

P.E.R.C. NO. 2021-20

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONMOUTH COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2020-044

PBA LOCAL 240,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Monmouth County Sheriff's Office (Sheriff) to restrain binding arbitration of a grievance filed by PBA Local 240 (PBA) alleging that the Sheriff violated the parties' collective negotiations agreement (CNA) by unilaterally implementing a revised outside employment policy for County Correctional Police Officers (CCPOs) employed by the Sheriff, which in pertinent part limits the ability for these employees to engage in outside employment requiring a firearm. This prohibition on armed outside employment included employment as a Special Law Enforcement Officer (SLEO) pursuant to N.J.S.A. 40A:14-146.8 et seq., but did not prohibit other forms of outside employment. The Commission finds that N.J.S.A. 40A:14-146.10(d) does not statutorily preempt arbitration of the grievance. The Commission concludes that arbitration of the grievance will not significantly interfere with the Sheriff's policy-making powers because the Sheriff, under the revised policy, retains sufficient control over the outside employment process.

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, Monmouth County Special County Counsel, attorneys (Steven W. Kleinman, of counsel and on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Robert A. Fagella, of counsel and on the brief)

DECISION

On February 25, 2020, the Monmouth County Sheriff's Office (Sheriff) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 240 (PBA). The grievance asserts that the Sheriff violated the parties' collective negotiations agreement (CNA) by unilaterally implementing a revised outside employment policy for County Correctional Police Officers (CCPOs) employed by the Sheriff, which in pertinent part limits the ability for these employees to engage in outside employment requiring a firearm. This prohibition on armed outside employment included employment as a Special Law Enforcement Officer (SLEO) pursuant to N.J.S.A.

40A:14-146.8 et seq., but did not prohibit other forms of outside employment.

The Sheriff filed briefs, exhibits and the certification of Sheriff Shaun Golden. The PBA filed a brief.^{1/} These facts appear.

The PBA represents sworn rank-and-file Corrections Officers at the Monmouth County Correctional Institution (MCCI). The Sheriff and the PBA are parties to a CNA in effect from January 1, 2018 through December 31, 2021, which is authorized pursuant to the February 8, 2019 Memorandum of Agreement (MOA) between the parties. Unless specifically modified by the MOA, the parties continue to follow the previous 2014-2017 CNA. The grievance procedure ends in binding arbitration.

Article 28, Section 1 ("Maintenance of Standards and Savings") of the CNA provides, in pertinent part:

It is the intention of the parties hereto that during the term of this Agreement, all terms and conditions of employment, established past practices, and other benefits presently in this contract, shall be continued to the same level and in the same manner as presently in existence.

Additionally, Article 4 ("Management Rights") and Article 6 ("Handbook and Work Rules") preserve the Sheriff's management rights.

^{1/} PBA Local 240 did not file a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

Golden certifies that there is no specific language in the MOA or CNA governing off-duty or other outside employment of CCPOs, but Golden acknowledges that for many years there has been a standard practice where an employee seeking to work outside employment, including work requiring a firearm, must seek approval from management, and such approval had been regularly granted.

Golden is the Monmouth County Sheriff, an elected Constitutional position. Golden certifies that prior to being elected Sheriff, he served for 18 years with the Colts Neck and Toms River Police Departments, as well as serving as Undersheriff in 2010 responsible for operating the Monmouth County 911 Communications Center. Citing his law enforcement experience and numerous other credentials, Golden certifies that he is fully knowledgeable in law enforcement policies, procedures, and practices.

Golden certifies that the Sheriff operates the MCCI, which is one of the larger County correctional facilities in the United States. It has an occupancy rating of 1,328 inmates and is considered a "maximum security" facility. The MCCI is part of the Sheriff's Corrections Division, which is overseen by an Undersheriff. The MCCI's Warden administers the facility's day-to-day operations along with his command staff. Golden further

certifies that security at MCCI is handled by a force of about 275 CCPOs, along with several dozen supervisors.

