

P.E.R.C. NO. 2014-26

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MERCER COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

PBA LOCAL 187,

Docket Nos. SN-2013-026

SN-2013-027

SN-2013-028

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Mercer County Sheriff's Office for a restraint of binding arbitration of grievances filed by PBA Local 187. The grievances assert that the County violated the parties' collective negotiations agreement by terminating Sheriff's Investigators without just cause. The Commission finds that N.J.S.A. 40A:9-117a preempts negotiations or arbitration over termination of Sheriff's Investigators.

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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Respondent.

Appearances:

For the Petitioner, Trimboli & Prusinowski, LLC,  
attorneys (Stephen E. Trimboli, of counsel)

For the Respondent, Alterman & Associates, LLC,  
attorneys (Christopher A. Gray, of counsel)

DECISION

On December 21, 2012, the Mercer County Sheriff's Office (County) filed three scope of negotiations petitions. The County seeks a restraint of binding arbitration of grievances filed by PBA Local 187 (PBA) on behalf of three Sheriff's Investigators. The grievances assert that the County violated multiple provisions of the parties' collective negotiations agreement (CNA) when it terminated Sheriff's Investigators without just cause. We grant the County's request for a restraint of binding arbitration.

The County filed a brief, exhibits, and the certification of Sheriff John A. Kemler. The PBA filed a brief. These facts appear.

The PBA and the County are parties to a collective negotiations agreement (CNA) effective from January 1, 2005 through December 31, 2008. The grievance procedure ends in binding arbitration.

Article 1. of the CNA, entitled "Recognition" provides, in pertinent part:

For purposes of this Agreement the position of "Sheriff's Investigator" shall be included as abridged to "Sheriff's Officer."

Article 14. of the CNA, entitled "Discipline/Discharge" provides, in pertinent part:

14.1 It is expressly understood that the Employer shall have the right to discipline any Employee, however, the Employer agrees that it shall not discipline or discharge any Employees covered by the terms of this Agreement without just cause.

The New Jersey law regarding Sheriff's Investigators is N.J.S.A. 40A:9-117a. This statute states:

**40A:9-117a. Sheriff's investigators**

The sheriff of each county may appoint a number of persons, not to exceed 15% of the total number of sheriff's officers employed by the sheriff and set forth in the sheriff's table of organization in the county budget, to the position of sheriff's investigator. All sheriff's investigators shall serve at the pleasure of the sheriff making their appointment and shall be included in the unclassified service of the civil service.

A sheriff's investigator appointed pursuant to this section shall have the same compensation, benefits, powers and police officer status as is granted to sheriff's officers. The duties of sheriff's

investigators shall be law enforcement investigations and related duties. A person appointed to the position of sheriff's investigator shall, within 18 months of appointment, complete a police training course at an approved school and receive certification by the Police Training Commission as provided in P.L.1961, c. 56 (C. 52:17B-66 et seq.). The implementation of this act shall not result in the layoff of permanent sheriff's officers.

Sheriff Kemler assumed the office of Mercer County Sheriff in November 2010, replacing his predecessor Sheriff Kevin Larkin. The three grievants are all Sheriff's Investigators appointed by Sheriff Larkin who continued employment as "holdovers" when Sheriff Kemler took office. Because the statutory 15% cap on Sheriff's Investigators had been met, Sheriff Kemler was barred from creating additional Sheriff's Investigators positions. In order to appoint his own Sheriff's Investigators, Sheriff Kemler dismissed the three grievants from their holdover Sheriff's Investigator positions on July 13, 2012.

On July 13, 2012, the PBA filed grievances on behalf of the three terminated holdover Sheriff's Investigators, alleging that the County violated multiple CNA provisions and wrongfully discharged them without just cause. On July 23, 2012, Undersheriff James P. Taylor denied the grievances. After quoting N.J.S.A. 40A:9-117a, Taylor stated, in pertinent part:

As such, your employment was at the pleasure of the Sheriff as a matter of statutory law. Further, your term of employment formally ended when the sheriff who appointed you left

office. Therefore, it is not necessary to prove cause in order to terminate you.

