

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

BERGEN COUNTY PROSECUTOR,

Public Employer,

-and-

SUPERIOR OFFICERS OF COUNTY DETECTIVES
ASSOCIATION OF BERGEN COUNTY,

Petitioner,

-and-

DOCKET NO. RO-76-43

BERGEN COUNTY BOARD OF CHOSEN
FREEHOLDERS,

Intervenor,

-and-

STATE OF NEW JERSEY,

Intervenor.

MERCER COUNTY PROSECUTOR,

Public Employer,

-and-

DOCKET NO. RO-76-72

MERCER COUNTY BOARD OF CHOSEN
FREEHOLDERS,

Intervenor,

-and-

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, AFL-CIO,

Intervenor.

SYNOPSIS

Resolving limited issues raised in two matters specifically involving clerical personnel and county detective superior officers, the Director of Representation determines that a county prosecutor, and not a county board of freeholders, is the public employer, for the purposes of collective negotiations, of personnel assigned to the prosecutor's office. The Director reaches his conclusion based on an analysis, from a collective negotiations perspective, of the relevant statutory enactments concerning county prosecutors, court decisions construing the responsibilities of prosecutors and counties, and various indicia traditionally associated with identifying public employers for collective negotiations purposes. The Director concludes that a prosecutor exercises substantial control over labor relations concerning employees in his or her office. The Director also assesses in a labor relations sense a county's fiscal responsibilities in appropriating the prosecutor's budget in light of the following factors: (1) a prosecutor's ability to seek an order of an assignment judge directing a county to increase funding and to authorize additional personnel positions and salary scales, (2) a prosecutor's overall control over terms and conditions of employment and, (3) the statutory scheme of maintaining the independence of the prosecutor's office. The Director finds that the county can provide considerable input into the financial aspects of a prosecutor's negotiations notwithstanding that it is not designated as the public employer.

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Intervenor.

MERCER COUNTY PROSECUTOR,

Public Employer,

-and-

TEAMSTERS UNION LOCAL 102,

Petitioner,

-and-

DOCKET NO. RO-76-72

MERCER COUNTY BOARD OF CHOSEN
FREEHOLDERS,

Intervenor,

-and-

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, AFL-CIO,

Intervenor.

Appearances:

For Bergen County Prosecutor
Roger W. Breslin, Jr., Esq., Prosecutor

For the Superior Officers of County Detectives
Association of Bergen County
Captain Raymond Morrissey

For the County of Bergen
Leon B. Savetsky, Esq.

For the State of New Jersey
William F. Hyland, Attorney General
(Melvin E. Mounts, Deputy Attorney General)

For Mercer County Prosecutor
Anne E. Thompson, Esq., Prosecutor

For Teamsters Union Local 102
Sipser, Weinstock, Harper, Dorn & Weinstock, Esqs.
(Michael Schnipper, of Counsel)

For County of Mercer
Harvey L. Stern, Esq.
(William L. Boyan, Assistant County Counsel)

For American Federation of State, County, and
Municipal Employees, AFL-CIO
John J. Merkel, Executive Director

DECISION

On September 30, 1975, the Superior Officers of County Detectives Association of Bergen County (the "Association") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission (the "Commission") Docket No. RO-76-43, seeking to represent a proposed collective negotiations unit consisting of superior officers of county detectives in the Bergen County Prosecutor's office. On October 28, 1975, Teamsters Union Local 102 ("Local 102") filed a Petition for

Certification of Public Employee Representative, Docket No. RO-76-72, with the Commission seeking to represent a proposed collective negotiations unit consisting of clerical, stenographic and technical employees in the Mercer County Prosecutor's office. In each Petition the Prosecutor's office was claimed to constitute the public employer for the purposes of collective negotiations under the New Jersey Employer-Employee Relations Act (the "Act"). The undersigned caused an investigation to be conducted into each of these Petitions.

Bergen County Board of Chosen Freeholders and the State of New Jersey (the "State") have intervened in the Bergen County matter. Mercer County Board of Chosen Freeholders, the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME"), and the State have intervened in the Mercer County matter.

