

P.E.R.C. NO. 2021-22

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ENGLEWOOD,

Petitioner,

-and-

Docket No. SN-2021-003

ENGLEWOOD PBA LOCAL 216,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, and denies, in part, the request of the City of Englewood for a restraint of binding arbitration of a grievance filed by the Englewood PBA, Local 216, contesting the City's implementation of a new uniform requirement (reverting from the Class "B" to the Class "A" uniform as the daily police uniform). The Commission restrains arbitration of the City's non-mandatorily negotiable decision to designate the daily police uniform, including its decision to allow officers to continue to use the Class "B" weapon holster with their Class "A" uniforms until they are able to qualify in the normal course at the weapons range with the Class "A" holster. The Commission finds permissively negotiable the PBA's claim that the City unilaterally reduced a previously established phase-in period for changes in uniforms. The Commission finds the grievance legally arbitrable as to alleged economic and safety-related impacts of the City's decision to revert to Class "A" uniforms. Finally, the Commission finds the PBA's retaliation claim falls under the Commission's unfair practice jurisdiction, and may not be submitted to binding 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, Ruderman & Roth, LLC, attorneys
(Mark S. Ruderman, of counsel and on the brief)

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

DECISION

On July 10, 2020, the City of Englewood (City) filed a scope of negotiations petition, as amended on August 12, seeking a restraint of binding arbitration of a grievance filed by Englewood PBA, Local 216 (PBA). The grievance asserts that the implementation of a new uniform requirement by the Chief of Police constituted a unilateral change in working conditions in violation of the parties' collective negotiations agreement (CNA), including Article XVIII, Section 18.3. The grievance alleges that the change required unit members to purchase new uniforms and new equipment, with resultant impacts of increased laundering and dry cleaning costs, as well as a decreased uniform

replacement period. The grievance also alleges that the change in uniforms was accomplished for discriminatory and retaliatory purposes. As a remedy, the grievance demands that all unit members be made whole, including through payment for the full costs of such uniforms on an annual basis. On June 29, 2020, the PBA filed with PERC a request for submission of a panel of arbitrators. On July 20, 2020, an arbitrator was appointed. The City's scope petition ensued.

The City filed briefs, exhibits, and the certifications of Mark S. Ruderman, the City's labor counsel, and Lawrence Suffern, the City's Chief of Police. The PBA filed a brief and the certification of Corey M. Sargeant, Esq. After the City filed its reply brief, the PBA filed a "request to strike" the City's briefs.^{1/} These facts appear.

The City and the PBA are parties to a CNA in effect from January 1, 2018 through December 31, 2020. The PBA represents

^{1/} We decline to address the PBA's request to strike the City's briefs, which the PBA filed without leave. Scope proceedings allow the filing of a brief by the petitioner, an opposition brief by the respondent, and a reply brief by the petitioner. N.J.A.C. 19:13-3.6. "No other briefs shall be served or filed without leave of the Chair or such other person designated by the Commission." Id., at (d). Further, the PBA's asserted basis for striking the City's briefs is an alleged failure to comply with N.J.A.C. 19:13-3.7(f)'s requirement that all briefs filed with the Commission shall recite all pertinent facts supported by certifications based on personal knowledge. Here, both the City's initial and reply brief were supported by certifications.

all members of the City's regular police force, excluding those with the rank of Chief, Deputy Chief, Captain, Lieutenant or Sergeant. The grievance procedure ends in binding arbitration.

Article XVIII, Section 18.3 of the CNA states:

Prior Practices and Conditions - All previous practices and conditions of employment which inure to the benefit of any Member and which are not herein enumerated or modified shall continue in full force and effect.

For a period of nearly four years, unit members were subject to the Pilot Uniform Program, which the City enacted effective October 1, 2016. Under the Pilot Uniform Program, officers were allowed to wear Class "B" uniforms instead of Class "A" uniforms. The City required officers to revert to Class "A" uniforms when it ended the Pilot Uniform Program effective June 16, 2020, on notice issued May 8, 2020.^{2/} Mr. Ruderman certifies that the notice gave officers approximately 39 days to prepare for the uniform change. Mr. Ruderman also certifies that the notice included a list of acceptable manufacturers from which officers could purchase a Class "A" uniform in addition to the one provided at hire; and further that at least one such manufacturer offers Class "A" uniforms in both cotton fabric, the same as the Class "B" uniform, and wool, which is typical of the Class "A" uniform.

^{2/} The record does not contain a copy of the May 8, 2020 notice.

