

P.E.R.C. NO. 2014-66

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LIVINGSTON,

Petitioner,

-and-

Docket No. SN-2013-071

SUPERIOR OFFICERS ASSOCIATION,  
LOCAL NO. 263,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of Livingston for a restraint of binding arbitration of a grievance filed by Superior Officers Association, Local No. 263. The grievance asserts that the Township violated the parties' collective negotiations agreement when it prohibited a unit member from performing extra duty work assignments while on terminal leave. Citing the Police Chief's safety, efficiency, and Departmental reputation concerns regarding officers on terminal leave who no longer report for active duty, the Commission holds that the Chief's judgment of which officers are qualified for extra duty assignments falls within his managerial prerogative and is not mandatorily negotiable.

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, Genova Burns Giantomasi & Webster,  
attorneys (Jennifer Roselle, of counsel)

For the Respondent, Klatsky, Sciarrabone & DeFillippo,  
attorneys (David J. DeFillippo, of counsel)

DECISION

On May 14, 2013, the Township of Livingston filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Superior Officers Association, Local No. 263 (SOA). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when it prohibited the grievant from performing extra work assignments while on terminal leave.

The Township has filed briefs, exhibits, and the certification of Craig Handschuch, Chief of Police. The PBA filed a brief, exhibits, and the certification of the grievant. These facts appear.

The SOA represents all Police Department employees in the rank of Lieutenant or Captain. The SOA and Township are parties to a collective negotiations agreement (CNA) effective from January 1, 2009 through December 31, 2013. The grievance procedure ends in binding arbitration.

The Township's "Extra Work/Outside Employment Policy" provides, in pertinent part:

**PURPOSE:** Frequently, private organizations, firms and individuals desire to employ an off-duty police officer to perform police functions that exceed normal departmental operations and obligations. Therefore, it shall be the policy of this agency to handle, in the most equitable way, requests to hire off-duty police officers.

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**POINT OF COORDINATION:** The Chief of Police has designated the Uniform Patrol Division Commander to act as the Side Job Coordinator to oversee adherence to this policy and processes related to side jobs. The Coordinator shall carry out the following duties:

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b. As per contractual agreement with P.B.A.#263 establish a system for announcement, selection, and assignment of officers for contractual extra work.

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**LIMITATIONS ON SIDE JOB EMPLOYMENT:** Members of this department may not engage in any employment or business where they will:

- a. Sell or distribute alcoholic beverages;
- b. Conduct any form of illegal or immoral activity;
- c. Conduct investigative work for insurance companies, private guard services,

collection agencies, or attorneys or bail bond agencies.

- d. Officers who are assigned to light duty assignments or disciplinary leave will not be allowed to work side job details.

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**SELECTION/APPROVAL PROCESS:**

**SELECTION PROCESS FOR EXTRA JOB EMPLOYMENT:**

The Coordinator shall maintain a selection process for hiring officers wishing to work side jobs.

- a. Requests for Off-Duty Officers: Any requests to hire off-duty officers for side jobs shall be routed to the Side Job Coordinator or his designee. It shall be the responsibility of the side job coordinator to assess the hazards involved to an officer in his/her assignment to the side job. Any request which may place an officer in any undue risk or jeopardy shall be declined by the side job coordinator.

- b. Permission to Work: No officer is to accept a side job assignment directly from a prospective employer. Officers may only work a side job with the express permission of those officers named within this policy who handle such requests for off duty employment.

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- d. Sign-up Sheets: When sufficient advanced notice has been received for an extra job (prior to the 15<sup>th</sup> of the month), a notice shall be posted in the "Extra Work Book"...

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1. All Officers will pick numbers by random drawing, for extra work picks.

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- e. Approval Process:
  - 1. Officers wishing to work a side job will sign their names on the appropriate sign-up sheets....

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- f. All anticipated work once received will be placed in the extra work book and on the prescribed dates and at the prescribed time a drawing will be held by those officers in attendance. By random drawing a list will be promulgated and officers will be allowed three (3) picks of off-duty work for that particular day....  
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- g. Unanticipated work once received will be turned over to a duly authorized representative of the Department, who will call the officers interested in working side jobs. Officers will be contacted in order of the Departmental "On Call/Extra Work" list.

