

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY SHERIFF'S DEPARTMENT,

Petitioner,

-and-

Docket No. SN-2000-17

ESSEX COUNTY SHERIFF'S OFFICERS,
P.B.A. LOCAL 183,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Essex County Sheriff's Department for a restraint of binding arbitration of a grievance filed by the Essex County Sheriff's Officers, P.B.A. Local 183. The grievance alleges that the employer violated N.J.S.A. 40A:14-146.16b by assigning volunteer deputy sheriff's officers to patrol the County's parks on bicycles, thereby replacing full-time regular sheriff's officers. The grievance further alleges that the employer violated N.J.S.A. 40A:14-146.6 by requiring the volunteer officers to wear department-approved shirts which do not include the word "deputy." The Commission finds that the dispute has evolved since the grievance was filed and the PBA now agrees that N.J.S.A. 40A:9-117.2 prohibits the County from using any deputy sheriff's officers. The Commission concludes that because the PBA seeks to prevent the employer from using volunteers to perform any of the wide range of functions they currently perform, it is seeking to arbitrate issues that do not relate solely to negotiable terms and conditions of employment. The claims raised by the PBA are more appropriate for consideration by the courts and not an arbitrator. The Commission also finds that the determination of the daily police uniform 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. 2000-79

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Appearances:

For the Petitioner, Catherine E. Tamaski, Essex County
Counsel (Kenneth Aaron Rosenberg, Assistant County
Counsel, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys
(Charles J. Sciarra, on the brief)

DECISION

On August 9, 1999, Essex County Sheriff's Department petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by the Essex County Sheriff's Officers, P.B.A. Local 183. The grievance alleges that the employer violated N.J.S.A. 40A:14-146.16b by assigning volunteer deputy sheriff's officers to patrol the County's parks on bicycles, thereby replacing full-time regular sheriff's officers. As discussed later, this aspect of the dispute has broadened: the PBA now contends that the Sheriff has no legal authority to appoint volunteer deputy sheriff's officers. The grievance further alleges that the employer violated N.J.S.A. 40A:14-146.6 by requiring the volunteer officers

to wear department-approved shirts which do not include the word "deputy."

The parties have filed briefs and exhibits. The employer has filed certifications of Donald Brown, the Personnel Officer/Director of Administrative Services for the Sheriff's Office, and David Berkowitz, the Director of the Division of Volunteer Deputy Sheriff's Officers. These facts appear.

The PBA represents all permanently appointed sheriff's officers, court attendants, identification officers, sheriff's officers (bilingual) and sheriff's investigators. The Sheriff's Office and the PBA are parties to a collective negotiations agreement which was extended by a Memorandum of Agreement through December 31, 1998.^{1/}

Sometime in the 1960's, the employer formed the Deputy Sheriff's Officers Division to assist the Sheriff's Office.

N.J.S.A. 40A:9-117.2 provides:

In addition to the deputies authorized to be appointed pursuant to N.J.S. 40A:9-117, the sheriff of any county having a population of more than 850,000 inhabitants, according to the latest federal decennial census, may designate and appoint to serve at the pleasure of the sheriff without compensation up to 85 persons to the positions of deputy sheriffs. As an auxiliary force of the sheriff's office, they shall assist in providing for the health, safety and welfare of the people of the State

^{1/} The PBA filed for interest arbitration on January 21, 1999; an arbitrator was appointed, and the parties reached a settlement. The record does not indicate the term of the successor agreement.

of New Jersey and aid in the prevention of damage to and the destruction of property during any emergency and such other duties as may be prescribed and directed by the sheriff.

N.J.S.A. 40A:14-146.16b provides:

Notwithstanding any provision of this act to the contrary, special law enforcement officers may be employed only to assist the local law enforcement unit but may not be employed to replace or substitute for full-time, regular police officers or in any way diminish the number of full-time officers employed by the local unit.

The division consists of volunteers who are called deputy sheriff's officers. In August of 1998 there were 57 volunteer deputy sheriff's officers. Now there are 67. Before being appointed, volunteers are interviewed and undergo background checks. They must also pass physical and psychological examinations and complete a State-certified, class II police training program lasting approximately 410 hours. Berkowitz, also a volunteer, is director of the division and is responsible for supervising the volunteers.