On August 2, 2012, the PBA demanded binding arbitration of all three grievances. These consolidated petitions ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the Township may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). For police officers and firefighters, binding arbitration is restrained only if the agreement alleged is preempted or would substantially limit government's policy-making powers. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981).

The County argues that N.J.S.A. 40A:9-117a expressly provides that "all sheriff's investigators shall serve at the pleasure of the sheriff making their appointment" and therefore their termination is not negotiable. It asserts that because the Legislature intended Sheriff's Investigators to be hand-picked by the Sheriff and capped at 15% of the overall sheriff's officers, it would violate the spirit of the law to find that a successor Sheriff could be bound to his or her predecessor's appointments absent "just cause." The County argues that the fact that Sheriff Kemler waited several years into his term to appoint his own Sheriff's Investigators is not legally relevant.

The PBA argues that N.J.S.A. 40A:9-117a does not specifically preempt the mandatorily negotiable CNA provisions related to just cause and continuation of employment. It concedes that Sheriff's Investigators are at-will employees under the statute, but contends that this fact does not preclude reasonable contractual restrictions on termination. The PBA asserts that N.J.S.A. 40A:9-117a lacks the necessary specificity over termination and is not imperative in explicitly preempting a just cause provision. It argues that the "serve at the pleasure of the sheriff" language leaves great room for discretionary action by the Sheriff in negotiating terms of employment.

Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). As noted in Paterson, supra, if a particular item in dispute is controlled by a specific statute or regulation, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

In the absence of the Sheriff's Investigators statute, the language of the CNA's Recognition and Discipline clauses (quoted above) would be negotiable such that an arbitrator could decide whether Sheriff's Investigators are included in the unit and whether they are entitled to just cause protections. However,

N.J.S.A. 40A:9-117a. specifically controls the issues of appointment of and tenure of Sheriff's Investigators. The statute does include the following sentence which generally supports a contention that Sheriff's Investigators have the employment status of sheriff's officers:

A sheriff's investigator appointed pursuant to this section shall have the same compensation, benefits, powers and police officer status as is granted to sheriff's officers.

Read alone, this portion of the statute would suggest that Sheriff's Investigators enjoy all of the same benefits and protections afforded by the collective negotiations agreement in effect for the sheriff's officers.

Where there is a seeming conflict between a general statute and a specific statute covering a subject in a more minute and definite way, the latter shall prevail over the former and will be considered an exception to the general statute. Goff v. Hunt, 6 N.J. 600, 607 (1951); Ackley v. Norcross, 122 N.J.L. 569 (Sup. Ct. 1939), affirmed 124 N.J.L. 133 (E. & A. 1940). Although N.J.S.A. 40A:9-117a. generally incorporates the benefits of sheriff's officers into the Sheriff's Investigator positions, the following two sentences define their appointment and tenure as dependent on the County Sheriff:

The sheriff of each county may appoint a number of persons, not to exceed 15% of the total number of sheriff's officers employed by the sheriff and set forth in the sheriff's

table of organization in the county budget, to the position of sheriff's investigator. All sheriff's investigators shall serve at the pleasure of the sheriff making their appointment and shall be included in the unclassified service of the civil service.

These sentences combine to provide context to the County Sheriff's special appointment power for the Sheriff's Investigator positions. The fact that the statute specifies that these Sheriff's Investigators are an additional 15% group of specially appointed officers that "shall serve at the pleasure of the sheriff making their appointment" (emphasis added) supports the interpretation that these positions are created and terminated at the discretion of each Sheriff.

Further clarifying that Sheriff's Investigators are a supplemental, discretionary cadre of officers whose employment terms of appointment and termination are not congruent with those of other sheriff's officers is the following, final sentence of N.J.S.A. 40A:9-117a.:

The implementation of this act shall not result in the layoff of permanent sheriff's officers.

That Sheriff's Investigators are not intended to be permanent officers is apparent by the statute's reference here to "permanent sheriff's officers" who are not to be replaced due to the Sheriff's appointment of this up to 15% additional cadre of Sheriff's Investigators.