By agreement of the parties, these matters were consolidated for the purpose of resolving the issue of the identity of the public employer or employers in each of these matters. Pursuant to an Order Scheduling Hearing, a hearing was held on September 17, 1976 in the consolidated matters. The record of that hearing reflects that the parties agreed to enter into a stipulation of facts in the consolidated matters, and that upon such stipulation of facts and opportunity for the submission of briefs the parties further agreed to submit this matter to the Director of Representation for a decision limited to the issue of the identity of the public employer.

Subsequently, a complete stipulation of facts was reached among the parties in each of these matters. Timely briefs have been filed by the State, Local 102 and the Bergen County Prosecutor; a letter memorandum in lieu of brief has been timely filed by the Mercer County Prosecutor.

The Association and Local 102, as well as the Bergen County Prosecutor and the State, contend that the County Prosecutor is the public employer within the meaning of the Act. Bergen County, Mercer County, and AFSCME state that the County is the public employer of the instant employees. The Mercer County Prosecutor does not assert that she is the public employer of the clerical employees in her office for the purposes of the Act.

The undersigned has determined to accept the parties' stipulations for resolution of the limited issue presented.

The county prosecutor is an officer appointed by the Governor with the advice and consent of the Senate. ^{1/} The expenses incurred by the county prosecutor's office in the performance of his or her duties are paid by the county treasurer upon approval of the board of chosen freeholders. ^{2/} However, the assignment judge for the county has conclusive authority to approve expenditures of the county prosecutor beyond that appropriated by the board of chosen freeholders and to order the board of chosen freeholders to meet the needs of the county prosecutor. ^{3/}

^{1/} N.J. Const. Art. 7 §2 par. 1; N.J.S.A. 2A:158-1.

^{2/} N.J.S.A. 2A:158-7.

^{3/} Id. See In re Bigley, 55 N.J. 53 (1969) and In re Schragger, 58 N.J. 274 (1971).

The stipulated facts relating to the Bergen County Prosecutor's office indicate that the Prosecutor hires county detectives and exercises "final authority" as to discharge, discipline, evaluation and demotion of employees. The Prosecutor, as well, exercises equivalent authority in the establishment of work rules and the assignment of work. He also exercises sole authority with regard to promotions. ^{4/}

As noted earlier, the expenses for the County Prosecutor's office are provided by the Bergen County Board of Chosen Freeholders through the appropriation of a budget submitted by the Prosecutor. The Prosecutor prepares and submits a final budget which the Board passes upon. Paychecks for employees are signed by the County Treasurer and are drawn from the salary account of the Prosecutor's office which is appropriated by the Board of Chosen Freeholders.

The Prosecutor may fix the salaries of county detectives and county investigators at amounts in excess of the statutory minimums set out in N.J.S.A. 2A:157-1 et seq. These salary figures will be either approved or rejected by the Board of Chosen Freeholders; however, the Prosecutor may apply to the Assignment Judge for an order compelling such payment in the absence of County approval. N.J.S.A. 2A:158-7. See In re Bigley, 55 N.J. 53 (1969); In re Schragger, 58 N.J. 274 (1971). There have been three instances since 1973 when the Bergen County Prosecutor has

^{4/} The Prosecutor's authorities are qualified to the extent that county detectives are Civil Service classified employees. N.J.S.A. 2A:157-2.

applied to the Assignment Judge and obtained an order increasing the appropriation for the County Prosecutor's office from the County.

The record indicates that there have been negotiations since 1974 as to salaries and terms and conditions of employment between Bergen County and the non-superior detectives and investigators in the Bergen County Prosecutor's office. In the 1974 negotiations, the Prosecutor sat in representing his office. In 1976, preliminary discussions took place between PBA Local 221 (representing the detectives and investigators) and the Prosecutor in an attempt to reach an accord regarding salaries. The PBA then presented its contract demands to the Bergen County Labor Advisory Committee which negotiates for the Board of Chosen Freeholders. The Prosecutor interceded in that latter process with respect to certain fringe benefits which he felt affected the operation of the Prosecutor's office -- college credit reimbursement, expenses reimbursement, a step system, and longevity. The Prosecutor did not address other benefits such as health, dental and medical benefits.

