

P.E.R.C. NO. 2017-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2016-072

PBA LOCAL 243,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the County's request for a restraint of binding arbitration of a grievance contesting the County's use of private, armed security guards instead of PBA members to patrol certain areas within a County building. The Commission holds that notwithstanding an alleged past practice of using PBA members for the patrol, the decision to subcontract work currently performed by public employees to a private employer 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.

P.E.R.C. NO. 2017-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2016-072

PBA LOCAL 243,

Respondent.

Appearances:

For the Petitioner, Atlantic County Law Department
(Elizabeth D'Ancona, on the brief)

For the Respondent, Crivelli & Barbati, LLC, attorneys
(Frank M. Crivelli, of counsel and on the brief; Donald
C. Barbati, on the brief)

DECISION

On May 11, 2016, the Atlantic County Sheriff's Office (County) filed a scope of negotiations petition. The County seeks a restraint of binding arbitration of a grievance filed by PBA Local 243 (PBA). The grievance asserts that the County violated the parties' collective negotiations agreement (CNA) when the County hired private, armed security guards to patrol certain areas within the Atlantic County Office Building, and discontinued the use of PBA unit members to patrol the building.

The County has filed briefs, exhibits, and the certifications of County Administrator Gerald DelRosso, Atlantic County Chief of Security and Park Ranger Law Enforcement Unit

Glenn Hausmann, County Welfare Director Karen Enous, and Atlantic/Cape May Vicinage Trial Court Administrator Howard Berchtold. The PBA filed a brief, exhibits, and the certifications of PBA Local 243 President Andrew Freeto and of its attorney Frank M. Crivelli.^{1/} These facts appear.

The PBA represents all Sheriff's Officers and Sheriff's Investigators, but excluding the Sheriff, Under Sheriff, Chief Sheriff's Officers Sergeants, Captains, and Lieutenants. The PBA and the County are parties to a CNA effective from January 1, 2013 through December 31, 2017. The grievance procedure ends in binding arbitration.

DelRosso certifies that the County Office Building (COB) is an eight floor building located in Atlantic City, New Jersey which houses the following divisions, departments and entities: Administration, Department of Law, Office of the County Adjuster, Atlantic County Improvement Authority, Finance, Division of Budget and Purchasing, Treasurer's Office, Division of Human Resources, Division of Information Technology, Quick Copy, Atlantic City Worker's Compensation Court, Probation, Department of Family and Community Development, Juvenile Justice Commission, Superintendent of Elections, Office of Internal Audit, Web

^{1/} On June 22, 2016, PBA Local 243 requested oral argument pursuant to N.J.A.C. 19:13-3.9. We deny the request because the issues have been fully briefed.

Services, the Atlantic Homeless Alliance, the Atlantic County Clerk's Office and the Atlantic City Free Public Library.

DelRosso also certifies that prior to 1995, public employees were employed as security guards in the COB, and other County buildings. These public employee security guards were laid off in 1995, in favor of privatization of security services. Sheriff's Officers have never patrolled the entire COB. From 2010 to the present, the private company that the County has used for security services has been Security Guard, Inc. t/a Tri-County Security, NJ. The coverage and staffing hours and posts for the unarmed Tri-County guards are detailed in the Bid Specifications for Security Guard Services. The Bid Specifications provide for one security officer at each of the following locations/posts in the COB, during normal operation hours: Front Desk, Welfare Station, County Clerk's Office/Atrium, COB Roving, Roving Relief. Since the time the Bid Specifications were issued, the County has added one additional unarmed guard from Tri-County. The officers assigned to the Welfare Station posts and the County Clerk's/Atrium posts must observe pedestrian traffic entering, exiting or within the Atrium, and will report any condition or event that poses a potential threat to the safety and welfare of employees and visitors.

DelRosso further certifies that three additional unarmed security guards are assigned to the Atlantic County Department of

Family and Community Development. These officers monitor non-employee pedestrian traffic, conduct periodic tours of the floors and restrooms, and notify Security supervision of any event or situation that poses a potential threat to any County employee, visitor, or County owned property or equipment.

According to DelRosso, in March 2016, Atlantic County increased its contract with Tri-County to provide one armed guard to staff the COB forty hours per week. The armed guard is one of two retired law enforcement officers. There is an armed guard in the COB Monday through Friday from 8:00 a.m. to 4:30 p.m. who roves all eight floors, with a concentration on the first three floors. There are now a total of 9 unarmed guards and one armed guard patrolling the COB. The decision to add an additional unarmed guard and one armed guard to the COB came after the shooting in San Bernardino, California in December 2015.