Chief Suffern certifies that several years prior to the Pilot Uniform Program the City and the PBA negotiated a yearly allowance of \$600 for the maintenance and purchase of new uniforms, which is rolled into the base salaries of PBA members. Since the enactment of the Pilot Uniform Program, the Chief certifies, all new hires were issued two Class "A" uniforms: one Class "A" winter/dress and one Class "A" summer/dress uniform. The Chief further certifies: Class "A" uniforms can be purchased in material that can be machine-washed rather than dry-cleaned; PBA members may use the Class "B" uniform weapon holster with their Class "A" uniforms until they are able to qualify at the weapons range with the holster required for the Class "A" uniform; law enforcement officers are required to train and qualify on their weapon semiannually, however during the COVID-19 pandemic they are required to qualify once annually; and PBA members are not required to carry medical equipment, although they may do so at their own discretion.

PBA's counsel wrote to Mr. Ruderman on May 28, 2020, requesting a response to prior correspondence demanding dates and times for negotiations over "the PBA's list of impact items and . . . mandatorily negotiable items," as well as "documents which supported the decision to unilaterally establish the Class A uniform." The letter further enumerated and requested

negotiations over items assertedly impacted by the City's decision to change the uniform requirement.

By letter to Mr. Ruderman dated June 9, 2020, PBA's counsel filed a formal grievance "concerning the unilateral implementation of a new uniform required by the Chief." In pertinent part, the grievance stated:

The change in uniforms has required officers to purchase new uniforms and . . . new equipment. This constitutes a unilateral change in working conditions which violates the contract. Additionally, the increase[d] cost of laundering and dry cleaning these materials including the impact of a decreased replacement period is also a change in working conditions. Among other relevant articles this violates Article XVIII, Section 18.3. The change in uniforms was also accomplished for discriminatory and retaliatory purposes. Accordingly, the PBA/SOA demands compensation for this change in working condition and requests that all unit members be made whole in every way, including paying for the full cost of such uniforms on an annual basis. Please note that this is a class grievance and a continuing violation.

Mr. Sargeant certifies that the PBA does not seek to arbitrate the determination of what constitutes the daily police uniform, but rather issues relating to alleged economic and safety impacts of the uniform change, as well as an alleged discriminatory and retaliatory basis for it.

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 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, 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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The City argues that arbitration must be restrained because the determination of the daily police uniform is a managerial prerogative and thus, not a term and condition of employment. The City adds that a uniform policy is only a mandatory subject of negotiation if it touches on the health and safety of officers. The City asserts that its policy does not do so.

The PBA argues that it does not seek to arbitrate the determination of what constitutes the daily police uniform, but that the cost for the uniforms and the economic impact of changes employers require to uniforms is mandatorily negotiable. The PBA asserts that all of the issues raised by the PBA are cost and economic-impact related. Specifically, it seeks to arbitrate the following matters:

- The cost of the new uniform requirement unilaterally imposed by the Chief.

- The cost of increased new laundering costs.
- The cost of requiring a complete set of new uniforms due to the unilateral change in the replacement periods or transition periods leading up to the new uniforms.
- Fees and costs of the grievance due to the unilateral imposition of new uniforms as retaliation against the PBA for passing a no confidence vote against the Chief of Police and for making statements within news articles critical of the Chief.
- Costs for leather goods and payment for retraining with new firearm equipment at overtime rates.
- Requiring the employer to negotiate in good faith over the general safety of the materials used in the new uniforms. Where better and safer materials are available the employer should be required to consider same in good faith.
- The need to requalify all officers at the weapons range because the Class "A" uniform uses a different weapon holster than the Class "B" uniform, which renders all prior qualifying tests invalid.
- The need to address the inability of unit members to carry certain safety gear within the Class "B" uniform, such as "quick clot, Israeli bandages, tourniquets, medical kits, pressure wound bandages and green doorstops."
- The need to negotiate the material used in the Class "A" uniforms to ensure that it is fire retardant and does not melt to the skin when exposed to flames.

- The phase-in period for a change in uniforms which, previously, had been as long as one year, and which is a working condition incorporated into the contract through section 18.3.

The PBA argues that because the City provides no reasons and states no particularized need for unilaterally changing its uniform policy, it appears to be a retaliatory gesture to punish the PBA for publishing a no-confidence vote related to the Chief. The PBA adds that there have been no issues reported with the Class "B" uniforms, which have been worn without incident or objection for the past four years.