It is noteworthy that in 1976 the Prosecutor raised the issue of who was the employer of the employees in his office and asserted the position that he was the employer. The Bergen County Board of Chosen Freeholders took the position that it was the employer. The parties chose not to litigate the issue at that time and used the negotiating procedure described above.

In 1976 the parties reached an impasse in their negotiations and the detectives and investigators rejected the Fact-

finder's report. The implementation of steps and salary levels of these employees then became one point in the Prosecutor's Schragger application to the Assignment Judge.

The stipulated facts do not indicate a general history of exchange of employees between the Prosecutor's office and other County departments, with the exception of certain temporarily assigned county police, sheriff's and district court officers (all prior to 1970). The stipulations characterize promotions as generally being "in-house".

A detective's grievance concerning discharge, discipline, promotion, demotion, work assignments, overtime, work hours or vacation scheduling is handled primarily "in-house" by the Prosecutor subject to Civil Service requirements. When a grievance concerns a fringe benefit which the Prosecutor does not deem as vitally affecting the operation of his office, the Prosecutor will intercede with the County Administrator to determine the County's position and will thereafter remove himself from any further proceedings.

The stipulated facts relating to the Mercer County Prosecutor's office indicate that the Prosecutor's office was organizationally placed in the Department of Law and Justice when the County changed to a County Executive form of government. ^{5/} As in Bergen County, the Prosecutor's office has both classified

5/ The County Prosecutor has protested the placement of her office in the Department of Law and Justice.

and unclassified employees for Civil Service purposes. With respect to classified employees, when a budgeted vacancy occurs the Prosecutor requests authority from the Director of the Department of Law and Justice to fill the position. Upon approval of the Director, the request is forwarded to the County Administrator for approval. Once approval is given (in no instance has it yet been withheld) the personnel department submits a list of eligibles, based on Civil Service Rules, from which the Prosecutor accepts or refuses to accept the names submitted to fill the vacant position. This procedure is the normal County policy for all its divisions. Unclassified employees are recruited, interviewed and selected by the County Prosecutor, independent of any County machinery except that payroll authorization is obtained from the County Administrator, pursuant to the existing personnel budget or court order.

There is no County policy regarding the evaluation of employees and the Prosecutor has developed and utilized her own system of evaluation. The Prosecutor implements decisions with respect to promotions. However, decisions regarding promotions are reached in accordance with applicable Civil Service Rules. This is consistent with the promotion procedures of all other County division heads. Decisions as to work rules and overtime are also made in the same manner as in other County departments.

The Prosecutor, as do all County division heads, prepares a budget which is reviewed by the director of the department and is then presented to the County Administrator who again makes a review and in turn submits the budget to the County

Executive. The County Executive reviews the budget request and presents the final budget to the Board of Freeholders which has the statutory authority to adopt it. The Prosecutor's office is unique in that the Prosecutor has the aforementioned statutory authority to apply to the Assignment Judge of the County for an order compelling the Board of Freeholders to increase the appropriation. This has occurred twice since 1971, and such requests have been partially granted.

Paychecks for employees in the County Prosecutor's office are signed by the County Treasurer and the County Executive and are drawn from the same payroll account from which all County employees are paid.

The stipulations indicate that there has been no past history of negotiations for either salaries or other terms and conditions of employment for the clerical employees in the County Prosecutor's office. A unit of detectives and investigators was recognized by the Board of Freeholders in 1972 and negotiations with representatives of that unit have taken place with regard to salaries and fringe benefits only; these negotiations have not dealt with other terms and conditions of employment. The negotiations have taken place between the unit representatives and the County, but the Prosecutor has been involved in an advisory capacity. These negotiations have culminated in signed letter agreements encompassing salary and fringe benefit agreements.

