

P.E.R.C. NO. 2014-94

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and-

Docket No. SN-2014-055

ELIZABETH POLICE SUPERIOR
OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Elizabeth for a restraint of binding arbitration of a grievance filed by the Elizabeth Police Superior Officers Association. The grievance contests a directive prohibiting police captains from working extra duty assignments known as "pay jobs." The Commission finds that the police-type services at issue implicate the City's concern for its integrity and reputation, and that the City has shown abuses related to a lack of unity of rank. The Commission holds that to permit an arbitrator to second-guess the City's determination that limiting pay jobs to ranks below captain may prevent future abuse would substantially limit the City's policymaking power.

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, Lum, Drasco & Positan, LLC,
attorneys (Wayne J. Positan and Daniel M. Santarsiero,
of counsel; Noah J. Gold, on the brief)

For the Respondent, Mets, Schiro, McGovern, LLC,
attorneys (James M. Mets, of counsel and on the brief)

DECISION

On January 10, 2014, the City of Elizabeth petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Elizabeth Police Superior Officers Association (SOA). The grievance contests a directive by Police Director James Cosgrove prohibiting police captains from working "pay jobs"^{1/} otherwise known as extra duty assignments.

^{1/} "Pay Jobs" are off-duty police assignments for private or public entities for which police officers are requested and compensated by the entity through the City.

The parties have filed briefs and exhibits. The City has filed the Certification of Cosgrove. The SOA has filed the certification of Lieutenant and SOA President Richard Shaughnessy. These facts appear.

The SOA is the majority representative of the City's sergeants, lieutenants, and captains. The parties' collective negotiations agreement has a duration from July 1, 2009 through June 30, 2014. The grievance procedure ends in binding arbitration.

Article is entitled "Work Week" and provides, in part:

Work schedules shall be at the discretion of the Director. However, the Police Director retains the right to assign any police officer to the time and places when and where police officers are most needed.

Article XXX is entitled "Maintenance of Standards" and provides:

All benefits and other terms and conditions of employment which are beneficial to employees shall be maintained at the highest standards existing on the date of commencement of collective negotiations leading to the execution of this Agreement.

The superior ranks of the Department consist of: the Chief of Police; three Deputy Chiefs; eight Captains; 21 Lieutenants; and 39 sergeants. Cosgrove certifies this chain of command creates a unique environment for supervising "pay jobs" as there were often instances where a captain would be working a pay job

while supervised by a lieutenant or sergeant. Deputy Chiefs were never permitted to work "pay jobs".

Elizabeth Police Department General Order 138A-(1), effective June 2004, set forth the guidelines governing secondary employment by members of the department. It provides, in part: "Any sworn police officer of this department, who has successfully completed the police basic training course, may work extra duty assignments, except as otherwise prohibited by the Chief of Police or other command authority."

On January 1, 2014, General Order 138 was revised to provide that patrol supervisors are responsible for checking personnel working extra duty assignments to ensure proper performance and adherence to regulations. Shaughnessy certifies that extra duty assignment checks are recorded on the "supervisor activity report". If a patrol supervisor determines that officers working "pay jobs" are not performing their duties, the patrol supervisor reports to the Inspections Captain. According to Shaughnessy, if the Inspections Captain has issues with a captain working a "pay job", the Inspections Captain will report it up the chain of command. There is a Patrol Captain on duty for 22 of 24 hours per day and a Patrol Deputy Chief on duty from 7:00 a.m. to 11:00 p.m each day.

Prior to the change, Captains worked "pay jobs" for over 27 years. The "pay jobs" were distributed by dividing the number of

police officers, up to and including the rank of captain, into four groups in alphabetical order. The first group selects all pay jobs that are available in the first week of the cycle. The second group picked the second week and the cycle continued. Officers work "pay jobs" off-duty to supplement their income.

On December 27, 2012, the City of Elizabeth passed Ordinance No. 4351. The Ordinance provides for the administration of "pay jobs" and grants the department the right to authorize officers to perform outside employment subject to certain managerial controls. It provides the rates of pay of each job based on patrol officer rates and recognizes that, on occasion, captains may be working a "pay job" beside a lower ranking officer.

