P.E.R.C. NO. 2009-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY PROSECUTOR'S OFFICE,

Petitioner,

-and- Docket No. SN-2008-068

PASSAIC COUNTY ASSISTANT PROSECUTORS' ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Passaic County Prosecutor's request for a restraint of binding arbitration of a grievance filed by the Passaic County Assistant Prosecutor's Association. The grievance contests the order of recent layoffs of assistant prosecutors. The Prosecutor argued that the Association's claim that the order of layoffs should be by seniority is preempted by N.J.S.A. 2A:158-15, which states that assistant prosecutors hold their appointments at the pleasure of the prosecutor. Applying the relevant case law that interprets "at the pleasure" statutory language, the Commission finds the statute does not preempt the Prosecutor's discretion to agree through collective negotiations to use seniority to decide the order of layoffs.

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.

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Appearances:

For the Petitioner, Genova, Burns & Vernoia, attorneys Brian W. Kronick, of counsel and on the brief; Kristina E. Chubenko, on the brief)

For the Respondent, Loccke, Correia, Schlager, Limsky & Bukosky, attorneys (Michael A. Bukosky, of counsel and on the brief; Lauren P. Sandy, on the brief)

DECISION

On April 14, 2008, the Passaic County Prosecutor's Office petitioned for a scope of negotiations determination. The Prosecutor seeks a restraint of binding arbitration sought by the Passaic County Assistant Prosecutors' Association. The Association contests the order of recent layoffs of assistant prosecutors. We deny the request to restrain arbitration.

The parties have filed briefs and exhibits. Prosecutor James F. Avigliano has filed a certification. The Association

has filed the certification of Paul DeGroot, its president.[1/] These facts appear.

The Association represents assistant prosecutors. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2005.

The parties' contract does not contain a provision for the order of layoffs. It does contain an "Existing Policies" provision in Article XV, Sections C and D, which provides that the Prosecutor agrees to maintain all existing benefits and terms and conditions of employment, including those not specifically addressed in the agreement. Article I contains a management rights clause that provides the Prosecutor with the right to hire, demote, promote, transfer, assign and retain employees and to relieve employees from duties because of lack of work or for other legitimate reasons.

Section VI of the Prosecutor's Employee Manual provides:

> The Prosecutor may lay off an employee in the classified service for purposes of efficiency or economy or other valid reason requiring a reduction in the number of employees in a given class. No permanent employee may be laid off until all temporary, provisional and probationary employees have been let go.
>
> A. Order of Termination - Where there are two or more permanent employees in the same classification from which a layoff is to be made, employees with an unsatisfactory

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1/ We deny the Association's request for an evidentiary hearing on what is essentially a legal dispute.

> evaluation within the last twelve (12) months shall be the first to be laid off. The order of layoffs for other employees is as follows:
>
> 1. The layoff of a permanent employee shall be in the order of seniority in the classification. Those last appointed are the first terminated.
>
> 2. A disabled veteran or veteran, in that order, shall have priority over the other employees of equal seniority and shall be retained.

The County personnel manual contains similar language.

The Prosecutor's Employee Manual also addresses "at-will employment" in Chapter 1, I (B). It provides:

> Employment with the Passaic County Prosecutor's Office is "at will," which means that your employment can be terminated with or without cause, with notice as governed by law, at any time at the option of the Prosecutor, except as may otherwise be provided by law.
>
> * * *
>
> 1. Pursuant to N.J.S.A. 2A:158-15, assistant prosecutors are appointed by the Prosecutor, and hold their appointments at the pleasure of the prosecutor.

N.J.S.A. 2A:158-15 provides in pertinent part that "[a]ssistant prosecutors in and for the respective counties may be appointed by the prosecutors of such counties as hereinafter provided, who shall hold their appointments at the pleasure of the respective prosecutors . . . ."

The Prosecutor asserts that layoffs became necessary due to a severe budget crisis. He states that he met with the unions to

discuss alternatives to layoffs, including across-the-board salary reductions, but the unions were not willing to consider such alternatives. On January 9, 2008, the Prosecutor notified five assistant prosecutors that they would be laid off effective March 1st. Due to voluntary attrition, it only became necessary to lay off two. The Prosecutor contends that the determination whom to lay off was based on "how best to minimize the impact of the layoffs throughout the office and [an] overall evaluation of the operational efficiencies."

