

P.E.R.C. NO. 2007-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY PROSECUTOR,

Respondent,

-and-

Docket No. IA-2006-066

CAMDEN COUNTY ASSISTANT
PROSECUTORS ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission grants the Camden County Prosecutor's motion to dismiss a Petition to Initiate Compulsory Interest Arbitration filed by the Camden County Assistant Prosecutors Association. The Prosecutor asserts that the assistant prosecutors are not covered by the Police and Fire Public Interest Arbitration Reform Act, N.J.S.A. 34:13A-14 et seq. The Commission finds that N.J.S.A. 34:13A-15 permits interest arbitration for employees "performing police services" and lists an extensive, although not exhaustive, list of job titles in which employees have direct, front-line responsibility for enforcement of laws, detection of legal violations, or custody of offenders. Assistant prosecutors are not included. The Commission also finds that N.J.S.A. 2A:158-1 et seq. does not specify the assistant prosecutors' duties or powers, reiterate the statutory language setting forth the prosecutor's powers, or give them police powers conferred on prosecutor's detectives and investigators. Thus, the Commission holds that while the lack of statutory police powers is not necessarily dispositive for purposes of N.J.S.A. 34:13A-15, it is consistent with the conclusion that assistant prosecutors primarily perform legal services, rather than police services. The Commission concludes that assistant prosecutors are not entitled to interest arbitration under N.J.S.A. 34:13A-15 and dismisses the Association's petition.

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 Respondent, Howard S. Wilson, Assistant County
Counsel

For the Petitioner, Loccke, Correia, Schlager, Limsky &
Bukosky (Michael A. Bukosky, of counsel)

DECISION

On March 23, 2006, the Camden County Assistant Prosecutors Association filed a Petition to Initiate Compulsory Interest Arbitration. On May 8, the Camden County Prosecutor moved to dismiss the petition, asserting that the assistant prosecutors are not covered by the Police and Fire Public Interest Arbitration Reform Act, N.J.S.A. 34:13A-14 et seq.

The parties have filed briefs, exhibits and certifications. These facts appear.

In 1987, the Prosecutor recognized the Association as the majority representative of all assistant prosecutors and law clerks in the Camden County Prosecutor's Office. The parties have entered into a series of collective negotiations agreements,

the latest of which expired on December 31, 2005. When the parties were unable to reach agreement on a successor contract, the Association filed the instant petition.

The duties normally performed by assistant prosecutors include:

Providing legal advice to law enforcement officers within and outside the Prosecutor's Office;

Meeting and interacting with representatives of law enforcement agencies on the municipal, county, state and federal levels;

Meeting and interacting with crime victims and members of their families;

Drafting and approving criminal charges and search warrants;

Drafting and approving wiretap applications and consensual wire intercepts;

Reviewing police reports and other documents relating to completed and on-going criminal investigations;

Supervising and advising subordinate assistant prosecutors, agents, investigative and clerical staff members;

Preparing cases for presentation to a County Grand Jury;

Preparing witnesses to give testimony at Grand Jury, at pre-trial hearing and at trial;

Presenting cases to the Grand Jury and to petit juries in Superior Court trials;

Preparing formal motions, correspondence and legal documents including but not limited to judicial order, witness lists, requests for voir dire questions and requests to charge;

Preparing legal briefs, memoranda of law, internal memoranda and other administrative documents;

Interacting with defense counsel and judges to resolve legal issues, procedural and scheduling matters;

Engaging in plea negotiations;

Participating in plea hearings and sentencing hearings;

Handling appellate matters including municipal and Superior Court cases;

Making appearances at public events and forums to educate the public as to the role of the Prosecutor's Office and to answer questions regarding the operation of the office;

Providing instruction to police recruits and experienced officers at various training sessions;

Reviewing and responding to requests for file materials in connection with civil litigation and for other purposes;

Advising the Prosecutor with respect to the setting of standards for office policy and protocols;

Supervising internal investigations of the Prosecutor's Office, homicide and child abuse investigations and inquiries into the use of force by law enforcement officers;

Planning and carrying out Megan's Law notifications regarding certain classes of sexual offenders.

According to the Acting Camden County Prosecutor, assistant prosecutors do not normally perform "traditional police work" such as pursuing, subduing, arresting and transporting offenders; assistant prosecutors do not ordinarily interrogate suspects or

defendants; and the Prosecutor's Office has more than 100 sworn investigative personnel who have full police powers and who perform the "traditional police work" on behalf of the Prosecutor's Office.

