

P.E.R.C. NO. 2017-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LYNDHURST,

Petitioner,

-and-

Docket No. SN-2017-016

LYNDHURST POLICEMAN'S BENEVOLENT
ASSOCIATION, LOCAL 202,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township for a restraint of binding arbitration of a grievance filed by the PBA challenging the adoption of an ordinance that restricts captains and the police chief, ranks not represented by the PBA, from performing off-duty police work. The Commission notes that the PBA did not raise any issue regarding the allocation of off-duty employment opportunities among unit members and that eligibility for off-duty assignments is a non-negotiable managerial prerogative on the specific facts of this case.

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. 2017-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LYNDHURST,

Petitioner,

-and-

Docket No. SN-2017-016

LYNDHURST POLICEMAN'S BENEVOLENT
ASSOCIATION, LOCAL 202,

Respondent.

Appearances:

For the Petitioner, Benecke Economics (Robert
L. Benecke, Financial Advisor)

For the Respondent, Loccke, Correia &
Bukosky, attorneys (Michael A. Bukosky, of
counsel and on the brief; Corey M. Sargeant,
of counsel and on the brief)

DECISION

On October 13, 2016, the Township of Lyndhurst (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by Lyndhurst Policemen's Benevolent Association, Local 202 (PBA). The grievance challenges the adoption of Ordinance No. 2903-14, which modifies the Township regulations pertaining to off-duty police work.

The Township filed a brief, exhibits, and the certifications of two Board Commissioners, Theodore Dudek and John Montillo. The PBA filed a brief, exhibits, and the certification of its

delegate to Local 202, Francis O'Rourke. The Township also filed a reply brief. These facts appear.

The Township Police Department is comprised of 51 members: 1 chief, 2 captains, 7 lieutenants, 8 sergeants, and 33 patrol officers. Currently, there is no deputy chief.

The PBA represents the Department's patrol officers, sergeants, and lieutenants. The Township's captains and police chief are not in the negotiations unit.

The Township and the PBA were parties to a collective negotiations agreement (CNA) effective from July 1, 2009 to June 30, 2011. The CNA was modified by two memoranda of agreement, the last of which extends the term of the CNA to December 31, 2017. The grievance procedure ends in binding arbitration.

On May 13, 2014, the Township adopted Ordinance No. 2903-14 (Ordinance). It adds the following paragraph to the Township's "Regulations for Off-Duty Employment of Police Officers":

Upon approval of the chief of police of off-duty police employment, pursuant to Paragraph b. hereof, the chief, or his designee, which may be a collective bargaining unit representative, shall determine, by means of a written rotating list, those members of the police department who may be eligible for any individual off-duty employment assignment (or post). Such a list, or lists, shall only include members of the police department having a rank of patrol officer, sergeant, lieutenant, or assigned the rank of detective. Said list shall be based on members who have signed up for such off-duty employment on a voluntary basis. The list shall include those members wishing

(volunteering) to work an off-duty employment assignment and such off-duty employment assignment shall be based solely on seniority. No member holding the rank higher than lieutenant may be placed on said off-duty employment list, and members holding these ranks may not work such off-duty assignments, unless no other member of the police department has volunteered to work such an assignment. However, any off-duty employment assignment (or post) relating to a public entity, such as the Township of Lyndhurst, New Jersey Meadowlands District, County of Bergen, Lyndhurst Board of Education, State of New Jersey, etc. may be filled by a member of the police department based on seniority and without regard to rank.

We surmise, although it is not affirmatively said by either party, that the Township had not previously restricted members of the Department holding rank above lieutenant from performing off-duty police work.

A captain is responsible for managing the extra-duty assignments. A police officer is responsible for developing the list of extra-duty jobs and for obtaining volunteers for the assignments. Officers are selected for off-duty assignments on a rotating, seniority basis.

On May 12, 2014, the PBA, through counsel, sent a letter objecting, on multiple grounds, to the adoption of the Ordinance. The letter was characterized as a grievance and accepted as such by the Township. On June 12, 2014, the PBA filed a Request for Submission of a Panel of Arbitrators (AR-2014-733). 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 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 (1981). Paterson 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.

[Id. at 92-93.]

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, an arbitrator may 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.

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The Township argues that the PBA does not have the right to file a grievance on behalf of managerial executives or employees

that the PBA does not represent.^{1/} The Township also argues that it had a managerial prerogative to adopt the Ordinance. It claims in that regard, and the Commissioners certify, that the Ordinance was adopted in order to promote a sound reporting structure in the Police Department. Specifically, the Township maintains that it would be inappropriate, as a matter of policy, for the police chief, deputy chiefs, or captains to work off-duty assignments because they would report to an on-duty tour commander who could be a sergeant or lieutenant.^{2/}

The PBA responds that it is not asserting "individual claims" on behalf of the police chief, deputy chiefs, or captains, but rather objecting to the unilateral change in off-duty work terms and conditions of employment. It also maintains that the Ordinance adversely affects officer safety and workload, issues which the PBA argues may proceed to arbitration as negotiable impacts.

