

P.E.R.C. NO. 90-105

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of  
CITY OF VINELAND,

Petitioner,

-and-

Docket No. SN-89-90

FRATERNAL ORDER OF POLICE,  
CUMBERLAND LODGE NO. 8,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds that the subject matter of a grievance filed by the Fraternal Order of Police, Cumberland Lodge No. 8 against the City of Vineland could be submitted to binding arbitration. The grievance alleged that the City violated a past practice by directing that police officers not take their lunch and dinner breaks at restaurants that serve alcoholic beverages. The Commission finds that the dispute relates to a subject which is at least permissively negotiable.

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Appearances:

For the Petitioner, Reuss & Cavagnaro, attorneys  
(Carl W. Cavagnaro, of counsel)

For the Respondent, Richard C. Earl, President.

DECISION AND ORDER

On June 23, 1989, the City of Vineland petitioned for a scope of negotiations determination. The City seeks to restrain binding arbitration of a grievance filed by the Fraternal Order of Police, Cumberland Lodge No. 8 ("FOP").<sup>1/</sup>

The City has filed a brief. These facts appear.

The FOP represents the City's non-supervisory police officers. The FOP and the City have executed a collective negotiations agreement effective January 1, 1987 to December 31, 1989. The agreement contains a grievance procedure ending in binding arbitration.

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<sup>1/</sup> The petition sought restraints of three grievances. Only one grievance is now in dispute. We delayed processing this case pending settlement efforts.

On February 17, 1989, the FOP filed a grievance alleging that the City violated a past practice by directing that police officers not take their lunch and dinner breaks at restaurants which serve alcoholic beverages. The City denied the grievances and the FOP demanded binding arbitration. This petition ensued.

On November 15, 1989, an arbitrator issued an award finding that the City's directive violated the contract.

The City asserts that the challenged directive was made pursuant to a City ordinance (No. 1046) which established rules and regulations for the police department. One rule (Section No. 127-16) prohibits on-duty officers from visiting establishments selling alcoholic beverages except for police business. It asserts that the grievance challenges the exercise of a non-negotiable managerial prerogative and that arbitration is preempted by N.J.S.A. 40A:14-118 giving a municipality and its police chief the power to prescribe and administer police department rules and regulations.

The FOP did not file a brief.<sup>2/</sup> It argued before the arbitrator that the complete ban on eating in establishments which served liquor contravened a written revision in the policy made several years ago which permitted police officers on duty to eat in such establishments if they had a dining area separate from a bar or lounge area where liquor is served.

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<sup>2/</sup> The FOP urges that the petition be dismissed because the City did not serve its brief on the FOP when it was filed with the Commission. The FOP was afforded extra time to file a responsive brief after service was made. The delay did not prejudice the FOP. We deny its request to dismiss the petition.

The FOP acknowledged that there may be restaurants that an on-duty officer should not frequent for reasons of decorum. But the arbitrator found that the ban was broad enough to prevent an officer from eating in an innocuous establishment like Pizza Hut because it serves alcoholic beverages. Accordingly he directed the parties to prepare a list of restaurants serving alcoholic beverages which would be acceptable for a police officer to patronize while on duty.

The boundaries of the Commission's scope of negotiations jurisdiction are narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154; emphasis added].

Accordingly, we only determine whether the City could legally agree to arbitrate this grievance.

The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as mandatory category of negotiations. Compare, Local 195, IFPTE, 88 N.J. 393 (1982). In Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police and fire fighters:

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 fire fighters, 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 fire fighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policy-making 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. [87 N.J. at 92-93; citations omitted]

Because this dispute arises as a grievance, arbitration will be permitted if the subject of the dispute is either mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. Dkt. No. A-3664-81T3 (4/28/83). Paterson bars arbitration only if the agreement alleged would substantially limit government's policy-making powers.

N.J.S.A. 40A:14-118 does not preempt negotiations or arbitration of this matter. See Lacey Tp., P.E.R.C. No. 87-120, 13 NJPER 291 (¶18122 1987). Nor does the City ordinance. Bor. of Belmar, P.E.R.C. No. 89-73, 15 NJPER 73 (¶20029 1989), aff'd App. Div. Dkt. No. A-2418-88T2 (12/22/89); City of Paterson, P.E.R.C. No.

80-68, 5 NJPER 543 (¶10280 1979), aff'd App. Div. Dkt. No. A-1318-79 (2/10/81).

This dispute relates to a subject which is at least permissively negotiable. The arbitrator's opinion indicates that the FOP is contesting only a total ban on eating in "wet" restaurants rather than the more limited restriction of eating only in those establishments which do not have a dining area separate from the bar or lounge. Where an employee has lunch or dinner during a meal break is a matter which intimately and directly affects the employee. The City's right to ban the consumption of alcoholic beverages while on duty, its ability to regulate substance abuse, and its ability to contact an officer during a meal break to respond to an emergency would not be substantially limited by the restriction which the FOP claims should be honored.

ORDER

The subject matter of the grievance could be submitted to binding arbitration.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: May 14, 1990  
Trenton, New Jersey  
ISSUED: May 15, 1990