According to the Association's president, assistant prosecutors either assist or supervise in locating and interrogating witnesses; conducting property searches, and collecting evidence from crime scenes.

The current Standard Operating Procedures of the Prosecutor's Office provide that under N.J.S.A. 2A:158-5, the Prosecutor "will use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the law." They further state that assistant prosecutors must faithfully perform the duties of the office to the best of their abilities. SOP 50 provides that designated assistant prosecutors have special legal authority to use force and deadly force in certain situations subject to limitations and must complete firearms training and re-qualification twice a year.

SOP 57-1 provides that the primary law enforcement function of the Prosecutor's Office is not the enforcement of local ordinance violations; such infractions should be referred to the law enforcement agency with appropriate jurisdiction. Where notification to that agency is not possible, assistant prosecutors may sometimes make an off-duty arrest. We were not

supplied with any SOP governing on-duty arrest powers of assistant prosecutors.

N.J.S.A. 34:13A-16 sets forth procedures for resolving a negotiations impasse between a public police department and an exclusive representative, including the right of either party to petition for interest arbitration. N.J.S.A. 34:13A-15 defines "public police department" as:

[A]ny police department or organization of a municipality, county or park, or the State, or any agency thereof having employees engaged in performing police services including but not necessarily limited to units composed of State troopers, police officers, detectives and investigators of counties, county parks and park commissions, grades of sheriff's officers and investigators; State motor vehicle officers, inspectors and investigators of Alcoholic Beverage Commission, conservation officers in Fish, Game and Shell Fisheries, rangers in parks, marine patrolmen; correction officers, keepers, cottage officers, interstate escort officers, juvenile officers in the Department of Corrections and patrolmen of the Human Services and Corrections Departments; patrolmen of Capitol police and patrolmen of the Palisades Interstate Park Commission.

This definition was included in the 1977 interest arbitration legislation, L. 1977, c. 85, §2, and was not changed by the Police and Fire Public Interest Arbitration Reform Act, L. 1995, c. 425.

To determine whether assistant prosecutors are entitled to interest arbitration, we will consider whether: (1) the Prosecutor's Office meets the definition of "public police department" under N.J.S.A. 34:13A-15; and (2) assistant

prosecutors are engaged in performing police services. Newark Housing Auth., P.E.R.C. No. 2006-79, 32 NJPER 122 (¶57 2006); Cherry Hill Bd. of Ed., P.E.R.C. No. 2006-39, 31 NJPER 364 (¶146 2005); Camden Cty., P.E.R.C. No. 85-11, 10 NJPER 501 (¶15229 1984); New Jersey Institute of Technology, P.E.R.C. No. 84-47, 9 NJPER 666 (¶14289 1983) ("NJIT"); see also Rutgers, The State Univ., P.E.R.C. No. 94-45, 19 NJPER 579 (¶24275 1995), aff'd 21 NJPER 45 (¶26029 App. Div. 1994), certif. den. 140 N.J. 276 (1995) (addressing definition of "public police department").

The Prosecutor's Office does not challenge the conclusion that it is a public police department under N.J.S.A. 34:13A-15, so we turn to whether assistant prosecutors perform police services.

N.J.S.A. 34:13A-15 does not define "performing police services" and our decisions have not done so either. Instead, we have examined the duties, responsibilities, and required training of the employees in question, with emphasis on whether they have statutory police powers. Cherry Hill; Camden; NJIT. As we explained in Cherry Hill, our case law is related to decisions determining whether employees are police for the purposes of N.J.S.A. 34:13A-5.3, providing that police generally do not have the right to join employee organizations that admit non-police. Our analysis of section 5.3 was in turn shaped by Gloucester Cty. v. PERC, 107 N.J. Super. 150, 158 (App. Div. 1969), aff'd o.b. 55 N.J. 333 (1970), where the Appellate Division held that

corrections officers were "police" under that section because they had the statutory authority "to act as officers for the detection, apprehension, arrest and conviction of offenders."

See N.J.S.A. 2A:154-4.