The undersigned has carefully examined the record evidence and the arguments advanced by the parties on behalf of

their respective positions. The parties seeking a determination that the prosecutor is the public employer generally point to the statutory scheme relating to county prosecutors, as well as various court decisions, and argue that the prosecutor's office should be considered a law enforcement agency accountable to the executive branch of the State, independent of county control, and with the prosecutor exercising final authority over his or her staff. While these parties acknowledge that the prosecutor's office is funded through county appropriations, they contend that the county's fiscal authority is not final since the prosecutor may apply to an assignment judge to issue an order compelling the county to provide for the necessary expenses of the prosecutor above the funds which the county is willing to allocate. An argument has also been advanced that the prosecutor's staff are "State" employees. See State v. Winne, 12 N.J. 152 (1953); Cetrulo v. Byrne, 31 N.J. 320 (1960); Brennan v. Byrne, 31 N.J. 333 (1960); In re Bigley, supra, n.3; In re Schragger, supra, n.3; Cashen v. Spann, 66 N.J. 541 (1975), aff'g and modifying 125 N.J. Super. 386 (App. Div. 1973); Bergen County v. Department of Civil Service, 115 N.J. Super. 90 (App. Div. 1971); Muccio v. Cronin, 135 N.J. Super. 315 (Law Div. 1975); Thomas V. McGrath, 145 N.J. Super. 288 (App. Div. 1976). Those parties seeking a determination that the county be deemed the public employer point to the funding responsibility and fiscal control of a board of freeholders in authorizing appropriations for the county prosecutor. See N.J.S.A. 2A:158-7. These parties recognize the responsibility and authority of county prosecutors

to administer their offices, including making personnel decisions. However, as Bergen County states in its positional statement, "...so long as the County has the obligation to fund the operation of the Prosecutor's office including the salaries of members of the Prosecutor's staff, it must be recognized as the 'employer'; at least for the purposes of payroll, fringe benefits, and other fiscal matters." Bergen County, in its statement, also relates its responsibility to appropriate funds to its accountability to the public. The Counties also direct the undersigned's attention to various court decisions in support of the claim that the county is the employer of the prosecutor's staff. See Cooper v. Imbriani, 63 N.J. 535 (1973); Dunne v. Fireman's Fund Insurance Co., 69 N.J. 244 (1976); Dodd v. State of New Jersey, App. Div. Docket No. A-1736-75, dec. March 20, 1977 (unpublished). ^{6/}

The Commission has previously taken notice of the unique nature of the county prosecutor's office. In In re Bergen County Board of Chosen Freeholders, P.E.R.C. No. 66 (1972), aff'd App. Div. Docket No. A-2417-71, dec. November 6, 1972 (unreported), pet. for certif. den. 62 N.J. 574 (1973), the Commission found that a unit of County detectives and investigators was the most appropriate unit despite the County assertion that these employees should be included

^{6/} See also Muccio v. Cronin, supra, p.10, at p.319, where the court states that N.J.S.A. 40A:14-64, involving exempt firemen holding county office, "seems applicable" to N.J.S.A. 2A:157-10 which denotes the county investigator as an "office or position."

in a county-wide law enforcement unit. The rationale for this finding was based upon the unique nature of the County Prosecutor's office and the Prosecutor's authority, in comparison to other County Departments. The Commission stated, in part: "There exists a potential for treatment of employees in the Prosecutor's office which differs from that accorded to other law enforcement personnel in the County regarding certain terms and conditions of employment." The Commission's decision in Bergen County was limited to the community of interest issue insofar as the issue of the identity of the employer was not in dispute, the County having been stipulated as the public employer by all parties of record.

In the instant matter, the question of who is the public employer is in dispute and the undersigned is required to render a determination. In so doing, the undersigned's responsibility is to identify the public employer, pursuant to N.J.S.A. 34:13A-3(c), consistent with the purposes of the New Jersey Employer-Employee Relations Act. The undersigned has therefore considered the statutory provisions applicable to the county prosecutor's office, the various court decisions, and the precepts governing the identification of the public employer for collective negotiations purposes, in order to render his determination.

N.J.S.A. 2A-158.1 provides for the appointment of the prosecutor by the Governor with the advice and consent of the Senate. The necessary expenses of the prosecutor are provided for by the county and may not exceed the amount fixed by the

county unless authorized by order of the assignment judge.

