

P.E.R.C. NO. 96-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY PROSECUTOR,

Petitioner,

-and-

Docket No. SN-93-103

POLICE BENEVOLENT ASSOCIATION,
LOCAL #316,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines that a contract proposal submitted by Police Benevolent Association, Local #316 in successor contract negotiations with the Camden County Prosecutor is mandatorily negotiable except to the extent it would limit the prosecutor's discretion to remove an investigator despite a contrary recommendation from a presiding officer. The Commission has repeatedly held that contractual protections and pre-discipline procedures comparable to those found in the disputed article are mandatorily negotiable. N.J.S.A. 2A:157-10 does not address disciplinary actions besides removals so it does not prohibit negotiations over other disciplinary actions.

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.

P.E.R.C. NO. 96-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY PROSECUTOR,

Petitioner,

-and-

Docket No. SN-93-103

POLICE BENEVOLENT ASSOCIATION,
LOCAL #316,

Respondent.

Appearances:

For the Petitioner, Murray, Murray & Corrigan, attorneys
(David F. Corrigan, of counsel; Patricia M. Schmidt, on the
brief)

For the Respondent, Zazzali, Zazzali, Fagella & Nowak,
attorneys (Richard A. Friedman, of counsel)

DECISION AND ORDER

On May 3, 1993, the Camden County Prosecutor petitioned for
a scope of negotiations determination. The Prosecutor seeks a
declaration that a successor contract proposal submitted by Police
Benevolent Association, Local #316 is not mandatorily negotiable.
That proposal concerns procedures before disciplinary actions are
taken.

The parties have filed briefs and their collective
negotiations agreement. These facts appear.

The PBA represents the Prosecutor's investigators below the
rank of sergeant. The PBA and the then Acting Prosecutor, James F.
Mulvihill, entered into a contract effective from January 1, 1990 to
December 31, 1992. Article XVII is entitled Disciplinary Action.
It provides:

1. Purpose. The purpose of this article is to ensure the efficiency and the integrity of this office, promote employee morale, establish fair and equitable standards in the handling of disciplinary actions against employees, and to establish the guilt or innocence of employees charged with violations through prompt, thorough, and impartial investigations.

This article shall cover hearing wherein the proposed penalty could involve suspension without pay, fine, any penalty that is comparable to these, dismissal and any monetary reduction in salary, or reduction to the title of Agent.

2. Definitions. The term[s] employee, Union, Prosecutor, and County as used in this article shall be defined the same as contained in Article XV, Section 2 of this Agreement.

3. Rights. Any employee that becomes involved in any portion of a hearing and/or investigative stage of any alleged violation shall retain all rights afforded by this Agreement and all rights under law.

4. Representation. Any employee charged with a violation shall be entitled to represent himself, or be represented by an authorized member of the Union, or by an attorney. In any conference, investigation or hearing that might lead to a disciplinary action, a member may, at his or her option, have a Union representative present. All reports to be used in a disciplinary action are to be made available to the Prosecutor, employee and the Union.

6. Penalties. The following shall be the application of penalties and hearings:

(a) where the proposed penalty is greater than three (3) days suspension without pay, a fine equivalent to or greater than that amount, or a comparable penalty to these or dismissal, or reduction to the title of Agent to the Prosecutor, or any amount of monetary reduction in salary then the formal hearing procedures shall apply.

(b) where the proposed penalty is equal to, less than, or comparable to, a three (3) day suspension without pay then the formal hearing procedure shall not apply. The employee and the Union shall be given a copy of the charges, prior to any disciplinary action being taken and a copy of the final action as determined by the Prosecutor. The employee may submit a written request to have a formal hearing.

6. Hearings.

Formal. Whenever probable cause is established that an employee may be guilty of violating a Departmental Rule or Regulation, then the following is the procedure:

(a) A Notice of Disciplinary Action shall be prepared by the proper authority and be personally served on the employee and the Union. The Notice shall contain at least the employee's name and unit, the charges and the specifications of facts upon which the charge is based, the time, date and place of hearing, the penalties to which the employee is exposed, the signature of the Prosecutor and whether or not the employee is suspended with or without pay pending the determination of the hearing.

(b) The hearing shall be held during normal business hours, no sooner than five (5) days nor later than thirty (30) days after the submission of a nature of disciplinary action subject to the granting of reasonable requests for postponements by said employees.

(c) The charged employee shall have the opportunity to testify in his own defense, to produce relevant evidence and competent witnesses, and to cross-examine witnesses testifying against him.

(d) The hearing shall be conducted in an informal manner without formal rules or procedure but within the bounds of decency and respect.

(e) The Prosecutor may prosecute or preside but not both and may assign either or both of these duties to an authorized representative.

(f) The presiding officer shall admit testimony having reasonable probative value, but shall exclude immaterial, irrelevant and unduly cumulative testimony.

(g) The hearing may be recorded at the discretion of the presiding officer.

(h) After considering all the evidence both for and against the charge, the presiding officer shall render a verdict as soon as practicable. Although the verdict may be verbal at the time of the hearing, the determination shall be reflected in writing on the Notice of Final Determination which shall include the penalty to be imposed, if any, and must be served upon the member and the Union as soon as practicable.