The Association asserts that based on the policy manuals, the last appointed should be the first terminated, and the two layoffs did not follow that policy. The Association contends that the Prosecutor violated the contract because the policies have become part of the parties' practice through the maintenance of benefits clause.[2/] The Prosecutor maintains that the layoff provisions of the manuals apply only to classified employees and not to assistant prosecutors who are in the unclassified service. See N.J.A.C. 4A:3-1.3(a)(4) (employees who serve at the pleasure of an appointing authority are in the unclassified service). Positions in the unclassified service are not subject to the tenure provisions of Civil Service statutes or rules unless otherwise specified. N.J.A.C. 4A:1-1.3.

2/ The Association has also filed an unfair practice charge regarding this issue (CO-2008-240).

On January 16, 2008, the Association wrote to the Prosecutor setting forth its position that the order of layoffs violated office policies and the contract. There is no response to this letter in the record and neither party has submitted any grievance documents. On March 11, the Association demanded arbitration. This petition ensued.

I. Applicable Legal Standards

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts. [Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject

> has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

II. General Law on the Negotiability of Order of Layoffs by Seniority

Stressing that "nothing more intimately and directly affects an employee than whether he has a job," the New Jersey Supreme Court has stated that, unless preempted, a proposal to have layoffs among qualified employees by order of seniority is mandatorily negotiable. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 84 (1978); see also Lyndhurst Bd. of Ed., P.E.R.C. No. 87-111, 13 NJPER 271 (¶18112 1987), aff'd NJPER Supp.2d 194 (¶171 App. Div. 1988); South Orange-Maplewood Bd. of Ed., P.E.R.C. No. 97-54, 22 NJPER 411, 413 (¶27225 1996). However, none of these cases considered whether a statute like

N.J.S.A. 2A:158-15, setting forth that an employee serves at the pleasure of the public employer, would preempt negotiations over layoffs by seniority.

Several cases have attempted to mark the boundaries of statutory "serve at the pleasure" language in relation to disciplinary procedures, removals, and promotions. Those cases fall into one of two categories - - cases construing serve at the pleasure language outside the collective negotiations context, and cases in the collective negotiations context that have recognized an employer's ability to negotiate limits on its statutory right to have employees serve at its pleasure.

III. Cases construing serve at the pleasure language outside the collective negotiations context

In Brennan v. Byrne, 31 N.J. 333 (1960), a county investigator who, pursuant to N.J.S.A. 2A:157-10[3/], served at the pleasure of the prosecutor and was terminated after the appointment of a new prosecutor, was not afforded tenure protections under the Veterans' Tenure Act, N.J.S.A. 38:16-1 et seq. The Court found that the various legislative enactments providing that county investigators serve at the pleasure of the prosecutor and are in the unclassified service were adopted after

3/ In 2003, the serve at the pleasure language was removed from N.J.S.A. 2A:157-10, the statute authorizing the appointment of county investigators. In addition, a just cause standard for the discipline of county investigators was added. N.J.S.A. 2A:157-10.1.

the Veterans' Tenure Act, and that the general terms of that Act could not properly be applied to employees whom the Legislature subsequently expected to be excluded from its tenure protection. Id. at 337.

Walsh v. State, 147 N.J. 595 (1997), addressed statutory serve at the pleasure language as applied to assistant deputy public defenders in the context of a promise to promote. Walsh was an assistant deputy public defender who, pursuant to N.J.S.A. 2A:158A-6, served at the pleasure of the public defender. He claimed a breach of an agreement to promote him. See Walsh v. State, 290 N.J. Super. 1, 5-9 (App. Div. 1996). The trial court awarded Walsh damages and ordered that he be promoted, and the Appellate Division affirmed. Id. at 9-10. Two judges found that there was an implied-in-fact contract relating to the promotion, and that the chief personnel officer had the authority to make the promotion offer. Id. at 10-13.

Judge Skillman dissented, finding that even the public defender himself could not have made an enforceable agreement to promote the assistant deputy public defender at some future date, as such an agreement would be inconsistent with the statutory serve at the pleasure language and would unlawfully bind successors to the public defender. Id. at 13, 16. Judge Skillman found that the statutory authority of the public defender over personnel was expansive and that the pubic defender

has "unfettered discretion in determining when to hire, discharge, transfer, demote, or withhold promotion from an assistant public defender", short of the actions being "invidiously discriminatory." Id. at 13. On appeal, the Supreme Court reversed, substantially for the reasons expressed in Judge Skillman's dissenting opinion. Walsh v. State, 147 N.J. 595 (1997).