In 2013, Elizabeth Police Officers of several ranks, including 2 captains, were investigated by the Union County Prosecutor's Officer for allegedly not reporting for "pay jobs", but accepting compensation. Cosgrove certifies that the allegations and investigation of the officers caused the Department to perform its due diligence and to review the protocols and departmental policy concerning the administration of "pay jobs".

The SOA filed a grievance with Director Cosgrove on October 4, 2013 asserting the City violated Article XXX and other applicable articles of the parties' CNA and past practice by unilaterally prohibiting captains from working "pay jobs". On

October 16, Cosgrove denied the grievance. On October 25, 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 (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.

[Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

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. No preemption issue is presented.

The City argues that it has a managerial prerogative to administer the pay job system. It cites the recent investigation by the Union County Prosecutor which, it asserts, by its nature necessitated a Department response. Cosgrove certifies that prior to the directive to not permit Captains to work "pay jobs", the system was compromised by a lack of command presence in particular shifts and with respect to certain work performed. The City particularly cites the divergence of the chain of

command as a problem which may have led to improprieties in the "pay jobs" system. The City exercised its prerogative as the rank unity^{2/}, chain of command, supervision, discipline within the police department, and public safety functions performed within the "pay jobs" are critical functions of the Elizabeth Police Department structure.

The City also relies on the ordinance and regulations controlling the "pay jobs" system as providing for managerial control over the system and does not permit what it couches as the "inconsistent term and interpretation" sought in the SOA grievance.

The SOA responds that the issue it seeks to arbitrate is not the administration of "pay jobs", but the allocation and eligibility to work pay jobs by qualified officers. It asserts the allocation of opportunities for "pay jobs" is a mandatorily negotiable subject. Citing Tp. of Moorestown, H.E. No. 84-43, 10 NJPER 181 (¶15091 1984) and Tp. of Hanover, P.E.R.C. No. 94-85, 20 NJPER 85 (¶25093 1994), the SOA argues that the determination of which employees are entitled to perform outside work and the procedures used to allocate such outside work are mandatorily negotiable issues.

2/ Cosgrove certifies there was a unit of command problem with Captains performing "pay jobs". He states unity of command "requires that every employee be under the direct control of only one supervisor, his immediate supervisor."

The SOA further asserts that only a state statute or regulation may preempt a term and condition of employment, not a local ordinance.

Preliminarily, we note that the "pay jobs" the Captains seek to continue working are police-type services performed by police officers in police uniforms. Since the officers act as police officers and appear to be police officers, such jobs implicate the department's concern for its integrity and reputation. The City's policymaking interests in regulating this type of employment are more powerful than its interests in regulating other types of outside employment. City of Paterson, P.E.R.C. No. 2004-6, 29 NJPER 381 (¶120 2003).

The circumstances of this case persuade us that the City has a non-negotiable right to prohibit captains from working "pay jobs". Abuses by officers not reporting for "pay jobs" and accepting compensation have been reported, investigated, highly publicized, and we take administrative notice that criminal charges were filed against some officers. The City performed its due diligence and determined that a lack of unity of rank and supervision was a problem in the "pay jobs" system. It determined to limit "pay jobs" to ranks below Captain to prevent future abuse. How the City responds to the Prosecutor's investigation is a policymaking issue of public importance. To permit an arbitrator to second-guess that determination would

substantially limit the City's policymaking power. For these reasons, we will restrain arbitration.

However, the "pay jobs" system also provides opportunities for extra income for officers. Several aspects of off-duty employment are mandatorily negotiable. See, e.g., Somerset Cty. Sheriff, P.E.R.C. No. 2002-60, 28 NJPER 221 (¶33077 2002) (hourly rate of pay for road work); Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987) (hourly rate of pay for outside jobs); Hanover Tp. (Allocation of outside employment opportunities among qualified officers). We note an unfair practice charge has been filed alleging the City refused to negotiate with the SOA prior to eliminating "pay job" opportunities for captains. While we now hold that the City's determination that Captains are no longer qualified to perform "pay jobs" is not negotiable, we make no finding as to any severable negotiable issues that may be asserted in that charge.

ORDER

The request of the City of Elizabeth for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: June 26, 2014

Trenton, New Jersey