The volunteers assist with activities such as traffic and crowd control, cemetery escorts, patrolling parks and reservations, and other duties requested by the Sheriff. Volunteers patrol the parks, either in patrol cars or on their own bicycles, from 6:00 p.m. to 11:30 p.m., Monday through Friday and 8:00 a.m. to 12:00 a.m. on weekends. There are currently seven deputy sheriff's officers assigned to bicycle patrol and at any given time four to six volunteers are on duty patrolling the County's parks.

The volunteers obtain and pay for their own uniforms. A uniform specification was approved by the employer on April 24, 1998. The specification required that the uniform shirt have an embroidered Sheriff's Office patch on the left chest and the word "Sheriff" silk screened on the back. In his certification, Berkowitz states that the volunteers assigned to bicycle patrol wore these shirts during the summer of 1998 until he was advised by the chief of the Sheriff's Office that the shirts must have the word "deputy." New shirts were obtained during the summer and fall of 1998. These shirts are now being worn.

N.J.S.A. 40A:14-146.6 provides:

Any other law to the contrary notwithstanding, the identification card, badge or other identifying insignia of any person who serves as a special policeman, auxiliary policeman, civil defense worker, or who performs under the law any special police or law enforcement function in the State or any of its political subdivisions, shall clearly state the name of the agency by which any such person is employed and shall clearly distinguish any such person from the members of any regular and permanent State, county or municipal police department.

N.J.S.A. 40A:9-117.4 provides that "[t]he sheriff shall issue identification and badges to such deputy sheriffs as he shall designate and approve."

Berkowitz certifies that the division volunteered about 30,000 hours of service during 1998. He states that volunteers have never been used to replace full-time regular sheriff's officers who have been laid off, or to fill vacancies in the Sheriff's Office.

Donald Brown has been the personnel officer in the Sheriff's Office since 1984. He manages the budget, purchases supplies, and makes personnel decisions concerning sheriff's officers and staff. He states that in August 1998, the Sheriff's Office employed 341 sheriff's officers/investigators. Currently there are 294 sheriff's officers and 46 investigators. He states that the Sheriff's Office has not laid off any officers since he has been the personnel director. When staffing levels fall below what the employer's budget calls for, officers are hired from civil service lists. During 1998, nine sheriff's officers/investigators were hired to fill vacancies.

Sheriff's officers perform duties as required by the Sheriff including investigating and arresting violators of the law; providing court security; serving court process; identifying criminals; investigating ballistics; transporting prisoners; and preserving the peace. Brown states that sheriff's officers do not perform patrol duties in the County parks either in cars or on bicycles. However, if a Sheriff's officer is traveling from one location to another he or she may be ordered to pass through or by a particular area, including a county park.

On August 6, 1998, the PBA filed a grievance alleging that the employer violated N.J.S.A. 40A:14-146.6 and N.J.S.A. 40A:14-146.16b by replacing full-time regular officers on bicycle patrol with deputy sheriff's officers and by permitting deputy sheriff's officers to wear shirts which omit the word "deputy."

As a remedy, the grievance sought to replace the volunteer officers with full-time, regular officers and to require that volunteer officers display their position as deputy sheriff's officers so that the public can distinguish the permanently employed officers from the volunteer officers.

On August 27, 1998, the PBA demanded arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield 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].

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), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

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.... 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; citations omitted]

When a negotiability dispute arises over a grievance, arbitration will be permitted if the subject of the dispute is at least 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 policymaking powers.

The employer maintains that it has a managerial prerogative to use volunteers to patrol the County's parks to provide effective and cost efficient law enforcement, security and investigative services. It asserts that it has a tradition, authorized by N.J.S.A. 40A:9-117.2, of using volunteer deputy

sheriff's officers. It further asserts that no layoffs of regular full-time sheriff's officers have occurred; no volunteer deputy sheriff's officers were used to fill any vacancies; and the PBA's status as majority representative has not been undermined by using volunteer deputy sheriff's officers.