Handschuch certified that terminal leave is an employee's entitlement for payment of a percentage of unused sick leave balances in contemplation of his retirement. During terminal leave, an officer appears on payroll, however does not report for active duty and is not required to follow Department policies regarding reporting absences. He further certified that officers on terminal leave typically turn in their service weapon at the start of terminal leave. He certified that once officers go on terminal leave, the ability to maintain oversight of the officer is impeded in that officers are not present for training or to be apprised of Department rules and protocols on a regular basis, and that without such oversight, the Department cannot ensure the appropriate delivery of police services. He further certified that because an officer on terminal leave is unavailable for active duty and his qualifications cannot be monitored as an

active employee, "an officer on terminal leave in contemplation of retirement is deemed unqualified to work extra duty assignments during that period."

The grievant certified that he retired from the Township's Police Department on December 31, 2012 and that his last day of physically reporting for duty was in late December of 2011.<sup>1/</sup> He further certified that he began using accrued paid leave time January 1, 2012 through approximately July 31, 2012, and that during that time he continued to work extra duty assignments. From approximately August 1, 2012 through December 31, 2012, he used terminal leave, during which time he was prohibited from performing extra duty jobs. Grievant certified that during both his paid leave period and his terminal leave period he retained his service weapon, police identification, police radio, keys, and entry card to the police building and that he successfully qualified to continue to possess his firearm in late July/early August 2012 and again in October 2012.

In July 2012, the grievant filed a grievance alleging that the Township was violating the CNA by denying him extra duty work while on terminal leave. On July 9, Captain Marshuetz denied the

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<sup>1/</sup> Handschuch certified that the grievant's last day of active duty was December 26, 2011; the grievant certified that his last day physically on duty was December 25, 2011.

grievance. On July 20, the Chief denied the grievance, stating, in pertinent part:

I conclude that this is not a matter which applies to the grievance procedure because it is not specifically covered in the Collective Bargaining Agreement between the Township of Livingston and Livingston P.B.A. 263. Therefore, I am denying your grievance under Article VI, Step 2 and returning said grievance to you.

In addition, a review of the Police Division records indicate that no past employees have been permitted to work any extra work assignments once they have begun their terminal leave.

After a September 17 grievance hearing, Township Manager Michele E. Meade denied the grievance on October 2. On October 9, 2012, the SOA demanded binding 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 that the Township may have.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

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 or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, 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 firefighters, 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.

Because this dispute involves a grievance, arbitration is 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). Thus, if we conclude that the SOA's grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The Township asserts that its decision to deny extra duty assignments to an officer on terminal leave is essentially a non-negotiable determination of officer qualification. The Township contends that because the grievant is on terminal leave and lacks the obligations and daily supervision of on-duty officers, it has the non-negotiable prerogative to determine - for safety, efficiency, or the reputation of the Department - that he is ineligible for extra duty assignments.

The SOA asserts that the Township has arbitrarily determined that the grievant is no longer qualified for extra duty assignments due to going on terminal leave and contends that the Commission has found that off duty employment allocation procedures are mandatorily negotiable.

The grievance in this case involves a dispute concerning the allocation of overtime. Generally, the allocation of overtime among qualified employees is mandatorily negotiable and legally arbitrable. City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448

(¶13211 1982). However, in this case, the Chief, citing reasons of safety, efficiency and the reputation of the Department, has determined that officers on terminal leave are not qualified for overtime assignments since they do not report to active duty and are not subject to Department oversight or regular training.

This judgment by the Chief as to which officers are qualified for overtime assignments falls within his managerial prerogative and is not mandatorily negotiable. Hammonton, P.E.R.C. No. 2011-50, 37 NJPER 43 (¶14 2010).

ORDER

The request of the Township of Livingston for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Wall voted in favor of this decision. Commissioners Jones and Voos voted against this decision.

ISSUED: March 27, 2014

Trenton, New Jersey