

D.R. NO. 98-3

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

In the Matter of

UNION COUNTY PROSECUTOR'S OFFICE,

Public Employer,

-and-

Docket No. RO-97-60

UNION COUNTY ASSISTANT PROSECUTORS'  
ASSOCIATION,

Petitioner.

SYNOPSIS

Assistant county prosecutors, who were sworn as deputy attorneys general when their County prosecutor died and the State Attorney General appointed an acting prosecutor, are found not to be confidential employees statutorily exempt from representation by N.J.S.A. 52:17A-7. The Director orders an election among the assistant prosecutors employed by Union County Prosecutor's Office.

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Appearances:

For the Public Employer  
DeMaria Ellis, attorneys  
(Kathryn V. Hatfield, of counsel)

For the Petitioner  
Kenneth N. Siegel, Assistant Prosecutor

DECISION AND DIRECTION OF ELECTION

On November 4, 1996 the Union County Assistant Prosecutors Association filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission. The Association seeks to represent a unit of approximately 54 assistant prosecutors of the Union County Prosecutor's Office. The Prosecutor's Office objects to an election. It asserts that assistant prosecutors are sworn deputy attorneys general and therefore, pursuant to N.J.S.A. 52:17A-7, are confidential employees ineligible for representation under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.

We have conducted an administrative investigation in this matter which revealed the following facts. N.J.A.C. 19:11-2.6.

On September 20, 1995, Union County Prosecutor Andrew Ruotolo passed away. N.J.S.A. 52:17B-104 provides that, in a county having no prosecutor, the State Attorney General shall prosecute the criminal business of the State. On September 22, 1995, the Attorney General appointed Assistant Attorney General Edward Neafsey to serve as acting prosecutor for Union County. All Union County assistant prosecutors were immediately sworn in as "acting assistant prosecutors/special deputy attorneys general" and will continue to be so designated until a new prosecutor is sworn in. To date, a new prosecutor has not been appointed.

Acting Prosecutor Neafsey argues that under N.J.S.A. 52:17A-7, deputy attorneys general are confidential employees. That Act provides,

deputy attorneys general and assistant attorneys-general in the Department of Law and Public Safety shall hold their offices at the pleasure of the attorney general and shall receive such salaries as the attorney general shall from time to time designate. They shall be deemed confidential employees for purposes of the "New Jersey Employer-Employee Relations Act," P.L. 1941, c. 100 (C.34:13A-1 et seq.).

The Association argues that the 54 assistant prosecutors in the proposed unit are employed by the Office of the County Prosecutor, and not by the State Department of Law and Public Safety. Therefore, the above-cited statute does not apply to them.

When the identity of an employer is in dispute, the Commission identifies the employer by focusing on which governmental entity exercises substantial control over the labor relations and

personnel determinations affecting the employees involved. See, Morris Cty. Bd. of Social Services, P.E.R.C. No. 86-15, 11 NJPER 491 (¶16175 1985); Bergen Cty. Sheriff, P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984); Camden Cty. Health Services Bd. of Managers, D.R. No. 89-36, 15 NJPER 379 (¶20161 1989); Newark Housing Development and Rehabilitation, D.R. No. 80-2, 5 NJPER 328 (¶10175 1979); Mercer Cty. Superintendent of Elections, D.R. No. 78-37, 4 NJPER 147 (¶4069 1978), aff'd P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978); Passaic Cty. Bd. of Chosen Freeholders, D.R. No. 78-29, 4 NJPER 8 (¶4006 1977).

The State does not set or pay the salaries, or set any other terms and conditions of employment of assistant prosecutors. Assistant prosecutors do not perform duties assigned by the Department of Law and Public Safety. Their duties have remained unchanged since they were sworn in as acting assistant prosecutor/special deputy attorney general. Accordingly, I see no basis to conclude, under these circumstances, that the assistant prosecutors assigned to Union County are employed by the State Department of Law and Public Safety.