Following Gloucester, we have held that employees are "police" for purposes of section 5.3 if they have the statutory authority to make arrests, even if the authority is limited to a particular class of violations. Warren Cty., P.E.R.C. No. 86-111, 12 NJPER 357 (¶17134 1986) (weights and measures officers were police because they had statutory power to arrest with respect to violations of weights and measures statutes). Conversely, we have held that a lack of statutory arrest power weighs heavily against a finding that an employee is a police officer under section 5.3. See, e.g., Mercer Cty., P.E.R.C. No. 88-85, 14 NJPER 244 (¶19090 1988); Monmouth Cty., P.E.R.C. No. 88-10, 13 NJPER 647 (¶18244 1987), aff'd NJPER Supp.2d 169 (¶170 App. Div. 1988).

In Camden, we drew on Gloucester in holding that court attendants with statutory arrest powers were engaged in performing police services under N.J.S.A. 34:13A-15. We reached this conclusion even though their primary duty was to maintain order in court and they did not carry weapons while on duty. In Cherry Hill, we found that unarmed school district police officers were performing police services because they had statutory arrest powers and performed many traditional police

functions such as traffic enforcement and crime detection and investigation. See also NJIT (concluding that there was "no doubt" that college police officers were performing police services, given that they had statutory police powers, N.J.S.A. 18A:6-4.5, and that they carried service revolvers; performed foot and vehicular patrol; arrested violators of the law; and enforced traffic and parking regulations).

In sum, our cases under N.J.S.A. 34:13A-15 have not announced an abstract definition of "police services," but have stated that the specific duties and responsibilities of the employees in question have to be examined in each case, with part of that examination involving a determination of whether the employees have statutory police powers.

We reiterate our case-by-case approach and clarify that, in reviewing job duties and responsibilities, we will focus on such factors as whether the positions require police training or another type of training; whether the employees have statutory police powers; and whether the positions have direct responsibility for enforcement of laws, detection of legal violations, or custody of offenders. As in State of New Jersey, we note that a unit is not necessarily eligible for interest arbitration because a few members perform police services.

The Prosecutor contends that the list of covered employees in N.J.S.A. 34:13A-15 does not include assistant prosecutors or a prosecutor's office. The Prosecutor argues that although the

possession of statutory police powers is an important aspect to consider in deciding entitlement to interest arbitration, it is the performance of those services that is the focus of the Act's language and purpose. It maintains that overall, assistant prosecutors fulfill the daily duties of litigators, negotiators, mediators and legal researchers, and that these tasks do not require assistant prosecutors to regularly engage in traditional police services or regularly confront the "life threatening dangers" identified by the legislative policy statement in the interest arbitration statute.

The Association counters that assistant prosecutors are fully vested with the ability to perform police services pursuant to various constitutional and statutory authorities. It notes that assistant prosecutors have the authority to use deadly force and may make arrests; and many assistant prosecutors carry firearms and complete a basic firearms course. It argues that the Prosecutor's Office, and derivatively, the assistant prosecutors, have supervisory authority over all law enforcement activity in the County, including County and municipal police officers. It further argues that, in accordance with such statutory authority, assistant prosecutors have the power to apprehend, detain and arrest criminals. The Association contends that assistant prosecutors are "performing police services" pursuant to N.J.S.A. 34:13A-15 and that the assertion that their duties are primarily legal in nature is irrelevant.

The Prosecutor replies that the mere granting of statutory police powers is not enough to conclude that a group of employees is "performing police services" under the Act. It contends that the Act requires that these duties and responsibilities be performed on a regular, if not daily, basis.

Preliminarily, we find no material factual dispute as to the assistant prosecutors' duties and powers. The Prosecutor's Office does not dispute that assistant prosecutors perform the functions set forth in the Association president's certification and that some assistant prosecutors carry firearms and may make arrests. The Association does not dispute that assistant prosecutors are lawyers whose normal duties include presenting grand jury indictments; trying cases; and handling appeals. Instead, the parties disagree as to whether, by virtue of their legal functions and their involvement in investigations or criminal complaints, assistant prosecutors are performing police services. We conclude that they are not.

We start with the plain language and structure of N.J.S.A. 34:13A-15. It permits interest arbitration for employees "performing police services" and lists an extensive, although not exhaustive, list of job titles in which employees have direct, front-line responsibility for enforcement of laws, detection of legal violations, or custody of offenders. Assistant prosecutors are not included. Although that fact is not determinative, see NJIT, the omission is noteworthy given that the county prosecutor

is the chief law enforcement officer in each county and has longstanding statutory authority to hire assistant prosecutors. State v. Winne, 12 N.J. 152, 167 (1953); N.J.S.A. 2A:158-15.