The City replies that the Class "A" uniform is not new, and that all officers before the implementation of the Pilot Uniform Program as well as those hired during it were issued at least two Class "A" uniforms. The City adds that prior to the Pilot Uniform Program's implementation, the City and the PBA negotiated a uniform cost meant for maintaining and purchasing new uniforms, which inherently includes dry cleaning costs, and as such the parties have already negotiated the complete cost of the Class "A" uniforms. The City further stresses that it has never required PBA members to wear a particular uniform material. It only requires them to purchase uniforms from approved manufacturers, leaving the choice of the Class "A" uniform material to PBA members' discretion. The City further disputes the PBA's contention that its members will need to be retrained

at their own cost due to the weapon holster with the Class "A" uniform being different from that used with the Class "B" uniform, stressing that all PBA members are permitted to use the Class "B" holster with the Class "A" uniform until they are able to qualify at the weapon range with the Class "A" weapon holster. The City avers that this does not change conditions of employment because law enforcement officers in the State of New Jersey are already required to attend range training and qualify semi-annually. Finally, the City claims it has a justifiable reason for ending the Pilot Uniform Program, although under applicable Commission case law it is not required to provide one, because the unilateral decision to change to uniforms is and always has been a managerial prerogative.

A public employer's determination of the daily police uniform is not mandatorily negotiable unless related to the health or safety of police officers. Essex County Sheriff's Dept., P.E.R.C. No. 2000-79, 26 NJPER 202 (¶31082 2000), citing, inter alia, City of Trenton, P.E.R.C. No. 79-56, 5 NJPER 112 (¶10065 1979), recon. den. P.E.R.C. No. 79-95, 5 NJPER 235 (¶10131 1979), aff'd in part, rev'd in part, NJPER Supp.2d 84 (¶65 App. Div. 1980). See also, City of Jersey City, P.E.R.C. No. 2020-19, 46 NJPER 183 (¶45 2019). But the economic impact on employees of a decision to change uniforms is ordinarily mandatorily negotiable. Id.

Applying the foregoing authority to the record facts in this matter, the City's decision to designate the Class "A" uniform as the daily police uniform is not mandatorily negotiable, which the PBA does not dispute. Further, the City has certified that officers may continue to use the Class "B" weapon holster with their Class "A" uniforms until they are able to qualify in the normal course at the weapons range with the Class "A" holster. We find this to be an aspect of the City's non-negotiable managerial prerogative to determine the daily police uniform. Therefore we restrain arbitration of the PBA's claim for the "need to requalify all officers at the weapons range" due to the holster issue, as well as the PBA's claim for "payment for retraining with new firearm equipment," to the extent this refers to the holster issue.

We find permissively negotiable the PBA's claim that the City unilaterally reduced a previously established phase-in period for the change in uniforms. Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981) (finding permissively negotiable a contract clause requiring a 30-month phase-out period in the event of a change in duty uniform). We note that in City of Camden and IAFF Local 788, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994), the court found that under Paterson, supra, the employer controls whether a permissive subject will be negotiated, and, by

implication, "the results of such negotiations must be a part of a written agreement." City of Camden, 1994 N.J. Super. Unpub. LEXIS 2 at 19-20. It is in the arbitrator's authority to determine what, if any, evidence may exist regarding the PBA's claim as to the existence of a prior longer phase-in period for new uniforms, as part of the parties' written agreement. Ridgefield Park.

We find that the PBA's grievance is legally arbitrable as to the alleged economic impacts of the City's decision to revert to Class "A" uniforms, as well as its claims regarding any related safety impacts. The arbitrator has the sole authority to resolve any factual disputes associated with the PBA's claims as to economic and safety impacts and to consider the City's contractual defenses. Ridgefield Park.

Finally, the PBA's claim that the City implemented the uniform change in retaliation against the PBA and its president "for discriminatory and retaliatory purposes" may not be submitted to binding arbitration. That claim falls under the Commission's unfair practice jurisdiction, In re Bridgewater Tp., 95 N.J. 235 (1984), and the PBA has already presented it to the Director of Unfair Practices via an unfair practice charge.^{3/}

^{3/} We take administrative notice of the PBA's pending unfair practice charge against the City, Docket No. CO-2020-286, which claims, among other things, that the uniform change was a retaliatory response to a vote of "no confidence" in
(continued...)

ORDER

The request of the City of Englewood for a restraint of binding arbitration is granted, in part, and denied, in part.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: December 10, 2020

Trenton, New Jersey