Golden certifies that the Sheriff's Corrections Division issued a new Standard Operating Procedure (SOP), Number 1-3.29, entitled "Off Duty and Extra Duty Employment", which became effective on July 11, 2019. The SOP defines off-duty employment as follows:

Off Duty Employment. Secondary employment performed by sworn or non-sworn personnel while not on regular duty with the county. Off-duty employment shall include, but not be limited to, private employment as a security guard or security officer, so long as the employment does not involve or require the use/possession of a firearm, even if the firearm is personally owned or issued by the off-duty employer. This type of employment is where the sworn or non-sworn member is not authorized to wear Monmouth County Sheriff's Office apparel or use issued equipment and/or where the member or employee is not being compensated by the County of Monmouth. (Emphasis added).

The policy further reiterates, in Section 3, that "No application for off-duty employment will be approved where . . .

(b) The off-duty employment requires the use/possession of a firearm, even if the firearm is personally owned or issued by the off-duty employer." Moreover, Section 3, among other restrictions, states that no outside employment application will be approved where the off-duty employment will exceed twenty four hours aggregate in a week and if management reasonably concludes that the off-duty employment will adversely effect the employees'

on-duty assignment. In addition to other procedural requirements for approval of outside employment by the Sheriff, the SOP requires the Contractor, whether it be a "private vendor" or "public entity", to execute a contract with the Sheriff. The form contracts, which are appended to the SOP, set forth, among other things, the terms and conditions of the requested off-duty assignment, subordinates the off-duty assignment to the employee's regular on-duty assignment, and is terminable "in case of emergency or in the event the assignment creates an unreasonable risk to health, safety or welfare of the Officer or public."

Prior to the issuance of the SOP, approval of outside employment was based on the parties' past practice and would be handled on case-by-case basis. Golden certifies that before approval would be granted, employees were required to acknowledge and agree in writing, via the "Sheriff's Off-Duty Employment Request Form" which was used for many years, that the proposed employment will not in any way interfere with their duties as CCPOs or compromise their position with the Sheriff through a conflict of interest, or otherwise reflect unfavorably upon an employee or the Sheriff. Further, the employees acknowledged that a supervisor's written approval was required in advance of performing any off-duty employment, and the approval could be withdrawn at any time. Golden further certifies that employees

approved for outside employment were not permitted to wear their uniform or use equipment issued by the Sheriff. As detailed above, the 2019 SOP maintains many of these same approval requirements and restrictions on outside employment that were previously in place pursuant to the parties' past practice.

Golden also certifies that prior to the 2019 SOP, employees were allowed to accept armed outside employment positions. Notably, the prior "Sheriff's Off-Duty Employment Request Form" countenanced Officers' off-duty municipal employment as a "Special Officer". As such, Golden certifies that at least one CCPO, D.H., had previously been approved, since 2004, to serve as a Class Two SLEO, which is authorized to use a firearm, with the Union Beach Police Department. Golden further certifies that following the SOP's restriction on armed outside employment, D.H. and anyone else similarly situated could no longer serve as an SLEO Two.

Golden certifies that following the issuance of the SOP and subsequent revocation of D.H.'s continuing outside employment as an SLEO Two, the PBA, in its June 6, 2019 letter, objected to the SOP, arguing that the ban on outside employment requiring a firearm violated the CNA, established past practice, and the Sheriff's obligation to negotiate changes in terms and conditions of employment. Sheriff Golden did not modify the SOP, and in

response, the PBA filed a Request for Submission of a Panel of Arbitrators to hear its grievance.

Golden certifies that the parties entered into an interim settlement agreement and have held the pending arbitration in abeyance. Golden further certifies that the agreement allowed D.H. and any other CCPO previously approved to serve as an SLEO to be grandfathered in (subject to compliance with the remaining sections of the SOP), with a stay on any future requests to serve as a SLEO. The agreement further allowed CCPOs the opportunity to serve in security-type outside employment even if they are required to use a firearm. Thus, Golden certifies that the status quo ante has been restored and discussions on a permanent resolution continue, pending the Commission's determination in the instant scope of negotiations petition.

