

**NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS**

PBA LOCAL NO. 88,

Plaintiff,

v.

TOWN OF GUTTENBERG,
GUTTENBERG POLICE DEPARTMENT, Civil Action

Defendant.

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L-1763-17

Decided:

Eric B. Levine for plaintiff (Lindabury, McCormick, Estabrook, & Cooper, attorneys).

Mark A. Tabakin, Janet Lucas for defendant (Weiner Law Group, LLP, attorneys).

VANEK, J.S.C.

INTRODUCTION

This matter is before the court on plaintiff PBA Local 88's ("Local 88") complaint seeking an order requiring the defendants Town of Guttenberg and Guttenberg Police Department (collectively referred to as "the Town") to reduce the number of Class Two special law enforcement officers to a total of five. On June 21, 2017 this court granted Local 88's motion for an order allowing this matter to proceed summarily pursuant to R. 4:67-1(b) subsequent to oral argument. Local 88 represented that this matter

could be decided summarily based upon the submissions of both parties without the need for discovery. The court's order set forth a briefing schedule and a return date of August 11, 2017 for disposition of the matter.

Local 88 filed a brief in support of its request for summary relief on the complaint to which the Town filed opposition. Local 88 filed a brief in reply. The court heard oral argument on August 11, 2017.

STANDARD OF REVIEW

Rule 4:67-1 is designed "to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment while at the same time giving the defendant an opportunity to be heard at the time plaintiff makes his application on the question of whether or not summary disposition is appropriate." In such summary actions, "findings of fact must be made, and a party is not entitled to favorable inferences such as are afforded to the respondent on a summary judgment motion for purposes of defeating the motion."

[Grabowsky v. Twp. of Montclair, 221 N.J. 536, 549 (2015) (citing Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 4:67-1 (2015); O'Connell v. New Jersey Mfrs. Ins. Co., 306 N.J. Super. 166, 172 (App.Div.1997), *appeal dismissed*, 157 N.J. 537 (1998)).]

STATEMENT OF FACTS

The court finds the following facts established in the record before it:

On March 27, 2017, the governing body of the Town of Guttenberg passed Resolutions #112-2017, #113-2017 and #114-2017 designating Brian Polacik ("Polacik"), Emilio Barroso ("Barroso") and Aleksander Ramadanovic ("Ramadanovic") as Class Two special law enforcement officers by way of probationary appointments providing that employment shall commence only upon fulfillment of certain conditions specified in the Resolutions. The Resolutions each specifically state that the appointments are probationary and are subject to the condition that said employment shall only commence upon: 1) the successful passing of the appropriate New Jersey Police Training Commission Police Academy; 2) a finding that each candidate is mentally and psychologically fit to successfully carry out and perform the functions of a Class Two police officer; and 3) successful completion of training on the use of the firearm pursuant to N.J.S.A. 40A:14-146.11.

Polacik, Barroso and Ramadanovic were previously appointed as Class One special law enforcement officers. Lt. Juan Barrera of the Town of Guttenberg Police Department issued Order #17-24 on March 31, 2017 advising police personnel of various appointments and stating that Polacik, Barroso and Ramadanovic "may no longer work as Class 1's and will not be authorized to work until they complete the Class 2 Police Academy."

Erick Regojo appears on the document entitled "Police Roster" submitted by Defendants as part of the motion record.

Local 88 asserts that on or about May 3, 2017, when the immediate complaint was filed there were a total of seven Class Two special law enforcement officers and twenty-two regular police officers on the Town's Police Department roster. The Police Roster lists twenty-three regular police officers, three Class Two special police officers, and four Class One special police officers. Polacik, Barroso and Ramadanovic do not appear anywhere on the Police Roster.

Polacik, Barroso and Ramadanovic are not on the Town's payroll, they do not receive any employment benefits, they have not been assigned any duties or police powers and have not performed any official duties whatsoever for the Town.

On or about June 14, 2017, Ramadanovic and Barroso volunteered to drive a police vehicle in the Guttenberg Flag Day parade. They did not wear uniforms or receive any compensation from the Town.

LEGAL ANALYSIS

Arguments

Local 88 argues that the number of Class Two special law enforcement officers employed by the Town violates N.J.S.A. § 40A:14-146.17. It argues that the decision of the New Jersey

Public Employment Relations Commission (“PERC”) in Township of Union, is conclusive on the definition of “employed” in this context. It argues that Polacik, Barroso and Ramadanovic receive other unspecified benefits as a result of their alleged employment.