Enous certifies that prior to the County's contracting for armed security services, the County Director of Welfare would make an annual request to the Sheriff's Office for two Sheriff's Officers to patrol the Department of Family and Community Development on the last day of the month, and the first four days of each month. There has never been a written contract with the Sheriff's Office to provide this service. This was an overtime assignment by the Sheriff's Office, and different officers were assigned from day to day and month to month. Most public traffic

occurred on days of the month when food stamps and electronic benefits were provided to the public. There have been occasions when customers have become irate, difficult to handle and even menacing because their benefits were denied, deferred, reduced or terminated. Once the County hired an armed security guard from Tri-County, the Department no longer utilized a Sheriff's Officer to rove on the busiest days of the month.

The PBA filed a grievance challenging the County's action in discontinuing the use of the Sheriff's Officers to patrol certain parts of the COB. The grievance also alleged that other entities contained in the COB, namely the Probation Department, must be patrolled and/or protected by Sheriff's Officers based on the New Jersey Model Court Security Plan and the administrative determinations of the New Jersey Supreme Court.^{2/} The County argues that the Model Court Security Plan is inapplicable to the COB because the "Probation Department" is actually called the

^{2/} The pertinent recommendation from the Statewide Judiciary Committee that was approved by the New Jersey Supreme Court provides:

"Discontinue probation reporting in unsecured ancillary facilities (adult and juvenile).

'Probation reporting now being conducted in unsecured ancillary facilities shall be reviewed by the Local Court Security Committee and those facilities be brought into compliance with the Model Court Security Plan with the installation of proper security and screening; in the alternative, reporting should be transferred to a facility that provides proper screening and security as directed by the Model Court Security Plan.' "

"Child Support Enforcement Unit" and that no probation reporting takes place in that office (or client interviews); no probation reporting has ever taken place in that office, or anywhere else in the COB and no Sheriff's Officers were ever assigned to the Probation Department/Child Support Enforcement Unit.

The PBA also argues that there is a long-standing past practice of having Sheriff's Officers work in the COB and as a result, the matter is mandatorily negotiable, the past practice does not infringe on the its managerial prerogative and the County has "waived" its right to challenge the "negotiability and arbitrability" of the past practice.^{3/}

The grievance was denied by Sheriff Frank X. Balles on March 26, 2016. The PBA filed a Request for Submission of a Panel of Arbitrators on March 30, 2016. This petition ensued.

^{3/} The PBA has cited Jordan v. Solomon, 362 N.J. Super. 633 (App. Div. 2003), certif. den. 178 N.J. 250 (2003) for the proposition that the County effectively negotiated away its "unfettered" managerial prerogative right by allowing the past practice to be in effect for close to twenty years. Jordan, however, concerned a matter where a county prosecutor specifically negotiated disciplinary procedures in a CNA and the court found that he was bound to honor the disciplinary procedures that he created. Jordan at 637. The instant matter concerns the managerial prerogative of a public employer to subcontract, thus we do not find Jordan applicable to this case. (The PBA cited two other cases that are also inapposite to the subcontracting issue: Maywood Bd. of Education v. Maywood Education Asso., 168 N.J. Super. 45 (App. Div. 1979); South River Bd. of Ed. and South River Ed. Ass'n, P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987)).

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 contractual merits of the grievance or any contractual defenses the employer 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.

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 a 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 the government's policy-making powers.

Local 195 held that the decision to subcontract work currently performed by a public employer's own employees to a private employer is not mandatorily negotiable. The Court held that in cases where the subcontracting would result in layoffs, a public employer may agree to engage in pre-subcontracting discussions with the majority representative. 88 N.J. at 409. There is no evidence in the record that indicates that any of the

Sheriff's Officers were facing a layoff as a result of the County's decision to subcontract. See also Hamilton Tp. Bd. of Ed., P.E.R.C. No. 2015-71, 41 NJPER 482 (¶149 2015); Middlesex Cty. Coll., P.E.R.C. No. 2010-85, 36 NJPER 189 (¶70 2010).

Additionally, regarding the PBA's past practice argument, in Ridgefield Park, the parties' CNA contained explicit language addressing both voluntary and involuntary transfers of teachers. 78 N.J. at 150. The Association had filed several grievances alleging that transfer decisions by the Board violated contract mandates governing substantive and procedural aspects of transfers. Despite the existence of that language, the Court held that grievances seeking to enforce the language and remedy of the alleged contractual violations could not be submitted to arbitration because they were not mandatorily negotiable. Id. at 162. Therefore it follows that an alleged past practice cannot transform a non-negotiable managerial prerogative into a negotiable issue.

ORDER

The request of the Atlantic County Sheriff's Office for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: December 22, 2016

Trenton, New Jersey