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.

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. Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it speaks in the imperative and fixes a term and condition of employment expressly, specifically and comprehensively.

Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The Sheriff argues that arbitration of the PBA's grievance, challenging the SOP's prohibition of armed outside employment, should be restrained. First, the Sheriff argues that the grievance is statutorily preempted because CCPOs cannot serve as SLEO Twos pursuant N.J.S.A. 40A:14-146.10(d), which precludes a regularly appointed full-time police officer of any "local unit" from simultaneously serving in another "local unit" as a SLEO. The Sheriff argues that CCPO's are statutorily empowered to act as officers for the detection, apprehension, arrest, and conviction of offenders against the law, like other police officers. In recognition of these law enforcement powers and responsibilities, CCPO's statutory job titles were changed from

"County Correction Officer" to "County Correctional Police Officer". Thus, the Sheriff argues because CCPOs have law enforcement powers and responsibilities like any other police officer in any "local unit", they cannot serve as SLEOs in another "local unit" at the same time.

Second, regarding both outside employment as an SLEO Two or any other armed security assignment, the Sheriff argues that the decision of whether or not to permit certain types of outside employment is the Sheriff's non-negotiable, managerial prerogative and not legally arbitrable. The Sheriff cites myriad reasons why arbitration over the SOP would substantially limit its governmental policy-making powers and undermine CCPOs' critical mission including: the possibility of receiving orders from an SLEO's commander that would conflict with regular on-duty CCPO work; the risk of conflicts of interest, where for example a CCPO were hired as an armed security guard for a prisoner's friends or family; the potential for overwork; the risk of lawsuits and potential liability for the Sheriff if a CCPO misuses a firearm while engaged in outside employment; as well as prospective harm to the Sheriff's integrity and reputation. Accordingly, the Sheriff argues that the decision of what types of outside employment are allowed must remain the managerial prerogative of the Sheriff, based on his extensive law enforcement experience and expertise, rather than a civilian

arbitrator who is not qualified to make such an important decision.

The PBA argues that its grievance challenging the SOP is legally arbitrable because it is not statutorily preempted and does not significantly interfere with the Sheriff's managerial prerogative or substantially limit his governmental policy-making powers. First, the PBA argues N.J.S.A. 40A:14-146.10(d) does not preempt its grievance because that statute was intended to preclude regular police officers of a "local unit", such as those of a municipal police force, from serving as SLEOs. The PBA argues that while CCPOs have similar law enforcement powers and responsibilities to those of municipal police officers, they are not the same, particularly in their employment setting. The PBA argues the statutory prohibition on police officers of a "local unit" simultaneously serving as SLEOs in another "local unit" is inapplicable to CCPOs.

Second, the PBA argues that arbitration of its grievance does not significantly interfere with the Sheriff's managerial prerogative or substantially limit his governmental policy-making powers. The PBA essentially seeks to preserve the outside employment approval process prior to the SOP. The PBA argues that it has never disputed that the Sheriff has the authority to impose reasonable conditions on off-duty employment. The PBA's issue is with the Sheriff's unilateral prohibition of armed

outside employment, even if it involves the personal weapon of a fully qualified CCPO. The PBA argues that the prior outside employment approval process allowed employees to make written requests for outside employment, including work requiring a firearm, and the Sheriff could approve or reject the request on a case-by-case basis with considerable safeguards to address any potential conflicts between off-duty and on-duty work. The PBA argues that the Sheriff has not proffered any evidence that the previous outside employment policy produced any problems whatsoever, including any of the potential concerns the Sheriff cites as justifying the ban on armed outside employment, in the many years it was permitted.

We first address the Sheriff's argument that N.J.S.A. 40A:14-146.10(d) preempts this dispute. To be preemptive, a statute must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem To. Bd. Of Ed., 91 N.J. 38, 44 (1982). Some background is necessary to place N.J.S.A. 40A:14-146.10(d) in the proper context.