Finally, Local 88 argues that the Town’s actions vis-à-vis allowing Police Officer Regojo to be appointed as a regular police officer since the filing of the immediate complaint without having received the requisite training gives rise to a separate violation of the New Jersey Code and, thus, serve as evidence of the Town’s alleged malfeasance in the immediate action with regard to the appointment of Class Two special law enforcement officers. Local 88 clarified at oral argument that its argument as to Officer Regojo simply highlighted the Town’s propensity to proceed without complying with regulations, and that it was not seeking relief any separate relief in this matter on the basis of that argument.

The Town argues that it does not employ Class Two special law enforcement officers in a number that exceeds the statutory maximum contained at N.J.S.A. § 40A:14-146.17. It argues that there is no employer-employee relationship between the Town and Polacik, Barroso and/or Ramadanovic such that they are “employed” within the meaning of the applicable statute. The Town also argues that the probationary appointments made here are pursuant

to statute, and the terms of the Resolutions prevent Polacik, Barroso and Ramadanovic from being employed and commencing duties as police officers until the conditions stated therein are satisfied. As to the further alleged violation of Code, it argues that the affected officer is subject to waiver of the training requirements, and the Town is therefore not in violation of New Jersey law on this issue.

In reply, Local 88 argues that the Town has shown no authority for a probationary appointment. Local 88 cites to additional administrative cases it argues are dispositive on the issue of interpretation of the statute. Local 88 also concedes that the Town is subject to a waiver provision that avoids a violation of N.J.A.C. §13:1-8.4.

At oral argument Local 88 argued that Polacik, Barroso and Ramadanovic are employees chiefly because the Town controls the terms of employment of the officers while attending the academy. Counsel for Local 88 confirmed that there are no facts certified to based upon personal knowledge in the motion record before the court establishing any control over Polacik, Barroso and/or Ramadanovic or establishing that they received any employment benefits or emoluments of employment as Class Two special law enforcement officers.

Counsel for the Town stated at oral argument that the officers were not currently employed by the Town, and that the

immediate lawsuit was entirely speculative and is not ripe for adjudication as no excessive Class Two officers are currently employed under the statute. The Town's position is that the Resolutions conditioned any possible employment upon the officers meeting certain contingencies as set forth in the plain language of the document adopted by the governing body and that those conditions have not yet been fulfilled. Counsel represented that the officers were paying for the police academy out of their own funds, though that fact was not certified by a witness with personal knowledge in the motion record.¹ Counsel for the Town argued that the volunteer efforts of Polacik, Barroso and Ramadanovic in driving a police vehicle in the Flag Day parade was not an indicia of employment and that their participation was only part of the evaluative process.

Relevant Law

N.J.S.A. § 40A:14-146.17 provides for the appointment of special law enforcement officers:

The local governing body shall by ordinance or resolution, as appropriate, establish limitations upon the number and categories of special law enforcement officers which

¹ Although the Town asserted at oral argument that Polacik, Barroso and Ramadanovic paid for their own participation in the academy program themselves, there are no facts certified to in the record to establish same. Thus, counsel's statements cannot be considered as factual evidence in the record.

may be employed by the local unit in accordance with the certification and other requirements provided for in this act. In communities other than resort municipalities, the number of Class Two special law enforcement officers shall not exceed 25% of the total number of regular police officers, except that no municipality shall be required to reduce the number of Class Two special law enforcement officers or the equivalent thereof in the employ of the municipality as of March 1, 1985. Notwithstanding the provisions of this section, each local unit may appoint two Class Two special law enforcement officers.

N.J.S.A. § 40A:14-146.11 provides, in relevant part, guidelines on the commencement of duties for special law enforcement officers:

a. A person shall not commence the duties of a special law enforcement officer unless the person has successfully completed a training course approved by the commission and a special law enforcement officer shall not be issued a firearm unless the officer has successfully completed the basic firearms course approved by the commission for permanent, regularly appointed police and annual requalification examinations as required by subsection b. of section 7 of P.L.1985, c.439 (C.40A:14-146.14).

N.J.S.A. § 52:17B-68 provides in relevant part:

Every municipality and county shall authorize attendance at an approved school by persons holding a probationary appointment as a police officer, and every municipality and county shall require that no person shall hereafter be given or accept a permanent appointment as a police officer unless such person has successfully completed a police training course at an approved school....