The PBA makes these additional claims:^{3/}

1/ The Township argues that the police chief and, apparently, captains are "managerial executives," as defined in N.J.S.A. 34:13A-3(f). Given our determination, we need not address that argument.

2/ The Township notes that the Ordinance makes exceptions from the restriction concerning ranks above lieutenant for off-duty work for public entities or when no unit members volunteer to take an assignment for a private entity.

3/ The PBA does not provide facts in support of these claims. Therefore, they do not assist us in resolving the

(continued...)

-the Ordinance was a retaliatory taking from the PBA of a liberty interest and diminished its constitutional right to contract with employers as set forth in Bowman v. Pennsauken, 709 F.Supp. 1329 (D.N.J. 1989);

-the Ordinance prevents the PBA from contracting with other employers in violation of the Contracts Clause set forth in the U.S. Constitution (Art. I, §X) and the New Jersey Constitution (Art. IV, §VII, ¶3); and

-the Ordinance eliminates the due process rights of PBA members by failing to give them notice and an opportunity to be heard prior to restricting their employment.

In support of all of its claims, the PBA Delegate certifies that the "Ordinance was established for retaliatory reasons in order to punish the PBA." The PBA also provided a portion of a transcript of the deposition of the Township Mayor, Robert Giangeruso, in a civil lawsuit captioned James O'Connor v. Township of Lyndhurst, Lyndhurst Twp. Bd. of Comm'rs, and Robert Giangeruso during which the Mayor was questioned about an ordinance, presumably the one in question here, and about how much overtime the police chief was working.^{4/}

In reply, the Township reiterates the arguments set forth above and maintains that the PBA has failed to produce any

3/ (...continued)
negotiability question before us and should be addressed to the courts.

4/ The Mayor responded that he did not know how much overtime the police chief was working. We take notice of the fact that James O'Connor is the name of the Township's police chief.

evidence supporting its claims. With regard to the PBA's impact argument, the Township states that the Department has more officers than it did when the Ordinance was adopted and that off-duty work opportunities for PBA unit members have not been diminished.^{5/}

The Commission has held that "[c]lauses allocating outside employment opportunities among qualified officers are, in general, mandatorily negotiable." Hanover Tp., P.E.R.C. No. 94-85, 20 NJPER 85 (¶25093 1994); see also, Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987) (holding that a contract proposal related to "outside off-duty employment of police" was mandatorily negotiable). However, the PBA has not raised any issue regarding the allocation of off-duty employment opportunities among unit members. It is undisputed that the only change the Ordinance makes to the pre-existing selection process concerns employees not in the PBA's unit.

Under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., "a majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit." N.J.S.A. 34:13A-5.3. Nothing in the Act bestows upon a majority

^{5/} According to the Township, \$412,747 in off-duty work was paid during 2013, the year preceding the Ordinance's adoption, whereas in 2015, the first year after the Ordinance's adoption, \$484,578 in off-duty work was paid.

representative standing to arbitrate grievances on behalf of non-unit members.

Moreover, on the record before us, we are unable to discern how the Ordinance's restriction on ranks above lieutenant "intimately and directly affects the work and welfare" of the PBA's unit members. While the PBA asserts that the unilateral alteration of terms and conditions of employment was in unit work, there has been no showing that the Township shifted PBA work to non-unit employees. Therefore, unit work is not implicated here.

While asserting several claims, the PBA has not specifically addressed the Township's determination to exclude captains and the chief from performing off-duty jobs in order to maintain appropriate supervisory reporting relations in the Police Department. Nor has it produced any evidence demonstrating that employee safety has been compromised, workload has increased, or off-duty work opportunities for unit members have decreased as a result of the adoption of the Ordinance. See Clark Tp., P.E.R.C. No. 2016-55, 42 NJPER 372 (¶105 2016), aff'd No. A-2544-15T3, 2016 N.J. Super. Unpub. LEXIS 2348, (App. Div. Oct. 28, 2016) (restraining arbitration with respect to an asserted severable impact based upon the grievant's failure to produce any evidence demonstrating that her workload increased as a result of the employer's action). Given the absence of any identified, actual

impact of the Ordinance on PBA unit members, we conclude that deciding which police officers are eligible for off-duty assignments is a policy decision reserved to management and is not mandatorily or permissively negotiable. See City of Elizabeth v. Elizabeth Police Superior Officers Ass'n, 42 NJPER 454 (¶124 2016) (App.Div. Mar. 29, 2016), aff'g P.E.R.C. No. 2014-94, 41 NJPER 67 (¶21 2014). Accordingly, we restrain arbitration over the adoption of the Ordinance and any severable impact postulated by the PBA.

ORDER

The request of the Township of Lyndhurst 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 and Voos voted against this decision. Commissioner Wall recused himself.

ISSUED: January 26, 2017

Trenton, New Jersey