

I.R. No. 2008-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY PROSECUTOR'S OFFICE,

Respondent,

-and-

Docket No. CO-2008-240

PASSAIC COUNTY ASSISTANT
PROSECUTOR'S ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief on a charge alleging that the Passaic County Prosecutor violated the New Jersey Employer-Employee Relations Act by laying off assistant prosecutors in a manner inconsistent with the provisions of an employee manual. The Prosecutor argued that the assistant prosecutors are at will employees pursuant to statute and serve at the Prosecutor's pleasure, and that no layoff procedures are contained in the parties collective agreement. The Commission Designee found that issues of law and fact make it impossible to find the Charging Party has a substantial likelihood of success on the merits of the case.

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Appearances:

For the Respondent, Genova, Burns & Vernoia, attorneys
(Brian W. Kronick, of counsel)

For the Charging Party, Loccke, Correia, Schlager,
Limsky and Bukosky, attorneys (Michael A. Bukosky, of
counsel)

INTERLOCUTORY DECISION

On February 20, 2008, the Passaic County Assistant
Prosecutors Association (Association) filed an unfair practice
charge with the Public Employment Relations Commission
(Commission) alleging that the Passaic County Prosecutor
(Prosecutor) violated 5.4a(1), (2), (3), (4), (5), (6) and (7)^{1/}

^{1/} These provisions prohibit public employers, their
representatives or agents from: "(1) Interfering with,
restraining or coercing employees in the exercise of the
rights guaranteed to them by this act. (2) Dominating or
interfering with the formation, existence or administration
of any employee organization. (3) Discriminating in regard
to hire or tenure of employment or any term or condition of
employment to encourage or discourage employees in the
exercise of the rights guaranteed to them by this act. (4)
Discharging or otherwise discriminating against any employee
(continued...)

of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The Association alleges that the Prosecutor repudiated the parties collective agreement and thereby violated the Act by laying off two employees inconsistent with the order of layoff contained in the Prosecutor's Employee Manual, the County Personnel Manual and the parties collective agreement.

The unfair practice charge was accompanied by an application for interim relief seeking to restrain the Prosecutor from laying off employees in a manner inconsistent with the policy manuals. An Order to Show Cause was executed on February 21, 2008 scheduling a telephone conference call return date for February 29, 2008. Both parties submitted briefs and affidavits and argued orally on the return date.

The Association conceded that the layoff was economically based, but argued that the order of layoffs is a negotiable term and condition of employment, that the policy manuals provided that the last appointed are the first terminated, and since two

1/ (...continued)
because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

employees were laid off inconsistent with that policy the Prosecutor violated the Act because the policy's had become part of the parties practice through their contractual maintenance of benefits clause. The Prosecutor argued that the affected employees, assistant prosecutors, are by law unclassified employees and that the layoff procedures in the policy manuals apply only to classified employees. Nevertheless, it further argued that as provided in the Prosecutor's Manual and statutory law, the assistant prosecutor's are at-will employees who hold their appointments at the Prosecutor's pleasure. Finally, the Prosecutor argues that the parties collective agreement does not contain an order of layoff.

The following pertinent facts appear:

In January 2008, the Prosecutor announced the need to layoff a number of employees by March 1, 2008 due to budget constraints. The Association does not dispute the economic basis for the layoff. Certain assistant prosecutor's were selected for layoff who were not the last appointed employees. The Association demanded negotiations over the layoff procedure. The Prosecutor met with the union but they could not agree.

Article VI Section A1 of the Prosecutor's Employee Manual provides:

The layoff of a permanent employee shall be in the order of seniority in the classification. Those last appointed are the first terminated.

The County Personnel Manual contains similar language.

But the Prosecutor's Employee Manual in Article I Section B also contains language that employment in the Prosecutor's office is "at-will". That section 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.

Generally speaking, all members of the prosecutorial staff, all county investigators of any rank, all agents of the Prosecutor, all interns, law clerks and clerical personnel in their working test period are 'at will' employees and may be terminated by the prosecutor at any time, for any reason or for no reason.

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.
2. Nothing contained in this Manual should be considered as creating any express or implied contract of continued employment.
3. Those employees whose positions are within the classified civil service may be terminated only after the PCPO has followed the procedures required by law.

N.J.S.A. 2A:158-15 referred to above provides in pertinent part:

Assistant 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 maintained that the layoff provisions of the manuals applied to classified employees, but that assistant prosecutors were in the unclassified service. Pursuant to 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.

The parties collective agreement does not contain a provision for the order of layoffs. It does contain an "Existing Policies" provision in Article XV Section C and D, which provides as follows:

(C) The Prosecutor of the County of Passaic agrees that all benefits, terms and conditions of employment relating to the status of Passaic County Prosecutor's Office, which benefits, terms and conditions of employment are not specifically set forth in this Agreement, shall be maintained at not less than highest standards in effect at the time of the commencement of collective bargaining negotiations between the parties leading to the execution of this Agreement.