In contrast to the Sheriff's Investigators law, the statute for appointment of sheriff's officers, N.J.S.A. 40A:9-117.6., does not place sheriff's officers in the unclassified service or limit them to serving at the pleasure of the sheriff. Likewise, the "Rice Bill", N.J.S.A. 40A:14-180, permitting sheriff's officers who were terminated for reasons of economy to be placed on a list for potential appointment to county or municipal police departments, explicitly excludes Sheriff's Investigators.<sup>1/</sup>

Although New Jersey's Supreme Court and Appellate Division have not squarely considered the tenure of Sheriff's Investigators under N.J.S.A. 40A:9-117a., the Supreme Court's decisions interpreting analogous statutory language are very instructive and accord with our view here. For instance, N.J.S.A. 40A:9-115 and 116 provide for the Sheriff to appoint a limited number of Undersheriffs. The sections of the Undersheriffs statutes relevant to our inquiry provide:

Nothing in this section shall prevent the sheriff at his pleasure from removing an undersheriff. N.J.S.A. 40A:9-115.

All such undersheriffs shall hold office during the pleasure of the sheriff making the appointment, or his successor. The undersheriffs shall be included in the unclassified service of the civil service. N.J.S.A. 40A:9-116.

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<sup>1/</sup> N.J.S.A. 40A:14-180 states: "The provisions of this section shall not apply to a sheriff's investigator appointed pursuant to section 2 of P.L.1987, c.113 (C.40A:9-117a)."

In Ackley v. Norcross, 122 N.J.L. 569 (Sup. Ct. 1939), affirmed 124 N.J.L. 133 (E. & A. 1940), the Supreme Court considered the undersheriffs statutes (at the time, R.S. 40:41-28 and 30) in response to a challenge by an Undersheriff who was terminated and replaced by the new Sheriff's chosen Undersheriffs. It found:

The statute, R.S. 40:41-28, authorizes a sheriff to remove an under-sheriff at pleasure. R.S. 40:41-30 says that a sheriff may appoint under-sheriffs and that they shall not be classified under the civil service. It seems to us that the legislative intention was to give the sheriff free rein to control the terms of office of his under-sheriffs, to appoint and remove at his pleasure. The quoted words of the statute, "or his successor," relied on by relator to show an indefinite term, do not in our view so indicate. It may well be that the meaning is that in the event of a new sheriff not making a new appointment of an under-sheriff the incumbent in office will hold over. Moreover, the statutes relating to tenure, supra, upon which relator relies, are general, while those dealing with the office of under-sheriff are special and specifically cover the subject. [Id. at 572, emphasis added]

The Court and this Commission have also construed the pre-1994 version of the County Investigators law, N.J.S.A. 2A:157-10, as precluding protection of tenure laws and preempting any claim that a County Investigator could not be removed without cause. Prior to 2004, N.J.S.A. 2A:157-10 stated, in pertinent part:

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 the state may appoint... county investigators, to serve at his pleasure and subject to removal by him, and to assist the prosecutor in the detection, apprehension, arrest and conviction of offenders against the law. [Emphasis added]

In Brennan v. Byrne, 31 N.J. 333 (1960), the Court traced the legislative history of the County Investigator statute, noting that "the prosecutor's appointees would hold office 'only during the pleasure of the prosecutor' and that the bill gave to the prosecutor the right to appoint during his term 'persons in whom he has that degree of confidence resulting from personal, intimate knowledge.'" Id. at 335. The Court found:

All of the foregoing enactments...evidence to us the clear legislative purpose and plan of affording to the county prosecutor a confidential investigatory staff serving at his pleasure and removable at his will notwithstanding the terms of any earlier tenure enactments.  
...and while the comprehensive 1951 revision continued the protection of county detectives under the Civil Service Act, it deliberately reaffirmed the legislative intent of withholding tenure protection to county investigators by placing them in the unclassified service of the civil service...and directing that they shall serve at the pleasure of the prosecutor and be subject to removal by him. See L. 1951, c. 274, p. 944; N.J.S. 2A:157-10. [Id. at 336]

The Brennan v. Byrne decision found support in the Court's earlier decision interpreting the Undersheriffs statutes in Ackley v. Norcross, supra. Brennan at 337-38.