While the Legislature may not have been confident that it could identify every "police services" position in the State, it did aim to delineate the "principal titles" within the scope of the interest arbitration statute. See Assembly Labor, Industry and Professions Committee, Statement to S. 482 (December 6, 1976).

In this regard, we note that the Prosecutor employs county investigators, a title that along with county detectives was included by the Legislature in the list of titles entitled to interest arbitration. Given this background, we believe that the Legislature would likely have also listed assistant prosecutors if it had intended them to be covered by the statute.

Moreover, based on a review of the statutes governing the offices of county prosecutors, we find that assistant prosecutors do not have the statutory police powers possessed by the employees in Gloucester, NJIT and related cases.

N.J.S.A. 2A:158-1 governs the appointment of a county prosecutor in each county. See also N.J. Const. art. VII, §2, ¶1. N.J.S.A. 2A:158-5 sets forth his or her duties. It provides:

Each prosecutor shall be vested with the same powers and be subject to the same penalties, within his county, as the attorney general shall by law be vested with or subject to, and he shall use all reasonable and lawful diligence for the detection, arrest,

indictment and conviction of offenders
against the laws.

In State v. Winne, our Supreme Court noted that the county prosecutor is not required to personally detect, arrest, and convict, "though he may and often does do so," but is responsible for seeing that those things are done either by himself or his staff or by local law enforcement authorities within the county.

In that vein, the prosecutor is authorized to appoint detectives and investigators, who are charged with assisting the prosecutor in the detection, apprehension, arrest and conviction of offenders. N.J.S.A. 2A:157-2; N.J.S.A. 2A:157-10. Detectives and investigators are deemed to "possess all the powers and rights and be subject to all the obligations of police officers, constables and special duty sheriffs in criminal matters." Ibid. These employees thus have the same statutory police powers as the officers in Gloucester and related cases. By contrast, the statute authorizing the employment of assistant prosecutors, N.J.S.A. 2A:158-15, does not specify their duties or powers, reiterate the language in N.J.S.A. 2A:158-5, or give them the police powers conferred on a prosecutor's detectives and investigators. It simply authorizes their appointment. This statutory framework indicates that, while the Legislature viewed a prosecutor's investigators and detectives as police employees in the traditional sense, it did not view assistant prosecutors in the same manner.

Nor does N.J.S.A. 2A:158-18 grant assistant prosecutors all of the powers of the county prosecutor. It permits assistant prosecutors to attend grand jury sessions to perform the duties of the prosecutor. It does not, however, grant them any statutory police powers.

Thus, assistant prosecutors are not entitled to interest arbitration on the grounds that they have statutory police powers. Contrast Camden. And, as discussed later, the fact that some prosecutors may arrest or search individuals does not, in and of itself, weigh in favor of a finding that this unit is entitled to compulsory interest arbitration. Compare State v. Vickery, 275 N.J. Super. 648, 652 n.2 (Law Div. 1994) (contrasting statutory power of arrest with common law tradition of private citizen arrest).

While the lack of statutory police powers is not necessarily dispositive for purposes of N.J.S.A. 34:13A-15, it is consistent with our conclusion that assistant prosecutors primarily perform legal services, rather than police services, in connection with the prosecution of criminal cases. Assistant prosecutors also have responsibilities in connection with criminal investigations and work with police and investigators, but their involvement in these pre-trial matters mainly involves the exercise of legal skills and judgment, not police skills or training. Contrast NJIT, Newark; cf. In re Eligibility, 301 N.J. Super. 551 (App. Div. 1997) (assistant prosecutors are not policemen eligible for

membership in Police and Firemen's Retirement System; they are trained as lawyers, not as police officers); Atlantic Cty. Pros. Office, D.R. No. 2007-2, ___ NJPER ___ (¶__ 2006) (certifying a unit of assistant prosecutors that specifically excludes police).

We recognize that some assistant prosecutors may sometimes participate in more traditional police activities. Viewed in the context of the entire record, the fact that some assistant prosecutors may sometimes make arrests, carry firearms or conduct searches does not demonstrate that this unit performs police services. Compare State of New Jersey (Dept. of Treasury).

For all these reasons, we conclude that the Camden County Assistant Prosecutors are not entitled to interest arbitration under N.J.S.A. 34:13A-15.

ORDER

The Camden County Prosecutor's motion to dismiss the Petition to Initiate Compulsory Interest Arbitration is granted.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners DiNardo, Fuller, Katz and Watkins voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

ISSUED: August 10, 2006

Trenton, New Jersey