N.J.A.C. §13:1-8.4 allows for the waiver of training for police officers under certain circumstances.

The New Jersey Rules of Court allow a trial court to consider unpublished cases only under certain conditions as follows:

No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel.

[R. 1:36-3.]

The Appellate Division has stated, "[t]he court's task in statutory interpretation is to determine and effectuate the Legislature's intent; courts look first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen." Paterson Police PBA Local 1 v. City of Paterson, 433 N.J. Super. 416, 426 (App. Div. 2013) (internal citations and quotations omitted). The Appellate Division has also observed, "[i]n determining the common meaning of words, it is

appropriate to look to dictionary definitions.” G.D.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist., 427 N.J. Super. 246, 261 (App. Div. 2012). Thus, in Paterson, the Appellate Division looked to the dictionary to determine the definition of “base salary” when that term was not defined by statute or regulation. Supra, 433 N.J. Super. at 426. With respect to matters of statutory construction, the Supreme Court of New Jersey has held, “[w]herever possible statutes dealing with the same general subject will be recognized and harmonized.” Lobda v. Clark Tp., 40 N.J. 424, 435 (1963).

The “time of decision rule” is a venerable rule, with precedent rooted in a decision by Chief Justice Marshall and adopted by the Supreme Court of New Jersey. See Kruvant v. Cedar Grove, 82 N.J. 435, 440 (1980) (citing United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801)). The Court in Kruvant set forth the purpose of the rule, which is “to effectuate the current policy declared by the legislative body,” as well as to avoid issuing an impermissible advisory opinion on what has become a moot question and to avoid issuing orders contrary to existing legislation. Ibid. The only exception to the rule as stated by the Court is when a court has previously set a reasonable time limit for a municipality to act (as through an injunction), and the municipality ignores such an order. Id. at 442.

Decision

The Town's Police Roster lists twenty-three regular police officers and three Class Two special police officers and the court's decision will be in consideration of this Police Roster under the time of decision rule articulated above. Polacik, Barroso and Ramadanovic do not appear on the Police Roster. According to the Police Roster, the percentage of Class Two special police officers as compared to regular police officers is approximately 13%, well below the statutory maximum of 25%. However, if the calculation were to include Polacik, Barroso and Ramadanovic, as Local 88 argues it should, that would bring the percentage to approximately 26% of the total complement of regular police officers and would thus violate N.J.S.A. § 40A:14-146.17.

The court is thus charged with determining the meaning of the term "employed" as contained in the statutory language that limits the number of "special law enforcement officers which may be employed by the local unit" at N.J.S.A. § 40A:14-146.17 (emphasis added). Hence, if the court finds that Polacik, Barroso and/or Ramadanovic are not "employed" within the meaning of the subject statute, then the Town is below the statutory maximum, and judgment shall be entered in favor of the Town.

The parties have offered various arguments as to what "employed" means in the context of this matter. This case is

before the court by way of the return date of Local 88's request to enter judgment on the motion record only as it has submitted that the matter can be disposed of summarily pursuant to R. 4:67-1(b). Accordingly, Local 88 bears the burden of establishing a violation of N.J.S.A. § 40A:14-146.17 by a preponderance of the evidence on the record before the court.

It is undisputed that the terms "employed" and "employ" are not defined in N.J.S.A. § 40A:14-146.17 which circumscribes the number of permissible Class Two special law enforcement officers to be employed by each municipality. Merriam-Webster provides the following definitions for "employ":

- a** : to make use of (someone or something inactive) *employ a pen for sketching*
- b** : to use (something, such as time) advantageously *a job that employed her skills*
- c** (1) : to use or engage the services of
(2) : to provide with a job that pays wages or a salary.

As to this issue, the Town argues that definition c(2) applies to the matter at bar. Local 88 asserts as to the definition of "employ" that "the Commission looks to the control of labor relations; i.e., who controls the hiring, firing, work schedule, promotions, discipline, evaluations, vacations, hours of work and scheduling, wages, benefits, funding and expenditures." It also relies on various PERC decisions in asserting that "[t]he source of funding for salaries will not by

itself determine who is the employer." See County of Morris, P.E.R.C. No. 86-15, 11 NJPER 491 (P16175 1985) (finding that the Morris County Board of Social Services, not the County, was the employer of employees at a nursing home); Bergen County Freeholders Bd. v. Bergen County Prosecutor, P.E.R.C. No. 78-77, 4 NJPER 220 (P4110 1978), aff'd 172 N.J. Super. 363 (App. Div. 1980) (finding that the county prosecutor, and not the county, was the employer).