N.J.S.A. 40A:14-146.9(c) ("Definitions") defines "local unit" as "any municipality or county having established a regular police force pursuant to law." (Emphasis added.)

N.J.S.A. 40A:14-146.10 ("Special law enforcement officers"), provides for the appointment of SLEOs by a "local unit". Subsection a states, in pertinent part, as follows:

Any local unit may, as it deems necessary, appoint special law enforcement officers sufficient to perform the duties and responsibilities permitted by local ordinances authorized by N.J.S.A. 40A:14-118 or ordinance or resolution, as appropriate, authorized by N.J.S.A. 40A:14-106 and within the conditions and limitations as may be established pursuant to this act.

Subsection d, which contains the language that the Sheriff asserts preempts this matter, provides:

No person shall be appointed to serve as a special law enforcement officer in more than one local unit at the same time, nor shall any permanent, regularly appointed full-time police officer of any local unit be appointed as a special law enforcement officer in any local unit. No public official with responsibility for setting law enforcement policy or exercising authority over the budget of the local unit or supervision of the police department of a local unit shall be appointed as a special law enforcement officer. (Emphasis added.)

N.J.S.A. 40A:14-146.11 ("Training; classifications") sets forth the three different classes of SLEOs. SLEO Twos, which are pertinent to this discussion, are described as follows:^{2/}

^{2/} Among other differences, the primary distinction between SLEO Ones and Twos is that SLEO Ones are strictly prohibited from carrying or using a firearm in their SLEO One role. SLEO Threes were created to provide additional school security, but only retired law enforcement officers,
(continued...)

(2) Class Two. Officers of this class shall be authorized to exercise full powers and duties similar to those of a permanent, regularly appointed full-time police officer. The use of a firearm by an officer of this class may be authorized only after the officer has been fully certified as successfully completing training as prescribed by the commission.

The Sheriff asserts that CCPOs are a regular police force pursuant to law, meeting the definition of "local unit" in N.J.S.A. 40A:14-146.9(c), and are thereby precluded from serving as a SLEO in another "local unit" pursuant to N.J.S.A. 40A:14-146.10(d). We disagree and find that N.J.S.A. 40A:14-146.10(d) does not expressly, specifically, and comprehensively preempt the issue of the Sheriff's revision of the outside employment policy to ban armed outside employment.

The operative language in the definition of "local unit" is "a county having established a regular police force pursuant to law." N.J.S.A. 40A:14-146.9(c). Such "county police departments and forces" are statutorily established pursuant to N.J.S.A. 40A:14-106 ("County police; establishment"). N.J.S.A. 40A:14-106 is expressly incorporated into N.J.S.A. 40A:14-146.10(a), which establishes the appointment of SLEOs by "local units." N.J.S.A.

2/ (...continued)
including retired corrections officers, are eligible to be SLEO Threes.

40A:14-107 sets forth the general powers of the county police departments established under N.J.S.A. 40A:14-106.

The above cited authority is different from the authority relating to County Sheriff's Offices. The office of the County Sheriff is established under the State Constitution. N.J. Const., art. VII, § II. Sheriff's officers' duties are enumerated in N.J.S.A. 2A:154-3 (Powers of sheriff's officers, and CCPOs) and N.J.S.A. 40A:9-117.6 (Sheriff's officers; appointment duties). The contrasts between the authority for county police departments and the authority for county sheriff's offices support that they are separate entities.

An example of a "county police department and force", established under N.J.S.A. 40A:14-106, is the Union County Police Department, which has its own Chief of Police and is under Union County's Department of Public Safety and not the Union County Sheriff's Office.^{3/} Another example of a county police department is the former Bergen County Police Department (BCPD) which was dissolved and merged with the Bergen County Sheriff's Office (BCSO), resulting in various litigation. See In re Brundage, 2020 N.J. Super. Unpub. LEXIS 1282 (App. Div. June 29, 2020) (discussing the differences between the BCSO and BCPD); see also Fraternal Order of Police Camden Lodge # 1, Inc. v. County

^{3/} See <https://ucnj.org/public-safety/division-of-police/> and <https://ucnj.org/search/>

of Camden, 2015 N.J. Super. Unpub. LEXIS 2408, 10-12 (App. Div. October 21, 2015) (discussing the formation of the Camden County Police Department pursuant to N.J.S.A. 40A:14-106, -106.1 and -107, as separate and apart from, the Camden County Sheriff's Offices).

