

P.E.R.C. NO. 2015-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF COLLINGSWOOD,

Petitioner,

-and-

Docket No. SN-2014-050

FOP LODGE 76,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Borough of Collingswood for a restraint of binding arbitration of a grievance filed by FOP Lodge 76. The grievance asserts that the Board violated the parties' past practice when it denied police officers retention of their service weapons upon retirement. The Commission finds that N.J.S.A. 2C:39-5 provides that a retired officer's fitness to retain a handgun will be considered by the Superintendent of State Police on an individual basis after evaluation of many factors, thus a negotiated agreement could not provide uniform treatment of all retiring officers. The Commission also finds that the law does not require the weapon sought to be retained be the one the officer used while on active duty, thus Rochelle Park, P.E.R.C. No. 96-68, 22 NJPER 137 (¶27068 1996) is applicable in restraining arbitration.

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, Parker McCay, P.A., attorneys
(Elizabeth M. Garcia, of counsel, Ms. Garcia and
Melissa M. Ferrara, on the briefs)

For the Respondent, Markowitz and Richman, attorneys
(Matthew D. Areman, of counsel)

DECISION

On January 6, 2014, the Borough of Collingswood filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by FOP Lodge 76 (FOP). The grievance asserts that the Borough violated the parties' past practice when it did not allow two police officers to retain their service weapons upon retirement.

The Borough filed briefs, exhibits and a certification. The FOP filed a brief. These facts appear.

The FOP represents all of the Borough's permanent patrolmen. The FOP and Borough are parties to a collective negotiations

agreement (CNA) effective from July 1, 2012 through December 31, 2015. The grievance procedure ends in binding arbitration.

In March 2013 and July 2013, two police officers retired from the Borough's police department. Both officers requested that the Borough give them their service weapon upon retirement.^{1/} On August 21, the Chief of Police denied their requests. The FOP filed a grievance on behalf of the two retired officers, alleging that the Borough violated a long established past practice of giving duty weapons to officers upon retirement once they receive the proper permit or authorization to carry the firearm. The grievance alleged that over the past 10-15 years, the past ten retiring officers were given their weapons by the Borough. On October 1, the Chief of Police denied the grievance, stating:

I am in receipt of the Grievance filed September 19, 2013 by you on behalf of former employees [Grievant 1] and [Grievant 2] concerning the non-issuance of Departmental weapons upon retirement to these individuals. After speaking to the governing body of the Borough of Collingswood, they indicated that they had no previous knowledge that transferring of weapons was being conducted. They also indicated that they no longer desired for this to continue. I am also in agreement with this decision.

1/ The grievance notes that retiring officers, including the two involved in this dispute, must obtain the necessary permits to carry firearms before seeking their service weapons. The Borough does not dispute that the officers applied for the required permits.

On November 26, 2013, the FOP demanded binding grievance arbitration. This petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the Borough may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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.

Arbitration is permitted if the subject of the grievance 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 FOP'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.

Citing Rochelle Park Tp., P.E.R.C. No. 96-68, 22 NJPER 137 (¶27068 1996), the Borough asserts that the employer has the sole right to determine whether and which former police officers should be provided weapons, and binding arbitration of the grievance would substantially limit the government's ability to decide this question.

The FOP responds that the rationale underlying Rochelle Park does not apply to the present matter because the Borough has determined that active police officers shall carry firearms in furtherance of their duties, and it is undisputed that there is a

past practice of permitting retired officers to retain their weapons. Moreover, the FOP argues that the requirement that a retiring/retired officer obtain an appropriate permit or authorization to carry a weapon essentially eliminates the broader governmental policy question about whether and which private citizens should be permitted to carry a firearm.

The Borough replies that an officer meeting firearm permit requirements is the bare minimum of what is required for the Borough to allow him to carry a weapon. It asserts that such precondition to carrying a service weapon does not obviate the employer's interests, and that such an argument oversimplifies the Borough's policy interests and violates Rochelle Park.