Local 88 points to the administrative decision of PERC in the Township of Union as requiring substantial deference by this court. Local 88's cite to the Township of Union opinion was to a "Lexis" reporter, which is not an official reporter of administrative decisions. The official reporter for PERC decisions appears to be "NJPER," as cited previously by the Appellate Division in Maywood Bd. of Educ. v. Maywood Educ. Asso., 168 N.J. Super. 45, 50 (App. Div. 1979). PBA Local did not provide the Court with a copy of that unreported decision, any representation that the decision at issue was a published decision nor did it certify that it had appended all contrary decisions to the extent the case relied upon is unpublished. In any event that opinion does not constitute binding precedent upon the court. R. 1:36-3.

For purposes of completeness, the court notes without relying on that PERC decision that the administrative tribunals'

conclusion in Township of Union is in fact consistent with the Town's proffered definition of term "employed." In that matter, PERC found that the officers in that case were jointly employed by the Township and subscribers because while the Township did not directly compensate the special police officers, they controlled the amount of compensation and otherwise directed those officers' duties. The officers in that matter were not probationary appointees, but were rather full officers who were receiving compensation. PERC considered "employment" in this context to entail, inter alia, monetary compensation and found that partly because of that compensation, the Class Two special officers in that matter were "employed" by one of the two potential employers involved in that matter.

Local 88 argues that Order #17-24 issued by the Commander of Operations of the Town's police force is dispositive on the issue of employment in that it states that Polacik, Barroso and Ramadanovic "have been appointed as Class 2 Special Police Officers." However, Local 88 has pointed to no law that establishes that an internal order is dispositive as to the issue of whether an individual is "employed" or that it can contravene governing body Resolutions.

This court is constrained to follow binding precedent from our highest state court on the issue of whether the subject individuals are "employed" by the Town. The Supreme Court of

New Jersey has adopted the "ABC" test to determine whether an individual is employee. Under that test, the law presumes an individual is an employee when that person "performs services for remuneration for an individual or a business concern" unless the employer can make certain showings regarding the individual employed, including:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

[Hargrove v. Sleepy's, LLC, 220 N.J. 289, 305 (2015) (citing N.J.S.A. 43:21-19(i)(6).)]

"[T]he failure to satisfy any one of the three criteria results in an employment classification." Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 125 N.J. 567, 581 (1991).

In the immediate case, the facts in the record establish that Polacik, Barroso and Ramadanovic do not meet the definition of "employee" under either the law cited by Local 88, the definition proffered by the Town or the "ABC" test adopted by the Supreme Court of New Jersey. First, it is undisputed by the

parties that the foregoing individuals do not receive "remuneration" in the form of monetary compensation or otherwise. The only certified competent factual evidence in the record establishes that neither Polacik, Barroso and/or Ramadanovic presently receive any pay and/or any other employee benefits that could possibly be considered remuneration.² The undisputed evidence in the case establishes that Polacik, Barroso and/or Ramadanovic drove a police vehicle in a Flag Day parade on a volunteer basis only and received no monetary compensation. There are no facts in the record to establish that the Town paid for Polacik, Barroso and/or Ramadanovic to attend the police academy such that their attendance at the academy could be considered remuneration. Since there is no evidence in the record that the subject individuals received any remuneration, under the decisions of our highest court which is consistent with the definition proffered by the Town, this court concludes based upon the facts in the record that neither Polacik, Barroso and/or Ramadanovic are employees or employed as a matter of law.

² Local 88 asserts that Polacik, Barroso and/or Ramadanovic are provided with "a number of employer-related services during police academy training, including workers compensation insurance and other benefits" predicated solely "upon information and belief" rather than on personal knowledge. See Certification of Joseph Keselica, PBA Vice President, Paragraph 9.