A more recent case interpreting statutory serve at the pleasure language is Golden v. Union Cty., 163 N.J. 420 (2000). It addressed that language in conjunction with disciplinary procedures in an employee manual. Golden was an assistant prosecutor who served at the pleasure of the prosecutor. N.J.S.A. 2A:158-15. Golden was discharged without the benefit of notice and hearing procedures outlined in the prosecutor's employee manual. Id. at 424. Golden asserted that the employee manual created an implied contract. The Court, however, found that N.J.S.A. 2A:158-15 trumped whatever implied contract may have existed between the parties. The Court determined that the language of the statute creates an at-will employment relationship between the prosecutor and assistant prosecutors and that prosecutors "may not limit their statutory prerogatives by the issuance of a manual, regardless of the manual's text." Id. at 431. The Court concluded that the procedures that Golden sought to enforce would impose limitations on the prosecutor that

would be contrary to the statute. Ibid. Important for the instant case is the fact that the Court noted that Golden was not asserting a right to disciplinary procedures under a collective negotiations agreement negotiated pursuant to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Id. at 432.

IV. Cases construing serve at the pleasure language within a collective negotiations context

In Camden Cty. Prosecutor, P.E.R.C. No. 96-32, 21 NJPER (¶26243 1995), we found that despite statutory serve at the pleasure language in N.J.S.A. 2A:157-10[4/], a contract provision setting forth pre-disciplinary procedures for prosecutors' investigators was mandatorily negotiable. The disciplinary procedures involved notice and a right to a hearing presided over by a hearing officer. The prosecutor reviewed all penalties prior to their imposition and had the ability to decrease but not increase the penalty. We found the procedures to be negotiable, noting that the contract provisions did not explicitly create a just cause standard that would limit a prosecutor's discretion to remove an investigator. We noted that the contract provision was not mandatorily negotiable to the extent it could be read to limit the prosecutor's discretion to remove an investigator despite a contrary recommendation from the hearing officer.

4/ This provision was later repealed. See Footnote 3.

Two years later, in State v. CWA, AFL-CIO, 154 N.J. 98 (1998), the Supreme Court found that a collective negotiations agreement could restrict the breadth of statutory serve at the pleasure language. That case involved an assistant deputy public defender who, pursuant to N.J.S.A. 2A:158A-6, served at the pleasure of the public defender. A provision in the collective negotiations agreement provided that unclassified employees who served at the pleasure could be dismissed for no reason, while another provision provided employees who had served six or more years with a two-step disciplinary review process ending in binding arbitration of appeals of major discipline for just cause. Id. at 101. Audrey Bomse was in the unclassified position of assistant deputy public defender. After serving for eight years, she received a notice of termination that did not state a reason for her termination.

Claiming she was terminated for misconduct, Bomse sought to avail herself of the disciplinary review procedures outlined in the contract. The State, relying on the provision of the contract providing that unclassified employees who served at the pleasure could be dismissed for no reason, argued that there was no jurisdictional basis for arbitration. Id. at 104.

The Supreme Court, however, found that since the contract provisions setting forth the disciplinary review procedures had been negotiated by the parties into a collective negotiations

agreement, N.J.S.A. 2A:158A-6 must be considered along with the provisions of our Act, specifically N.J.S.A. 34:13A-5.3, which provides that disciplinary review procedures are subject to negotiations. Ultimately, the State was bound by the contract provision establishing the two-step disciplinary review process to which it had agreed in negotiations. Id. at 114-115.

More recently, Jordan v. Solomon, 362 N.J. Super. 633, 637-638 (App. Div. 2003), certif. den. 178 N.J. 250 (2003), reconciled statutory serve at the pleasure language with Standard Operating Procedures (SOPs) that had been adopted by a prosecutor pursuant to a collective negotiations agreement and that identified potential disciplinary infractions and established a system of progressive discipline. A prosecutor's investigator was demoted from sergeant to senior investigator and was not afforded the procedural protections outlined in the SOPs. Relying on the statutory serve at the pleasure language then found in N.J.S.A. 2A:157-10, the prosecutor argued that he had wide discretion to remove investigators. The Court, however, held that the prosecutor was bound by the procedures he had agreed to through collective negotiations.[5/]

5/ The Court noted that its decision did not consider whether an infraction so serious that immediate termination is appropriate would remain within the statutory prerogative of the prosecutor notwithstanding the collectively negotiated right.