The prosecutor has statutory authority to appoint employees, set their compensation and set their working conditions. N.J.S.A. 2A: 157. Accordingly, the prosecutor normally is the employer of his or her detectives, investigators, and clerical staff. Bergen Cty. Prosecutor, D.R. No. 78-34, 4 NJPER 104 (¶4047 1978), P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), aff'd 172 N.J.

Super 363 (App. Div. 1980); Mercer Cty. Prosecutor, P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), aff'd. 172 N.J. Super 411 (App. Div. 1980); Ocean Cty. Prosecutor, D.R. No. 82-29, 8 NJPER 60 (¶13024 1981).

With regard to assistant prosecutors, N.J.S.A. 2A:158-15 gives prosecutors the power to appoint assistants, who then serve at their pleasure. N.J.S.A. 2A:158-16 gives the prosecutor authority to recommend their salaries to the county board of freeholders, subject to certain statutory maximums. Here, the prosecutor, acting alone or through the County, has traditionally controlled employees' terms and conditions of employment, including hiring and discipline, working hours, work assignments, salaries and benefits, and other working conditions. The County issues the employees' paychecks and funds their benefits packages. Neither the method of employee compensation nor their working conditions have changed since Neafsey was appointed as acting prosecutor.

In Coleman v. Kaye, 87 f.3d 1491 (3rd Cir. 1996), the United States Court of Appeals found that Monmouth County was liable for the personnel actions taken by its County Prosecutor and observed that, "county prosecutors are acting as county officials when they make employment decisions" and that "the discriminatory actions of [Prosecutor] Kaye and his subordinates may be imputed to the County of Monmouth since Kaye was the final policymaking authority acting on behalf of Monmouth County in the prosecutor's office." Coleman at 1503, 1506.

The petitioner cited a federal district court interlocutory decision, Mark G. Baldassare v. State of New Jersey, et al., civil action no. 95-6460 (MTB), 3/12/97 (unpublished) in which the Bergen County Prosecutor's Office was held to be the employer of its employees, notwithstanding that a State deputy attorney general was appointed to fill the role of acting prosecutor.<sup>1/</sup> The court, in Baldassare, held that the Coleman case could not be distinguished on the basis of the prosecutor's acting status, and that the County was liable for the acting prosecutor's personnel decisions.

I find that the assistant prosecutors in this matter are employed by the Union County Prosecutor's Office, not by the State Department of Law and Public Safety, notwithstanding the fact that they were sworn as special deputy attorneys general. Therefore, I find that these employees are not confidential within the meaning of N.J.S.A. 52:17A-7, and they may be represented under our Act for purposes of collective negotiations. I direct that a mail ballot election be conducted among the employees in the following unit:

Included: All assistant prosecutors employed by the Union County Prosecutor's Office.

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; first assistant

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<sup>1/</sup> In that matter, Bergen County and the Bergen Prosecutor's Office sought to dismiss a wrongful discharge suit under U.S.C. sections 1983 and 1988, claiming that they could not be held liable for the acting prosecutor's personnel decisions.

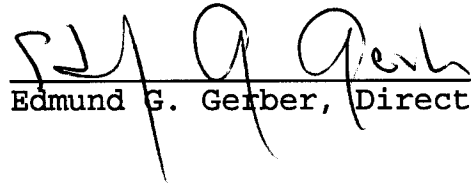
prosecutors, non-professional employees, craft employees and employees represented in other collective negotiations units.

The election shall be conducted no later than thirty (30) days from the date of this decision. Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, on vacation or temporarily laid off, including those in the military service. Ineligible to vote are employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the names of all eligible voters in the units, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by us no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously provided to the employee organization with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

The exclusive representative, if any, shall be determined by a majority of the valid votes cast in the election. The election shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION

  
Edmund G. Gerber, Director

DATED: July 18, 1997  
Trenton, New Jersey