Even if the court applied the law cited by Local 88 by way of the PERC decisions, which again the court finds is not binding precedent, the court finds no evidence in the record establishing that the Town is in any manner controlling Polacik, Barroso and Ramadanovic while they attend training at the academy. In this vein, there is no factual evidence before this court by way of certifications establishing that Polacik, Barroso and/or Ramadanovic are precluded from other employment or controlled in any manner while they attend the academy. In fact, the only evidence before the court is the Certification of the Town's Police Director establishing that neither Polacik, Barroso and/or Ramadanovic are undertaking any duties for the Town and the Resolutions themselves which by their plain language set forth that employment shall not commence until the contingencies specified are satisfied.

Moreover, the Resolutions specifically state that the foregoing individuals are given a probationary appointment and their employment shall only commence after the contingencies set forth are satisfied. The Resolutions appointing Polacik, Barroso and Ramadanovic to their positions read that said employment shall only commence upon 1) the successful passing of the appropriate New Jersey Police Training Commission Police Academy; 2) a finding that each candidates are mentally and psychologically fit to successfully carry out and perform the

functions of a Class Two police officer; and 3) successful completion of training on the use of the firearm pursuant to N.J.S.A. § 40A:14-146.11. The court finds that the probationary appointment with actual employment not able to commence until specified contingencies are met does not constitute the formation of an employee-employer relationship without the contingencies being satisfied. See Bonczek v. Carter-Wallace, Inc., 304 N.J. Super. 593 (App. Div. 1997) (finding no employment contract where employment was contingent upon completion of reference checks). Accordingly, since it is undisputed that Polacik, Barroso and Ramadanovic have not yet satisfied the specified contingencies, the Court finds that their employment with the Town cannot be deemed to have commenced.

Additionally, the court finds that the court's interpretation of the term "employ" used in the N.J.S.A. § 40A:14-146.11 should be harmonized where necessary to effectuate the general purpose of the statutes governing the appointment of police personnel to allow for probationary and contingent appointments of special law enforcement officers for the purposes of training. Lobda, supra, 40 N.J. at 435. N.J.S.A. § 52:17B-68 plainly allows a municipality to appoint probationary police officers to allow their attendance at the academy but prohibits those candidates from permanent appointment or from

performing any duties. The Court finds that the public policy set forth in the statute governing "police officers" should also apply to special law enforcement officers who are Class Two police officers of a police department. Thus, allowing the probationary appointment of individuals for purposes of allowing them to proceed with training without conferring employment rights is consistent with the statutory scheme governing police personnel.

The Court rejects Local 88's contention that the Township's alleged violation of N.J.A.C. §13:1-8.4 as to the training of Police Officer Regojo constitutes evidence that an order should be entered in its favor declaring that the Town has not complied with N.J.S.A. §40A:14-146.11. Local 88 argues that the Town's failure to seek a waiver from the training requirements as to Police Officer Regojo jeopardizes other officers and the community in general and runs contrary to the legislative intent of N.J.S.A. §40A:14-146.17. At oral argument, counsel for Local 88 reaffirmed the fact that this issue did not form the basis for any independent request for relief. The only issue before the court as alleged in Local 88's complaint is whether the Town violated N.J.S.A. §40A:14-146.17 through appointments of Class Two special officers in excess of the statutory maximum. Local 88 articulated that it sought for the court to find the failure to train or seek a waiver from training as to Regojo evidential

of the Town's violations of applicable regulations. The court declines to do so since Local 88 has not proffered any argument or competent factual evidence to this court as to Regojo's appointment, training background and training status so as to allow this court to make a determination as to relevancy under N.J.R.E. 401 and admissibility under N.J.R.E. 403.

Conclusion

For the reasons stated above, the court finds that the Town has not violated N.J.S.A. § 40A:14-146.17 by way of the probationary appointments of Polacik, Barroso and Ramadanovic as Class Two special law enforcement officers since the foregoing individuals are not presently employed by the Town. The Town currently has three (3) Class Two special law enforcement officers in its employ which is under the 25% of the total roster of twenty-three police officers allowable pursuant to N.J.S.A. § 40A:14-146.17.

Accordingly, the court shall enter judgment in favor of defendants Township of Guttenberg and Guttenberg Police Department on the complaint. Plaintiff P.B.A. Local No. 88's complaint is hereby dismissed since no other relief is sought by way of the pending litigation. This dismissal is without prejudice since the court's ruling herein is confined to the facts presented to the court by way of the motion record which

include Polacik, Barroso and Ramadanovic's present status as police academy candidates.