Both Fraternal Order of Police Camden Lodge # 1, Inc. and In re Brundage underscore the distinctions between a county sheriff's office and a county police department. The Court In re Brundage explained:

Further, unlike the BCPD officers [whose powers derive from N.J.S.A. 40A:14-107 ("General powers of county police")], under N.J.S.A. 40A:9-117.6, sheriff's officers "perform the duties involved in attending the courts . . . or in serving court processes, or in the investigation and apprehension of violators of the law, or in criminal identification, or in ballistics, or in any related work" determined appropriate for a sheriff's officer.

[Id. at 6].

The Court In re Brundage further explained:

While the PBA is correct in claiming that BCPD officers and BCSO officers have many similar duties and responsibilities, it fails to recognize foundational differences between the two titles. A BCSO officer gets his or her authority through the New Jersey Constitution. See N.J. Const., art. VII, § 2. Additionally, the BCPD and the BCSO have historically been separate entities. Specifically, the BCPD was a division of the county's Department of Public Safety, led by a director appointed by the county executive. The county sheriff was the head of a separate

department with officers under his or her jurisdiction.

[Id. at 20-21].

We find that CCPOs as Sheriff's Officers do not meet the definition of "local unit", and therefore the prohibition on simultaneously serving as an SLEO in two "local units" under N.J.S.A. 40A:14-146.10(d) is not applicable to CCPOs. Therefore, there is no language in N.J.S.A. 40A:14-146.10(d) that expressly, specifically and comprehensively preempts the issue of the Sheriff's revision of the outside employment policy to ban armed outside employment.

Having found that arbitration is not statutorily preempted, we next turn to whether the Sheriff has a managerial prerogative to revise the outside employment policy to ban armed outside employment. In Ass'n of New Jersey State College Faculties, Inc. v. New Jersey Bd. of Higher Ed., 66 N.J. 72 (1974), the Supreme Court of New Jersey found that an employer's unilateral implementation of additional restrictions on outside employment, beyond those which were preexisting, should have been negotiated. See also Borough of Clayton, P.E.R.C. No. 2005-19, 30 NJPER 411 (¶134 2004) (finding a police chief's ban on outside employment mandatorily negotiable where the record was devoid of justification for the ban), and Tp. of Montclair, P.E.R.C. No. 90-39, 15 NJPER 629 (¶20264 1989) (finding the employer's unilateral implementation of procedures regulating the off duty

employment of police officers to be mandatorily negotiable). However, the Commission has also held that a public employer's "policymaking powers" would be substantially limited if it was prohibited from administering the off-duty employment system or requiring the approval of its designated representative before off-duty employment is performed. City of Paterson, P.E.R.C. No. 2004-6, 29 NJPER 381 (¶120 2003).

With this background established, we find that this record, on balance, does not support restraining arbitration. Under the previous outside employment policy, which allowed for armed outside employment, the Sheriff possessed substantial discretion and authority to approve or reject requests for off-duty work with extensive procedural safeguards to protect against many cited concerns. Under this SOP, the Sheriff retains that same level of discretion and authority. For example, both the SOP and the contracts that control any potential outside employment subordinate the off-duty work to the CCPO's regular on-duty assignment, thereby addressing any potential conflicts that could adversely affect the CPO's regular duty. Further, under both the previous policy and the current SOP, approval for outside employment is revocable and the contracts for the outside employment are terminable. Thus, we conclude that arbitration of the grievance will not significantly interfere with the Sheriff's

policy-making powers because the Sheriff retains sufficient control over the outside employment process.

ORDER

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

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