

P.E.R.C. NO. 90-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MONTCLAIR,

Petitioner,

-and-

Docket No. SN-89-77

PBA LOCAL 53,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by PBA Local 53 against the Township of Montclair. The grievance contests the Township's unilateral adoption of procedures for regulating the off-duty employment of police officers. The Commission finds that the employer could not unilaterally require prior approval of outside employment.

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Appearances:

For the Petitioner, Ruderman & Glickman
(Mark S. Ruderman, of counsel)

For the Respondent, Greenwood, Young, Tarshis, DiMiero &
Sayovitz, P.A. (Joanne L. Butler, of counsel)

DECISION AND ORDER

On May 30, 1989, the Township of Montclair petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance which PBA Local 53 has filed. The grievance contests the Township's unilateral adoption of procedures for regulating the off-duty employment of police officers.

The parties have filed briefs and exhibits. These facts appear.

The PBA is the majority representative of all full-time police department employees, except the chief and deputy chiefs. The parties' collective negotiations agreement has a grievance procedure ending in binding arbitration.

The Township unilaterally adopted a policy on outside employment during off-duty hours. The policy provides:

I. POLICY

It should be understood by all Township of Montclair employees that the employee's position with the Township is to be considered their primary job. Nothing contained herein shall prevent an employee from engaging in outside employment on off duty hours provided such employment does not conflict with the employee's Township duties or interfere with the efficiency or performance of other employees of the Township of Montclair.

All Township of Montclair employees are prohibited from using any Township of Montclair tools, equipment supplies, personnel, or facilities in the production or manufacture of goods or in the provision of a service or services which result in a personal gain for the employee, or his/her private business, monetary or otherwise.

No Township of Montclair employee acting on his or her own behalf, or on the behalf of a private business interest, personal or otherwise, shall enter into a contract or understanding with the Township of Montclair for the production or manufacture of goods or the provision of a service or services, if such contract or understanding presents a conflict of interest.

II. PROCEDURE

- 1) All full time employees of the Township of Montclair shall report, in writing, to their department heads prior to January 31st of each year any outside employment they are engaged in.
- 2) Any full time employee wishing to accept outside employment shall request permission to do so, in writing, from their department head (or in the case of a department head from the Township Manager). This request shall set forth pertinent information concerning the type of employment to be engaged in, the name and address of the prospective employer, and the hours of such employment.
- 3) Department heads are to review all reports of outside employment and all requests for permission to accept outside employment and indicate their approval or disapproval of such

outside employment. No outside employment shall be approved by the department head if, in his or her judgment there is a reasonable probability that such outside employment will interfere with an employee's performance or compromise an employee's position with the municipality through a conflict of interest.

4) Department heads shall then deliver such outside employment reports and requests to the Township Manager along with their reason(s) for approval or disapproval by attaching his signature thereto.

5) The Township Manager will notify, in writing, any employee who is engaged in outside employment or private business, or who wishes to engage in outside employment or private business, which is determined to be inconsistent with the Township of Montclair policies or which presents a conflict of interest. Such employee(s) will refrain from such outside employment or private business or be subject to disciplinary action.

Upon learning of this policy, the PBA filed a grievance.

The PBA specifically objected to the first two paragraphs of Section II (Procedure). It maintained that information should be sought only if misconduct was reasonably suspected; that this policy should not have been adopted unilaterally, and that the policy invades privacy rights.

After the employer denied the grievance, the PBA sought binding arbitration. This petition ensued.

The employer asserts that the grievance is not arbitrable since the subject matter is not mandatorily negotiable. The PBA disagrees.

At the outset of our analysis, we stress the narrow boundaries of our jurisdiction. 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. [78 N.J. at 154]

Thus, we do not address the merits of the grievance or the wisdom of the Township's policy. Nor do we address the PBA's assertion that the employer failed to comply with step two of the grievance procedure.

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. Compare Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981) with Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson outlines the steps of a scope of negotiations analysis for police officers:

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. [87 N.J. at 92-93; citations omitted]

Because this dispute arises as a grievance, arbitration will be permitted if the subject is at least 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). No preemption arguments have been made.

In Ass'n of New Jersey State College Faculties, Inc. v. New Jersey Bd. of Higher Ed., 66 N.J. 72 (1974), our Supreme Court addressed the negotiability of restrictions on outside employment. There the parties' contract required disclosing any regular off-campus services. The majority representative did not object to guidelines prohibiting outside employment which: (1) constituted a conflict of interest, (2) occurred during college work time, or (3) diminished the employee's efficiency in doing his primary job. But the majority representative did object to other guidelines requiring the employer's prior and continuing written approval and limiting the compensation an employee could receive. The Court held that these additional restrictions were mandatorily negotiable and ordered them stricken pending negotiations.

Higher Ed. is still good law. See Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987); Somerset Cty. P.E.R.C. No.

84-92, 10 NJPER 130 (¶15066 1984). However, we have held that a proposal calling for the PBA president and Director of Police to jointly administer outside employment was an undue delegation of managerial authority and hence not mandatorily negotiable. Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (¶16184 1985).

Litigation has arisen on the constitutionality of outside employment restrictions. In Bowman v. Pennsauken Tp., 709 F. Supp. 1329 (D.N.J. 1989), Judge Rodriguez preliminarily enjoined restrictions on employers wishing to hire police officers to "moonlight" as security guards. These restrictions required the employers to execute a hold harmless and indemnification agreement, to insure each officer for at least one million dollars, and to pay an administrative fee. In effect, the Township became a broker in off-duty security work. Judge Rodriguez recognized the Township's legitimate interests in reducing fatigue, limiting litigation and lessening insurance expenses. Slip op. at 22-23. Nevertheless, the restrictions unduly encroached upon the liberty interests and equal protection rights of officers seeking security jobs.^{1/}

The PBA accepts the purposes of the off-duty employment policy (Part I). It objects only to the procedures (Part II), in particular the requirements that all outside employment be reported

^{1/} The parties agreed to stay a related unfair practice proceeding pending completion of the federal litigation. A Commission designee had temporarily restrained the employer from establishing a pay rate for outside employment. I.R. No. 87-16, 13 NJPER 164 (¶18073 1987). The federal case and the unfair practice charge have since been settled.

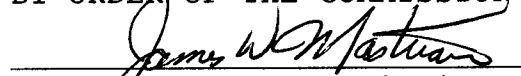
and approved. In this case, the question is simply whether negotiating over these procedures would substantially limit governmental policy making-powers under Paterson. Given Higher Ed.'s holding that the employer could not unilaterally require prior approval and given our subsequent cases, we answer this question no. Of course, the merits of the grievance are for the arbitrator to decide. Ridgefield Park.^{2/}

Accordingly, we decline to restrain arbitration.

ORDER

The request for a restraint of arbitration is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Wenzler, Bertolino and Smith voted in favor of this decision. None opposed. Commissioner Ruggiero was not present.

DATED: Trenton, New Jersey
October 27, 1989
ISSUED: October 30, 1989

2/ Orange Tp. is distinguishable. That case involved a union's involvement as co-manager in situations where police officers were employed during off-duty hours but were covered by the primary employer's workers' compensation and pension programs. This case involves employment outside the primary employer's control and potentially unrelated to police functions. Orange Tp. also did not involve any question of permissive negotiability.