When Rochelle Park was decided, there was no provision among the State's handgun laws that specifically addressed the status of retired police officers. That changed in 1997.

Prior to the passage of L. 1997, c. 67, retired police officers were required, like ordinary citizens, to prove a "justifiable need" in order to obtain a permit to carry a handgun.^{2/} That law, which amended and supplemented N.J.S.A.

2/ A police department may transfer a service revolver to its police officers. N.J.A.C. 13:54-1.3(c)(2) provides:

No law enforcement agency shall directly transfer a department-owned firearm, other than those issued as a duty firearm, to another person without such transfer going through a New Jersey licensed retail firearms dealer.

2C:39-6, allowed retired officers, who had been full-time members of various state, municipal and county law enforcement agencies, to apply to the Superintendent of State Police for a gun permit and to be exempted from criminal liability for gun possession pursuant to N.J.S.A. 2C:39-5.^{3/}

The amended N.J.S.A. 2C:39-6, placed the process for application, issuance, renewal, revocation and appeals of handgun permits for retired officers completely within the province of the Superintendent of State Police and the Superior Court. The role of the Chief of Police of the department from which the officer retired is to provide factual information.

3/ N.J.S.A. 2C:39-6(1) contains a comprehensive procedure for the issuance and renewal of a handgun permit to retired officers. It provides:

- The permit and personal identification card is for one year, subject to annual renewal;
- The chief of the retiring officer's department shall verify:
 - i. The officer's name and address;
 - ii. The officer's dates of service and that he/she retired in good standing;
 - iii. A list of all handguns registered to that officer;
 - iv. That, to the chief's knowledge, the retired officer is not subject to any statutory restrictions barring handgun possession;
- If the Superintendent denies the application, the retired officer may appeal to the Superior Court within 30 days and obtain a prompt hearing before the Court. The Court also has jurisdiction to revoke a handgun permit for good cause.

In a supplemental brief requested by the Commission, the Borough argues that the amendments to N.J.S.A. 2C:39-6 did not affect the holding of Rochelle Park which barred arbitration of a claim that two retiring police lieutenants should be allowed to retain their service revolvers. In the alternative, the Borough asserts that the comprehensive procedures in the statute completely preempt negotiations and arbitration over the present dispute. The FOP responds that as its grievance acknowledges that the officers must comply with the laws governing the issuance of permits, there is no governmental policy issue that would be impaired and the dispute is primarily one of compensation.

We conclude that, despite the addition of the statutory framework addressing handgun possession by retired officers, Rochelle Park still applies.

The fact that, as of 1997, (L. 1997, c. 67) it was permissible under the laws of the State for a retired police officer, who satisfied licensing and re-qualification protocols, to possess a handgun while retired, does not equate to making the retention of retirees' active duty service revolvers an issue that can be submitted to binding grievance arbitration pursuant to a collective negotiations agreement. First, the statute expressly provides that fitness to retain a handgun will be considered on an individual basis after evaluation of many

relevant factors. Thus, a negotiated agreement could not provide for uniform treatment of all retiring officers. Compare Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977) (where statute called for individual consideration of requests for extended sick leave, proposed contract language seeking uniform treatment not negotiable).

Second, the law does not require that the gun a retired officer seeks to carry, must necessarily be the weapon assigned to the officer while on active duty. Accordingly, a ruling that the grievance is not legally arbitrable would be consistent with Rochelle Park, but would not necessarily preclude a retired officer from applying, as an individual, for a carry permit in accordance with the terms of N.J.S.A. 2C:39-6(1)(1)-(4).

ORDER

The request of the Borough of Collingswood for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau and Eskilson voted in favor of this decision. Commissioners Voos and Wall voted against this decision. Commissioners Bonanni and Jones were not present.

ISSUED: January 29, 2015

Trenton, New Jersey