

P.E.R.C. NO. 2016-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and-

Docket No. SN-2015-081

PBA LOCAL NO. 4,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City for a restraint of binding arbitration of a grievance filed by the PBA contesting the denial of extra duty work permits for certain officers due to excessive absenteeism. The Commission finds that the City failed to demonstrate that its action was the exercise of a managerial prerogative or that arbitration of the grievance would substantially limit the government's policy-making powers.

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 (Daniel M. Santarsiero, of counsel and on the
brief; Wayne J. Positan, of counsel; Noah J. Gold, on
the brief)

For the Respondent, Perrotta, Fraser & Forrester, LLC,
attorneys (Donald B. Fraser, on the brief)

DECISION

On June 11, 2015, the City of Elizabeth (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local No. 4 (PBA). The grievance asserts that the City violated the parties' collective negotiations agreement (CNA) when it withheld or suspended "pay jobs" work permits for certain officers due to excessive absenteeism.

The parties filed briefs and exhibits. The City submitted the certification of Police Director James Cosgrove. The PBA submitted the certification of Police Officer and PBA Local No. 4 President Richard Steinke. These facts appear.

The PBA represents all full-time police officers employed by the City, excluding the Director, Chief, superior officers, and civilian personnel. The PBA and the City are parties to a CNA effective from July 1, 2009 through June 30, 2014. The grievance procedure ends in binding arbitration.

Cosgrove certifies that on June 10, 2004, General Order 138A-(1) was issued governing regular off-duty and secondary employment of police officers. This General Order provides that work permits for extra duty work may be refused or suspended "due to excessive sick time, discipline problems or where it is determined pursuant to departmental procedure that such outside employment is not in the best interest of the department." According to Cosgrove, neither the PBA nor any officers objected to the language contained in this General Order.

Cosgrove certifies that on January 1, 2014 General Order 138 Revised (Revised Order) was distributed to all City police personnel. It similarly provides the Police Department's policies and guidelines pertaining to secondary employment. The Revised Order contains the same provision as General Order 138A-(1) allowing work permits to be refused or suspended due to excessive sick time, discipline problems, or where the outside work is determined not to be in the Department's best interest.

Both General Order 138A-(1) and the Revised Order provide an appeal process for an officer refused a work permit. The officer

may initially request an expedited hearing before the Director, and if dissatisfied with the Director's decision, the officer or his majority representative may pursue the appeal at step 4 of the CNA's grievance procedure.

Cosgrove also certifies that the City adopted Ordinance #4351 on December 27, 2012 for the purpose of authorizing permissive contracted off-duty employment. The resolution provides, among other things:

The Police Department is hereby permitted to accept police related employment for other persons, public entities, or private entities only during off-duty hours and at such times that will not interfere with the efficient operations of the Police Department.

Cosgrove certifies that a decision was made to revoke extra duty work permits of officers who used excessive sick time. The affected officers, a total of forty-three, were provided the opportunity for a hearing before Cosgrove in accordance with the General and Revised Orders. The hearings were held in February 2015 and resulted in the restoration of 30 full permits and the issuance of 8 limited permits.

Cosgrove further certifies that during the hearings before him, those officers whose work permits were either revoked or restored only in part acknowledged their excessive absenteeism and indicated they would remedy the issue in the future. Additionally, Cosgrove denies that any officer at the hearing

requested counsel or was disciplined or reprimanded for excessive absenteeism.

Steinke acknowledges in his certification that he was present during the hearings before Cosgrove and that he, not the officers to his recollection, demanded counsel for them. He takes issue with the fairness of the hearings, contending that there was no testimony or evidence, only questioning of the officers to explain the reasons for their absences. He states that "there was nothing excessive about the sick time" and that the City has disciplined officers in the past for abusing sick time.

On April 23, 2015, the PBA demanded binding arbitration, alleging that the City violated the Maintenance of Standards provision of the CNA by disqualifying five officers from the extra duty jobs program and by limiting the extra duty work permits of eight others.^{1/} The arbitration demand also alleges that the Director's hearings denied the officers due process and resulted in the imposition of discipline. This petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is

1/ The Maintenance of Standards provision states:

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.

within the scope of negotiations. We do not consider the merits of the grievance or any contractual defenses that the City 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. and Middletown PBA, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶1111 App. Div. 1983). Thus, if we conclude that the PBA'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 City argues that the administration of the "pay jobs" program is a managerial prerogative that does not fall within the scope of negotiations and that the City's ability to deny or suspend pay jobs work permits is designed to maintain the integrity and reputation of the Police Department, which have previously been considered significant managerial concerns.

While the PBA acknowledges the City's right to promulgate and enforce non-discriminatory rules governing the pay jobs program, it claims that the City is using that managerial prerogative as a pretext to discipline officers accused, essentially, of abusing sick leave. The PBA asserts that the City has not defined "excessive absenteeism" and that none of the officers whose permits were revoked or limited have been found to have abused sick time.

In support of its claim, the City cites Livingston Tp., P.E.R.C. No. 2014-66, 40 NJPER 448 (¶156 2014), aff'd 41 NJPER 461 (¶142 App. Div. 2015) and City of Paterson, P.E.R.C. No. 2004-6, 29 NJPER 381 (¶120 2003).

In Livingston, we restrained arbitration of a grievance alleging that a township violated the parties' CNA when it denied an officer extra duty work while he was on terminal leave in contemplation of retirement. The police chief had certified that once an officer goes on terminal leave, the department's ability to maintain oversight of the officer and monitor his qualifications is impeded since the officer is not reporting for duty, and that without such oversight, the department cannot ensure the appropriate delivery of police services. The township argued that because an officer on terminal leave lacks the obligations and daily supervision of on-duty officers, it had a non-negotiable managerial prerogative to determine - for safety, efficiency, and the reputation of the department - that the officer was ineligible for extra duty assignments. We concluded that the chief's judgment as to the officer's qualifications was not mandatorily negotiable.

In Paterson, the Commission restrained arbitration of grievances to the extent they contested the City's decisions to assume administration of an off-duty employment program then run by the police officers' majority representative and to require

the Public Safety Director's approval of any off-duty employment calling for police officers to perform police-type services in police uniforms. But we rejected the City's broad sweeping argument that it had a non-negotiable managerial prerogative to establish all features and procedures of an off-duty employment system.

The dispute in this matter is different than those restrained in Livingston and Paterson. This case does not involve police officers on terminal leave who are no longer subject to supervision and training requirements, Livingston, or the ability of the City to administer outside employment opportunities, Paterson. In contrast to those cases, the City here has failed to demonstrate that its action was an exercise of a non-negotiable managerial prerogative. For instance, it has not shown, or even alleged, that the attendance records of the affected officers were such that they had become unqualified to perform extra duty work. Nor has the City articulated how the affected officers' absenteeism would adversely affect safety, efficiency, or the Department's reputation. The City has not presented facts showing that arbitration of this grievance would substantially limit the government's policy-making powers, Paterson, 87 N.J. at 92-93, and the PBA's grievance does not challenge the City's right to promulgate the General Order.

ORDER

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioner Wall was not present.

ISSUED: May 26, 2016

Trenton, New Jersey