(D) Unless a contrary intent is expressed in this Agreement, all existing benefits, rights, duties, obligations and conditions of employment applicable to any employee covered by this Agreement pursuant to any rules, regulations, instructions, directive, memorandum, statute or otherwise shall not be limited, restricted, impaired, removed or abolished.

ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a

final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

While the Association correctly argues that the Commission has held that unless preempted, a proposal to make economic layoffs among qualified employees by order of seniority is mandatorily negotiable. South Orange-Maplewood Bd. of Ed., P.E.R.C. No. 97-54, 22 NJPER 411, 413 (¶27225 1996); 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), those decisions concerned employees of a board of education. The Commission did not consider in those cases the at-will employment issues raised here by the Prosecutor's Manual, nor has it considered whether N.J.S.A. 2A:158-15 preempts the negotiations.

Even assuming such a layoff procedure were negotiable here, the parties collective agreement does not contain a clause providing for the order of layoff and there are insufficient facts showing what layoff practice has existed. To the extent the Association relies upon Article XV, the "Existing Policies"

provision of the parties collective agreement to prove its case here, any dispute about whether a particular layoff practice were included by that clause is more appropriate for resolution through the parties grievance procedure.

In seeking dismissal of the Association's application, the Prosecutor primarily relied upon N.J.S.A. 2A:158-15 and the Supreme Court's holding in Golden v. County of Union, 163 N.J. 420 (2000), arguing that the Association has not demonstrated a substantial likelihood of success of the merits of this case. In Golden, an assistant prosecutor was discharged without the benefit of a formal hearing and other procedures which he claimed he was entitled to because they were contained in the prosecutor's employee manual. The Court determined that the language of the statute "unambiguously creates an at-will employment relationship between the prosecutor and all assistant prosecutors . . ." Id. at 427, and concluded that the Legislature's mandate embodied in the statute would be thwarted if the prosecutor were required to follow the relied upon procedures contained in the employee manual. Id. at 433. See also, Walsh v. State, 147 N.J. 595 (1992); Cetrulo v. Byrne, 31 N.J. 320 (1960).

But the plaintiff in Golden had relied on State v. CWA, 154 N.J. 98 (1998) to support his claim. In that case, the Court upheld the enforcement of the right to arbitrate over disciplinary review procedures despite a separate statute,

similar to the prosecutors statute at issue here, permitting the Public Defender authority to terminate deputies at-will. The Golden Court noted that the State v. CWA dispute involved the interplay of two statutory provisions and distinguished it from the Golden facts which did not involve a competing statutory scheme. The Golden Court then noted that since the plaintiff did not contend he was entitled to disciplinary procedures under a collective bargaining agreement, State v. CWA did not control. Id. at 432-433.

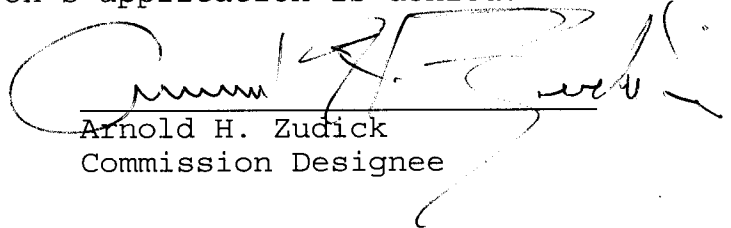
The Association on the return date argued that the Golden Court, while finding the employee manual inapplicable in that case, left the door open to find that layoff procedures negotiated into a collective agreement may be enforceable for employees of the Prosecutor despite N.J.S.A. 2A:158-15.

While I agree with the Association that the Golden Court may have left the door open regarding the negotiability of certain procedures affecting prosecutor employees that have been negotiated into a collective negotiations agreement, that does not establish a substantial likelihood of success on this application. First, State v. CWA did not concern the employer's inherent authority to terminate an unclassified employee, it concerned whether an unclassified employee could be terminated for misconduct without being charged for misconduct. Additionally, there are not enough facts here to determine whether an order of layoff practice has existed, it is not

possible to determine from the record before me whether the layoff procedures in the Prosecutor's Manual have been subsumed within Article XV of the parties collective agreement, and the Commission has not had the opportunity to consider N.J.S.A. 2A:158-15 and Golden and their impact on the negotiability of layoff procedures for prosecutor employees.

Consequently, I find that the Association has not established a substantial likelihood of success on the merits of this case.

Accordingly, the Association's application is denied.



Arnold H. Zudick
Commission Designee

DATED: March 11, 2008
Trenton, New Jersey