7. Appeals. Whenever an employee has been found guilty of a violation of rules and regulations and the penalty imposed is contained in Section 5(a) of this Article, then said penalty shall not be served by the employee until he has exhausted any appeal rights to which he is entitled within this office under Disciplinary Article of this Agreement.

The employee and/or the Union may at their option request that the Prosecutor review the severity and appropriateness of the penalty imposed under Section 5(a) of this Article.

The Prosecutor agrees to review all penalties prior to their imposition so that at his discretion he may decrease but not increase said penalty.

The employee and/or Union shall retain any appeal rights that may exist under law, regardless of the outcome of any appeal within the office.

During successor contract negotiations, the PBA proposed that Article XVII be retained in any successor contract. This

petition ensued. Mulvihill is no longer the Camden County Prosecutor.

We have repeatedly held that contractual protections and pre-discipline procedures comparable to those found in Article XVII are mandatorily negotiable. See, e.g., Hopatcong Bor., P.E.R.C. No. 95-73, 21 NJPER 157 (¶26096 1995), recon. den. P.E.R.C. No. 96-1, 21 NJPER 269 (¶26173 1995), appeal pending App. Div. Dkt. No. A-371-95T5; Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993); Middlesex Cty., P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991), aff'd NJPER Supp.2d 290 (¶231 App. Div. 1992); Branchburg Tp., P.E.R.C. No. 89-20, 14 NJPER 571 (¶19240 1988); City of Jersey City, P.E.R.C. No. 89-15, 14 NJPER 563 (¶19235 1988).^{1/} But the employer contends that N.J.S.A. 2A:157-10 makes Article XVII not mandatorily negotiable. That statute authorizes a county prosecutor to appoint investigators "to serve at his pleasure and subject to removal by him." N.J.S.A. 2A:157-10 and similar statutes protect the confidential and personal relationship between a prosecutor and the prosecutor's investigators and thus generally preclude investigators from asserting statutory tenure rights. See Brennan v. Byrne, 31 N.J. 332 (1960); Zamboni v. Stamler, 199 N.J.

^{1/} N.J.S.A. 34:13A-5.3 precludes post-discipline arbitral review when a disciplined employee has statutory tenure protection or an alternate statutory appeal procedure. See generally State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993). But that is not an issue since the parties' contract does not call for arbitral review of disciplinary actions and speaks instead only to pre-discipline procedures.

Super. 378 (App. Div. 1985); Rolleri v. Lordi, 146 N.J. Super. 297, 306 (App. Div. 1977); Muccio v. Cronin, 135 N.J. Super. 315 (Law Div. 1975).

N.J.S.A. 2A:157-10 does not address disciplinary actions besides removals so it does not prohibit negotiations over other disciplinary actions. Also, N.J.S.A. 2A:157-10 does not address the procedures to be followed during an investigation or a hearing so it does not prohibit negotiations over the pre-discipline procedures outlined in Article XVII. While N.J.S.A. 2A:157-10 does specify that investigators may be removed at a prosecutor's pleasure, Article XVII, on its face, does not appear to conflict with that statutory provision. It does not explicitly create a just cause standard that would limit a prosecutor's discretion to remove an investigator. It simply provides for pre-discipline hearing procedures in certain cases and permits the prosecutor to serve as the hearing officer and to determine the appropriate penalty. Nothing in Article XVII states that an investigator may not be dismissed without cause or permits arbitral review of a decision to remove an investigator.^{2/}

We accordingly hold that Article XVII is mandatorily negotiable. Should Article XVII be retained in a successor contract and should a dispute arise over the legal arbitrability of

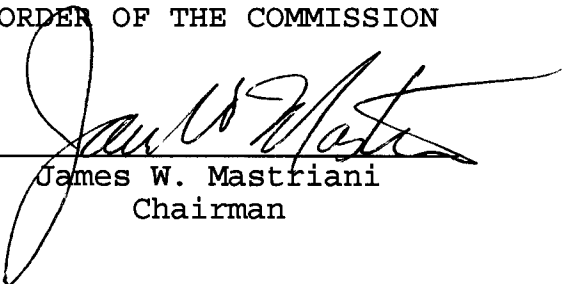
^{2/} Section 7, paragraph 3 is not mandatorily negotiable to the extent it can be read to limit the prosecutor's discretion to remove an investigator despite a contrary recommendation from a presiding officer.

a dismissal, the employer may file another scope-of-negotiations petition.^{3/}

ORDER

Article XVII is mandatorily negotiable except to the extent it would limit the prosecutor's discretion to remove an investigator despite a contrary recommendation from a presiding officer.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: October 31, 1995
Trenton, New Jersey
ISSUED: November 1, 1995

^{3/} In its reply brief, the Prosecutor submitted an unpublished bench opinion. Seda v. Borden, Chan. Div. Dkt. No. L-13010-91 (12/10/91). There, the Honorable Theodore Z. Davis, J.S.C. dissolved an injunction restraining a disciplinary hearing and dismissed an investigator's Complaint contesting his unpaid suspension. The Court rejected the contention that a contractual commitment negotiated by a predecessor prosecutor could bind a current prosecutor. Judge Davis distinguished and did not consider the question of whether a current prosecutor can agree to restrict his or her own discretion.