N.J.S.A. 2A:158-7.^{7/} In this regard, the Supreme Court has stated, "the financial burdens related to the position are imposed on the County." Dunne v. Fireman's Fund, supra, p.11, at p.248. The prosecutor has total statutory authority to appoint county detectives, N.J.S.A. 2A:157-2; county investigators, N.J.S.A. 2A:158-15; and legal assistants, N.J.S.A. 2A:158-18 et seq.; except as qualified by the requirements of N.J.S.A. 2A:157-2 that county detectives be Civil Service classified employees, where applicable. With regard to the above classifications other than the county detectives, there is no dispute that the employees therein serve at the pleasure of the prosecutor. See also Cetrulo v. Byrne, supra, p.10; and Thomas v. McGrath, supra, p.10. The above statutory provisions do not specifically provide for the prosecutor to appoint clerical personnel.^{8/} There is no dispute, however, that the clerical employees employed in the prosecutor's office are Civil Service classified personnel. Significantly, a prosecutor, when unable to secure his requested complement of clerical personnel from the county board of chosen freeholders, has obtained an assignment judge's order to increase the number of clerical personnel in his office. In re Bigley, supra, n.3. Additionally, it appears that a prosecutor may increase the employment hours of the clericals,

^{7/} The Bigley and Schragger matters, supra, n.3, indicate that the assignment judge acts in this capacity as a legislative agent rather than as a judicial officer.

^{8/} See, however, N.J.S.A. 2A:158-19 and 20.

along with other personnel assigned to the prosecutor's office. Prosecutor's Detectives and Investigators Association of Essex County, et al. v. Hudson County Board of Chosen Freeholders, 130 N.J. Super. 30 (App. Div. 1974).

The seeming incongruity of employees in the prosecutor's office being designated as state agents in some court decisions, and as holding county positions in others, is understandable. Justice Schreiber, speaking for the Court in Dunne v. Fireman's Fund, supra, p.11, at p.248 states: "County prosecutors' detectives possess a hybrid status." The undersigned is guided by the direction of the Court in Cashen v. Spann, supra, p.10, at p.552, wherein Justice Pashman states:

"We also agree with the Appellate Division that in the context of this case, the prosecutor and the detectives are to be considered as agents of the State and not the county. Cashen, supra, 125 N.J. Super. at 404-05. We wish to make it clear, however, that our resolution of this issue is limited to the factual circumstances here presented. We find it appropriate to regard the defendant officials as State agents where the alleged tortious conduct arose out of the investigation of criminal activity, but we express no opinion on the question of whether the prosecutor or his detectives can be considered State or county employees for other purposes. See Cooper v. Imbriani, 63 N.J. 535 (1973). We also leave for another day the question of whether a county may be held vicariously liable for the conduct of a prosecutor or his detectives in other circumstances." (emphasis added).

Accordingly, the undersigned's determination as to the public employer must appropriately be made in the context of collective

negotiations, and, while the various court decisions cited by the parties are helpful in this analysis, insofar as they relate to different contexts and "for other purposes" they cannot be definitive or dispositive as to the determination required herein.

In determinations relevant to the identification of public employer status, the undersigned has observed that the determination of the source of funding does not necessarily result in the identification of the employer for the purposes of collective negotiations. Rather, reliance is placed upon identifying the level of authority which exercises substantial control over labor relations affecting the concerned employees. See In re Cape May County Guidance Center, D.R. No. 78-19, 3 NJPER ____ (1977), and In re Passaic County Board of Chosen Freeholders, D.R. No. 78-29, 3 NJPER ____ (1977). Accordingly, while fiscal control granted to the counties can be an important factor in determining which authority exercises substantial control over labor relations, this factor must be considered in context with other factors traditionally utilized to identify employer status. In a matter placed before the Commission, In re Monmouth County Board of Recreation Commissioners, E.D. No. 76-36, 2 NJPER 127 (1976) (Hearing Officer's opinion attached), the Executive Director adopted the findings and recommendations of the Hearing Officer which identified some of the factors relevant to employer status identification:

"Courts and labor relations agencies of other states have also grappled with the problem of determining the appropriate employer when confronted with problems concerning the interrelationship of various governmental entities and constitutional appointees. Various indicia of employer attributes have been identified in many of those cases. These indicia have been identified as the supervisory control and authority to select, appoint, and pay employees; control over work, appointment, removal authority, duties and salaries within limits of available appropriation; day to day control of personnel practice, final control of wages, personnel selection; and the right to select the employee, the power to discharge him, and the right to direct both the work to be done and the manner in which such work shall be done. (Citations omitted). 9/