The employer also contends that N.J.S.A. 40A:9-117.2 preempts arbitration of the portion of the PBA's grievance concerning appointment of volunteer deputy sheriff's officers. It reasons that while the statute does not "speak in the imperative" as to the appointment of the volunteers, once the decision to appoint is made, N.J.S.A. 40A:9-117.2 gives the Sheriff unfettered discretion to assign them tasks to accomplish the mission of his office. Further, it rejects the PBA's assertion that it violated N.J.S.A. 40A:14-146.16b, arguing that deputy sheriff's officers are not "special law enforcement officers" under the statute.

The employer further argues that N.J.S.A. 40A:9-117.4 preempts that portion of the PBA grievance protesting the shirts worn by the deputy sheriffs. In addition, it maintains that employers have a managerial prerogative to determine uniforms and that, in any case, the grievance is moot because the shirts have been modified to include the word "deputy."

The PBA responds that N.J.S.A. 40A:9-117.2 authorizes a sheriff to appoint uncompensated deputy sheriffs only where the county has a population of more than 850,000. It maintains that since the 1990 census recorded Essex County's population as

778,206, the County is now prohibited from maintaining the deputy sheriff division.^{2/} The PBA states that it "reserves all rights" with respect to violation of the statute and maintains that the statute defeats any claims that the employer has a managerial prerogative to appoint deputy sheriff's officers. With respect to the dispute over uniforms, the PBA maintains that uniform requirements are arbitrable and that the issue for the arbitrator is not whether the word "deputy" appears on the uniform but whether the deputies are mistaken for full-time, regular officers.

The employer responds that regardless of whether N.J.S.A. 40A:9-117.2 pertains to Essex County, the Sheriff has a managerial prerogative to appoint the volunteer division under the "totality of circumstances" approach outlined in our case law concerning use of volunteers. Further, it maintains that the PBA's exhibit listing the 1990 census figures is unauthenticated and hence inadmissible. Finally, it argues that we should reject the PBA's interpretation of N.J.S.A. 40A:9-117.2 because it would nullify the statute since no New Jersey county has a population greater than 850,000. It reiterates that uniform specifications are not mandatorily negotiable, whether or not N.J.S.A. 40A:9-117.4 applies. Finally, it asserts that the yellow golf shirts worn by the deputy sheriff's officers cannot be confused with the standard blue police uniforms worn by the regular sheriff's officers.

^{2/} The PBA also states that it called the Essex County Clerk's office and received a revised figure of 765,348.

The PBA responds that the fact that no county has a population over 850,000 demonstrates that all counties are now small enough "to avoid using volunteers." It asserts that without the volunteers, regular sheriff's officers would work more overtime or more full-time regular officers would be hired.

We turn first to the portion of the grievance concerning the use of volunteers.

This dispute has evolved since the grievance was filed and the PBA now focuses exclusively on N.J.S.A. 40A:9-117.2. In arguing both that the statute prohibits the appointment of deputy sheriff's officers and that the grievance may be arbitrated, the PBA in effect argues that an arbitrator could determine whether the employer's appointment of volunteers violated the statute. We reject that position.

Because the PBA seeks to prevent the employer from using volunteers to perform any of the wide range of functions they currently perform, the PBA is seeking to arbitrate issues that do not relate solely to negotiable terms and conditions of employment of sheriff's officers. Volunteers perform a number of functions that the PBA does not claim can only be performed by sheriff's officers. To permit the arbitrator to consider whether the employer can use any volunteer deputy sheriff's officers would inject the arbitrator into areas over which the PBA does not have a direct interest. The employer asserts that if its approximately 70-member volunteer division were eliminated, it could not provide

its current range of services. An award prohibiting the employer from using any volunteer deputy sheriff's officers would thus substantially limit governmental policy and therefore arbitration must be restrained.