V. Analysis

The Prosecutor is arguing that the Association's claim that the order of layoffs should be by seniority is preempted by N.J.S.A. 2A:158-15, which sets forth that assistant prosecutors hold their appointments at the pleasure of the prosecutor. Applying the case law as it has developed, we disagree.

While the Prosecutor relies heavily on Golden, that Court specifically noted that the plaintiff's claim of a right to avail himself of disciplinary procedures was based on an implied contract theory, and not based on his rights under a collective negotiations agreement. The Golden Court did not find that an employer could not exercise its discretion under statutory serve at the pleasure language through the collective negotiations process.

The Association alleges that the Prosecutor modified the parties' practice of laying off qualified employees by seniority as outlined in the employee manual. The Association further alleges that the terms of the manual became part of the collective negotiations agreement through the maintenance of benefits clause. These allegations bring this case within the ambit of State v. CWA and Jordan v. Solomon, where the courts had to consider statutory serve at the pleasure language in conjunction with a provision of a collective negotiations agreement. As was done in State v. CWA, here the serve at the

pleasure language in N.J.S.A. 2A:158-15 must be read in conjunction with our Act, which authorizes negotiations over layoff by seniority provisions. State v. State Supervisory Employees Ass'n., 78 N.J. at 84.

Cases that have arisen in other contexts have found that an employer can exercise its statutory discretion through collective negotiations. In State of New Jersey, P.E.R.C. No. 84-77, 10 NJPER 42 (¶15024 1983), aff'd 11 NJPER 333 (¶16119 App. Div. 1985), a union sought to arbitrate a grievance claiming that the State violated an agreement to permit employees to choose between compensatory time or overtime pay for hours worked beyond their regular shift. The State argued that any agreement was preempted by a Civil Service regulation that provided that overtime compensation may be compensated in cash payment or compensatory time off at the discretion of the department head, with the approval of the Overtime Committee. We held, and the Appellate Division agreed, that absent any action by the Overtime Committee, the discretion of the department head could be exercised through collective negotiations. See also State of New Jersey, P.E.R.C. No. 2009-4, 34 NJPER 222 (¶76 2008).

We thus conclude that N.J.S.A. 2A:157-10 does not preempt the Prosecutor's discretion to agree through collective

negotiations to use seniority to decide the order of economic layoffs.[6/]

In addition to its preemption argument, the Prosecutor contends that it has a managerial prerogative to deviate from seniority in layoffs. However, the Supreme Court has held that when laying off for economic reasons, an employer can agree to use seniority as a deciding factor. State v. State Supervisory Employees Ass'n. Here, the layoffs were made because of a severe budget crisis. There is nothing in the record to suggest that the layoff decisions were performance-based. The Prosecutor asserts that he is a unique employer as he is a constitutional officer nominated and appointed by the Governor with the advice and consent of the Senate and by statute is vested with all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the law. We do not find these arguments persuasive. The public defender in State v. CWA is nominated and appointed in the same manner pursuant to N.J.S.A 2A:158A-4, and there are other law

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6/ Our decision in Camden Cty. Prosecutor noted an unpublished bench decision in Seda v. Borden, Chan. Div. Dkt. No. L-13010-91 (12/10/91). There, the Court rejected a contention that a contractual commitment negotiated by a predecessor prosecutor could bind a current prosecutor. The Court distinguished but did not consider the question of whether a current prosecutor could agree to restrict his or her own discretion. In this case, the current prosecutor entered into the collective negotiations agreement that allegedly binds him to lay off by seniority.

enforcement personnel who have been permitted to negotiate for layoffs by seniority. See, e.g. Middlesex Cty. College, P.E.R.C. No. 82-57, 8 NJPER 32 (¶13014 1981).[7/]

Finally, we fully appreciate the Prosecutor's argument that the employee manual is not applicable to assistant prosecutors as unclassified employees. However, that is an argument on the merits that must be made to the arbitrator. As stated earlier, our scope of negotiations jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed. We decide only whether the Prosecutor could have negotiated an agreement to lay off by seniority, not whether he did so.

ORDER

The request of the Passaic County Prosecutor's Office for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed.

ISSUED: December 18, 2008

Trenton, New Jersey

7/ The Prosecutor speculates that because it assigns assistant prosecutors to various units, layoffs by seniority might prevent it from sufficiently staffing all its units. Should a dispute along those lines arise, the employer may file a new scope petition and we will address its concerns on a complete factual record.