An analysis of the stipulated facts in the matters at hand indicates that it is the county prosecutor, without any supervision by any county entity or officer, who controls the functional operation of the county prosecutor's office. This includes supervisory control, work assignments, authority to control working hours and day to day control of personnel practices. The record further shows that it is the county prosecutor who, subject to Civil Service Rules and Regulations, where applicable, controls selection, appointment, discipline and discharge of the employees in the prosecutor's office. Furthermore, the facts show that although the funds for payroll are provided by the county, the prosecutor plays a significant role in the final control of wages and has the authority to seek funds for this purpose as part of his or her statutory authority to make a Schragger application to the assignment judge.

9/ 2 NJPER, at 132, 133.

The undersigned has given careful consideration to the position advanced by the Counties concerning their fiscal control of the prosecutor's office, however limited by the ability of the prosecutor to seek to obtain an order superseding the county's allocations. The undersigned finds, however, that the exercise or potential exercise by the prosecutor of this available means to supersede the county in matters acutely related to labor relations, combined with the prosecutor's control over employment terms and conditions, must lead to the conclusion that the prosecutor is the public employer of all employees assigned to his or her office. This finding is underscored by the observation in Dunne v. Fireman's Fund, supra, p.11, that the statutory scheme is designed to impose upon the county the financial burdens of the prosecutor's office. It is equally clear to the undersigned from the circumstances involved in these matters, that the employees in the prosecutor's office look to the prosecutor to resolve the major concerns affecting their employment -- even to the extent of seeking an overruling of the county's fiscal appropriations.

The report to the Governor and Legislature preceding the Legislature's passage and adoption of the New Jersey Employer-Employee Relations Act, Chapter 303, Laws of 1968 anticipated that the identification of a public employer would not necessarily correlate to the body exercising fiscal control. The Report stated:

"Collective negotiations can be effective in public employment despite the

fact that executive bodies often lack final authority to determine matters of wage, salaries, and working conditions, and are limited to making recommendations to chief executives and legislators." 10/

The undersigned notes that in the face of the assignment judge's authority to set aside county budget allocations and to impose greater allocations, neither the county nor the prosecutor exercise absolute fiscal control. However, since the prosecutor has the unique ability to initiate an application to the assignment judge, the more significant role is allotted to the prosecutor to secure funds necessary to implement a collective negotiations settlement.

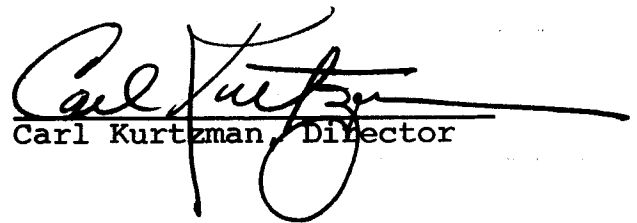
Finally, the undersigned has considered the argument of Bergen County that a county's input into negotiations matters is vital due to its accountability to the taxpaying public. However, the undersigned, in evaluating this consideration, has likewise considered the fact that the county has been chosen to bear the financial burden of furnishing the necessities of the prosecutor's office by legislative design. The undersigned notes, however, that the county need not be an observer devoid of negotiations input. Both the Bigley and the Schragger matters clearly direct the prosecutor to present his initial requests to the freeholders before proceeding to the assignment judge for an order. Ultimately, the checks built into the legislative design will permit the freeholders, and through them the taxpayer, to provide

10/ Final Report to the Governor and the Legislature of the Public and School Employees' Grievance Procedure Study Commission, January 9, 1968.

considerable input into the financial aspects of the prosecutor's negotiations.

Accordingly, for the reasons stated above and consistent with the statutory scheme of maintaining the independence of the prosecutor's office, the undersigned, in the best interest of stable labor relations, determines that the Bergen County Prosecutor is the public employer of superior officer county detectives, and that the Mercer County Prosecutor is the public employer of the clerical, stenographic and technical employees assigned to her office.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: February 2, 1978
Trenton, New Jersey