he did not know what the dress code was at other vicinages or if they implemented a dress code aside from dress-down Fridays. He testified that he is a member of the negotiations committee and that a dress code was not discussed during the negotiations for the parties' current agreement. Bell testified that the dress code was implemented because office attire was becoming less and less professional. He stated that probation officers are required to dress professionally when working in the office (no jeans, sneakers, baseball caps or sports jerseys). The code does not apply when probation officers are working in the field. Bell stated that if an officer violates the dress code, the employee

receives three coaching sessions and is thereafter subject to discipline. The hearing officer denied the grievance.

On October 3, 2006, PANJ demanded arbitration. This petition ensued.

We consider the negotiability of this dispute in the abstract. We express no opinion about the contractual merits of the grievance or any contractual defenses the Judiciary may have. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144, 154 (1978).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets forth a balancing test for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

The balancing test must be applied to the facts and arguments presented in each case. City of Jersey City v. Jersey City POBA,

154 N.J. 555, 574-575 (1998). No statute or regulation is asserted to preempt negotiations in this case.

We begin our analysis with a brief review of the relevant case law on dress codes. In 1982, the Appellate Division upheld the power of a school board to adopt a dress code for teachers under standards established by the State Board of Education. Carlstadt Teachers Ass'n v. Carlstadt Bd. of Ed., 1982 S.L.D. 1448 (App. Div. 1982). Those standards were:

1. The dress code must be substantially clear and concrete: otherwise it will not be enforceable.
2. The code should impose no undue financial burden on any individual teacher.
3. The code should not unduly limit an individual's right of selection and freedom of expression; several options as to styles and modes of dress should be available to both men and women.
4. The code should be reviewed periodically so it will conform from time to time with changing community attitudes.
5. The code should be consistently interpreted and enforced.

In 1985, we issued our only decision to date on dress codes for non-uniformed employees and concluded that a school board had a managerial prerogative to adopt a dress code for teachers that was almost identical to the code in Carlstadt. Egg Harbor Tp. Bd. of Ed., P.E.R.C. No. 86-84, 12 NJPER 99 (¶17038 1985). However, our inquiry was limited to dress codes for teachers and

specifically excluded non-faculty. We first found that a dress code intimately and directly affects employee work and welfare. It affects employee comfort, convenience and self-expression and may require employees to incur expenses buying and maintaining required articles of clothing. A dress code may also require employees to spend a greater amount of non-working time in meeting appearance requirements. We then found that a school board's interests in adopting a dress code are substantial. As the Appellate Division had observed in Carlstadt, a teacher dress code may help "create an atmosphere of respect for [teachers] within a dignified environment conducive of discipline and learning" and may bear "a relationship to the furtherance of educational goals in that teachers are undeniably role models to their pupils." Id. at 101. Balancing the interests of school boards and teachers, we held that requiring collective negotiations over the challenged dress code would significantly interfere with the board's ability to regulate the educational climate. However, since a dress code has such a direct effect upon employee welfare, permitting collective negotiations over aspects of implementing a code severable from the decision to adopt the code would not significantly interfere with the determination of educational policy. Notice and application

issues such as inconsistent, selective or unreasonable enforcement were identified as possible negotiable subjects.^{1/}

PANJ asserts that a dress code must be implemented and enforced statewide. No statute, regulation or case requires that a dress code be implemented and enforced statewide, but nothing bars an agreement requiring that one be implemented and enforced uniformly throughout a negotiations unit or job title, absent a specific showing of a governmental policy need for local variances. The Judiciary has not asserted any such need. Whether the parties agreed that any dress code must be implemented uniformly is an issue outside our jurisdiction and may be considered by an arbitrator.

PANJ also seeks to arbitrate issues of notice and selective enforcement. Egg Harbor held that such issues are negotiable and legally arbitrable. Whether those issues were properly raised in earlier steps of the grievance procedure is a question outside

^{1/} In 2002, a PERC Hearing Examiner recommended that the Commission find that the New Jersey Department of Corrections had a managerial prerogative to enact a dress code prohibiting jeans. State of New Jersey (Dept. of Corrections), H.E. No. 2002-11, 28 NJPER 181 (¶33067 2002). She concluded that a prerogative was justified by the special circumstances associated with the needs to maintain safety, security and order in a correctional facility; facilitate the identification of inmates; provide a behavioral model for inmates; and present a professional atmosphere to the public. The case was withdrawn before final Commission action.

our limited jurisdiction and may be raised in arbitration.
Ridgefield Park.

The only remaining question is whether the employer has established a managerial prerogative to prohibit the wearing of jeans, sneakers, baseball caps or sports jerseys in the office after complying with any uniformity, notice or selective enforcement requirements that might exist. We do not answer that question because the record is not sufficiently complete to allow us to balance the parties' interests as was done in Egg Harbor. For example, there is no description of the impact of the dress code on employees; what employees do when they are in the office; whom they see or who sees them; what impact the wearing of the prohibited apparel has on clients, the public or the Judiciary; and why the unwritten dress code does not apply while working in the field. Should a dispute arise over the negotiability of a dress code after the arbitrator addresses PANJ's contractual claims, the Judiciary may refile its petition and the parties may then develop a full record. Cf. N.J.A.C. 19:13-3.5(f) (parties must recite all pertinent facts supported by certifications based upon personal knowledge and apply all relevant negotiability tests and precedents to the particular facts of the dispute.)

ORDER

The request of the State of New Jersey Judiciary (Cumberland Vicinage) for a restraint of binding arbitration over PANJ's

uniformity, notice and selective enforcement challenges to the unwritten dress code is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed.

ISSUED: February 22, 2007

Trenton, New Jersey