

P.E.R.C. NO. 2009-34

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY PROSECUTOR'S OFFICE,

Petitioner,

-and-

Docket No. SN-2008-072

POLICEMEN'S BENEVOLENT ASSOCIATION,  
LOCAL 265,

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 Policemen's Benevolent Association, Local 265. The grievance contests the order of recent layoffs of prosecutor's investigators. 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:157-10, which contains the authority of the Prosecutor to appoint investigators. The Commission finds that the statute does not address layoff procedures and is therefore not preemptive as to whether the Prosecutor could 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 & Vernioia, attorneys  
(Brian W. Kronick, on the brief; Brian W. Kronick and  
Christina E. Chubenko, on the reply brief)

For the Respondent, Cohen, Leder, Montalbano &  
Grossman, LLC, attorneys (Bruce D. Leder, on the brief)

DECISION

On April 24, 2008, the Passaic County Prosecutor's Office petitioned for a scope of negotiations determination. The Prosecutor seeks a restraint of binding arbitration sought by Policemen's Benevolent Association, Local 265. The PBA contests the order of recent layoffs of prosecutor's investigators. We deny the request for a restraint.

The parties have filed briefs and exhibits. Prosecutor James F. Avigliano has filed a certification. These facts appear.

The PBA represents detectives, investigators and senior investigators. The parties' collective negotiations agreement is

effective from January 1, 2003 through December 31, 2006. The grievance procedure ends in binding arbitration. The parties are currently in negotiations for a successor agreement.

Article I of the agreement is entitled Management Rights. It provides the employer with the right to direct, hire, demote, promote, transfer, assign and retain employees and to relieve employees from duties because of lack of work or for other legitimate reasons.

Article XV, Section C, sets forth that all benefits and terms and conditions of employment, including those not specifically set forth in the Agreement, "shall be maintained at not less than the highest standards in effect at the time of the commencement of collective bargaining negotiations." Section D provides that the Prosecutor agrees to maintain "all existing benefits, rights, duties, obligations and conditions of employment applicable to any employee covered by th[e] Agreement pursuant to any rules, regulations, instructions, directive, memorandum [or] statute."

Section VI of the Prosecutor's Employee Manual is entitled Reduction of Staff/Layoffs. It 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 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.

A Passaic County Personnel Department Manual contains similar language.

N.J.S.A. 2A:157-10, entitled "county investigators generally, appointment, salaries and duties", provides:

In addition to the office of county detective, there is created in the office of the prosecutor, the office or position of county investigator which shall be in the unclassified service of the civil service. The prosecutor of each of the several counties of this State may appoint such number of suitable persons, not in excess of the number, and at salaries not less than the minimum amounts, in this act provided, to be known as county investigators, and to assist the prosecutor in the detection, apprehension, arrest and conviction of offenders against the law. Persons so appointed shall possess all the powers and rights and be subject to all the obligations of police officers, constables and special deputy sheriffs, in criminal matters.

Notwithstanding the provisions of this section, a single probationary or temporary appointment as a county investigator may be

made for a total period not exceeding one year.

The Prosecutor asserts that layoffs became necessary due to a severe budget crisis. He states that he met with the PBA to discuss alternatives to layoffs, including across-the-board salary reductions, but the PBA was unwilling to consider such alternatives. Effective March 1, 2008, some investigators were laid off. The record does not reflect how many. The PBA asserts that the most senior investigators were laid off.

The PBA states that it filed a grievance that was denied. Neither party has submitted grievance documents. On March 18, 2008, the PBA demanded arbitration. This petition ensued.

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.

As this dispute arises in the context of a grievance involving police officers, arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. A subject is mandatorily negotiable if it is not preempted by statute or regulation and it intimately and directly affects employee work and welfare without significantly interfering with the exercise of a management prerogative. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981). A subject involving a management prerogative can still be permissively negotiable if agreement would not place substantial limitations on government's policymaking powers.

Stressing that "nothing more intimately and directly affects an employee than whether he has a job," our Supreme Court has stated that, unless preempted, a proposal to have layoffs among qualified employees be by 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).

The Prosecutor asserts that the PBA's claim that the order of layoffs should be by seniority is preempted by N.J.S.A. 2A:157-10. We disagree. 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). N.J.S.A 2A:157-10 contains general authority about the appointment, salaries and duties of county investigators and does not address layoff procedures.<sup>1/</sup> It thus does not prohibit a prosecutor from negotiating over layoff procedures. We note that other employees in civil service jurisdictions without the protections of the classified service have been permitted to negotiate for protections not granted by civil service. See, e.g., Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981) (negotiable promotional procedures for State police in the unclassified civil service); Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992) (negotiable layoff and recall rights for provisional civil service employees); City of Jersey City, P.E.R.C. No. 85-78, 11 NJPER 84 (¶16037 1985) (layoff procedures for provisional employees that do not conflict with civil service statute and regulations are mandatorily negotiable).

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<sup>1/</sup> In a case issued earlier today, we held that despite statutory serve at the pleasure language, this Prosecutor could have agreed to include seniority by layoff provisions in a collective negotiations agreement covering assistant prosecutors. Passaic Cty. Prosecutor's Office, P.E.R.C No. \_\_\_\_\_, \_\_\_\_\_ NJPER \_\_\_\_\_ ( \_\_\_\_\_ 2008).

The Prosecutor notes that in 2003, language was removed from N.J.S.A. 2A:157-10 that had provided that county investigators serve at the pleasure of the prosecutor.<sup>2/</sup> In addition, N.J.S.A. 2A:157-10.1 through 10.8 added, among other things, a just cause standard for the discipline of county investigators, a requirement of written complaints within 45 days, and appeal rights for county investigators in non-Civil Service counties. The PBA does not challenge the Prosecutor's assertion that N.J.S.A. 2A:157-10.1 does not grant investigators statutory layoff protection.

In addition to preemption, the Prosecutor argues 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 Ass'n. Here, the Prosecutor has stated that 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

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<sup>2/</sup> The Prosecutor quotes from a Sponsor's Statement to A2588, a bill to provide "due process to county investigators in dismissal actions." That bill was introduced on June 8, 2000 and did not become law. S1558, which grants "certain rights, privileges and protections to investigators in the county prosecutor's offices," was introduced on May 30, 2002 and became law on September 9, 2003 as L.2003, c.173. That law enacted the changes described above.

officer nominated and appointed by the Governor with the advice and consent of 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. State v. CWA, AFL-CIO, 154 N.J. 98 (1998), held that the Public Defender was bound by disciplinary review procedures negotiated into a collective negotiations agreement. The Public Defender is nominated and appointed in the same manner as the Prosecutor. See N.J.S.A. 2A:158A-4. Also, there are other law 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).

Finally, the Prosecutor's arguments about the applicability of the employee manuals and/or eligibility for using seniority to determine the order of layoffs 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.

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