Moreover, we note that the PBA raises no issues of contract interpretation. It seeks a ruling on the continued viability of a statute that addresses the manner in which the Sheriff may deliver governmental services and that relates only tangentially to the terms and conditions of employment of regular sheriff's officers. Compare Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982); Rutgers, the State Univ. and Rutgers Council of AAUP Chapters, 256 N.J. Super. 104, 118-119 (App. Div. 1992), aff'd 131 N.J. 118 (1993); Rutherford Bd. of Ed., P.E.R.C. No. 85-96, 11 NJPER 223 (¶16086 1985) (qualifications of teacher evaluators are not a mandatorily negotiable term and condition of employment; therefore, regulations establishing such qualifications are not incorporated in negotiated agreement); see also Borough of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1995). As such, the PBA raises the type of statutory construction question that is appropriate for consideration by the courts, rather than the type of contract claim that is appropriate for consideration by an arbitrator. See N.J.S.A. 2A:16-53 (where a person's rights, status or other legal relations are affected by a statute, declaratory relief in court is available to construe or determine validity of statute). We

express no view on the merits of the PBA's arguments concerning N.J.S.A. 40A:9-117.2 and hold only that it must pursue in another forum its claim that the Sheriff is not legally authorized to appoint volunteer deputy sheriff's officers.

In view of this ruling and the nature of the claim that the PBA now seeks to arbitrate, we need not address whether N.J.S.A. 40A:9-117.2 preempts arbitration of a claim that protests the use of volunteer deputy sheriff's officers for particular assignments.

We turn now to that portion of the grievance involving the identification on the uniforms of the deputy sheriff's officers. We cannot find that this portion of the petition is moot, because the PBA maintains that whether or not "deputy" appears on the volunteers' uniforms, the public could still confuse them with regular sheriff's officers.

The determination of daily police uniforms is not mandatorily negotiable unless related to the health or safety of police officers. See 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); Borough of Butler, P.E.R.C. 87-121, 13 NJPER 292 (¶18123 1987); Hunterdon Cty., P.E.R.C. No. 83-46, 8 NJPER 607 (¶13287 1982). However, we have held some uniform clauses to be permissively negotiable. See Saddle Brook Tp., P.E.R.C. No. 91-95, 17 NJPER 250 (¶22114 1991) (provision stating that certain

officers would not be required to buy leather jackets until their nylon jackets wore out is permissively negotiable); Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981) (30-month phase-out for old uniforms permissively negotiable); Town of Kearny, P.E.R.C. No. 81-34, 6 NJPER 446 (¶11229 1980) (change from leather to nylon jackets is permissively negotiable).

Against this backdrop, we conclude that the grievance is not legally arbitrable. The decision as to what identification and uniforms deputy sheriff's officers will wear does not involve the terms and conditions of employment of sheriff's officers. It does, however, involve a governmental policy decision as to how deputy sheriff's officers should be viewed by the public. It may also involve a judgment as to how they should be differentiated from regular sheriff's officers without compromising the deputy sheriff's officers' authority vis-a-vis the public. We conclude that governmental policymaking would be substantially limited by an agreement that determined that balance. Such an agreement would trench significantly more on governmental policy than the uniform clauses we have found to be permissively negotiable.

Further, the PBA does not argue that the uniform specifications for volunteers affect the safety of regular sheriff's officers. We note as well that this grievance attempts to arbitrate a dispute over the employer's actions with respect to non-unit members. Compare State-Operated School, Dist. of Newark, P.E.R.C. No. 2000-51, 26 NJPER 66 (¶31024 1999) (scheduling clause


not mandatorily negotiable because it pertained to terms and conditions of employment of a non-unit title).

Finally, we note that the fact that there might be a statute addressing the insignia of deputy sheriff's officers does not convert the issue into a negotiable one for regular sheriff's officers. See N.J.S.A. 40A:14-146.6 (setting requirements for insignias for special police, auxiliary police, civil defense workers, and others who perform special police or law enforcement functions). Compare Holmdel Tp. Bd. of Ed., P.E.R.C. No. 2000-43, 26 NJPER 27 (¶31008 1999) (statute governing teacher certification does not make issue of teacher qualifications negotiable).

ORDER

The request of the Essex County Sheriff's Office for a restraint of binding arbitration over the claim that N.J.S.A. 40A:9-117.2 prohibits the employer from using volunteer deputy sheriff's officers is granted. Arbitration is also restrained to the extent the grievance challenges the identification worn by deputy sheriff's officers.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner Madonna abstained from consideration. None opposed.

DATED: April 27, 2000
Trenton, New Jersey

ISSUED: April 28, 2000