In Cape May County Prosecutor, P.E.R.C. No. 98-56, 23 NJPER 629 (¶28305 1997), the Commission followed Brennan to interpret N.J.S.A. 2A:157-10 as denying a County Investigator a right to arbitration over his removal. We found:

This statute 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. 333 (1960); Zamboni v. Stamler, 199 N.J. 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).

However, effective January 7, 1994, N.J.S.A. 2A:157-10 was amended, removing the "to serve at his pleasure and subject to removal by him" language of the prior version. This change in statutory language was reflected in Passaic County Prosecutor's Office, P.E.R.C. No. 2009-34, 34 NJPER 444 (¶139 2008), where we found that the law did not preempt negotiation and arbitration of layoff procedures for County Investigators.<sup>2/</sup> The Sheriff's Investigator law at issue here, on the other hand, has retained its "serve at the pleasure of the sheriff making their appointment" language; therefore the Commission's pre-1994 analysis in Cape May County Prosecutor finding similar County

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<sup>2/</sup> We noted the change in N.J.S.A. 2A:157-10, and additions in N.J.S.A. 2A:157-10.1 through 10.8 of a just cause standard for discipline of County Investigators, a requirement of written complaints within 45 days, and appeal rights for County Investigators in non-Civil Service counties.

Investigator language preemptive of arbitration of terminations is applicable to our current analysis of N.J.S.A. 40A:9-117a.

Finally, in a recent Civil Service Commission (CSC) decision, two Public Safety Telecommunicators who were granted leaves of absence in order to be appointed as Sheriff's Investigators sought to be included on the "Rice Bill list" of eligibles once their Sheriff's Investigators appointments ended.<sup>3/</sup> In denying the appellants' request to be included on the eligibles list, the CSC stated:

Thus, the Legislature clarified the Rice Bill to specifically exclude unclassified Sheriff's Investigators from its provisions because individuals in this title, unlike those in career service, competitive law enforcement titles who achieved permanency, are not appointed based on a competitive examination based on merit and fitness and never achieve permanent status as their appointments are always at the pleasure of the Sheriff....Indeed, the Legislature emphasized in its statements that Sheriff's Investigators serve at the pleasure of the Sheriff and are included in the unclassified service. This can only be construed as the Legislature not intending unclassified appointees to potentially gain permanency in career service law enforcement titles without going through the competitive testing and appointment process. [2011 N.J. CSC LEXIS 1041, emphasis added]

While a CSC decision construing the legislative intent of statutes relating to Sheriff's Investigators is not binding on

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<sup>3/</sup> Both were returned to their Public Safety Telecommunicator titles, but they wanted to be on the "Rice Bill list" for consideration for law enforcement officer positions.

this Commission, its determination on the issue is important to this case and is entitled to substantial deference.<sup>4/</sup>

In sum, it is persuasive that the Supreme Court, Commission, and the CSC have consistently construed analogous statutory language regarding appointments and tenure of Undersheriffs, County Investigators, and Sheriff's Investigators. Those opinions support our finding that N.J.S.A. 40A:9-117a. distinguishes the employment security of unclassified Sheriff's Investigators, versus that of regular career service sheriff's officers, as being subject to the discretion of the Sheriff who made their appointment as well as being vulnerable to a subsequent Sheriff's choice to exercise his or her statutory prerogative to make appointments of Sheriff's Investigators up to the 15% cap. Accordingly, termination of Sheriff's Investigator appointments is statutorily preempted and non-arbitrable.

We note that the question of what happens to a predecessor Sheriff's appointed Sheriff's Investigators when a new Sheriff assumes office does not appear to be unequivocally determined within the bounds of N.J.S.A. 40A:9-117a. The facts in the

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<sup>4/</sup> Assistance in interpreting a statute can be derived from the understanding of the administrative agency charged with enforcing it. The meaning ascribed to legislation by the administrative agency responsible for its implementation, including the agency's contemporaneous construction, long usage, and practical interpretation, is persuasive evidence of the Legislature's understanding of its enactment. See, e.g., Cedar Cove, Inc. v. Stanzione, 122 N.J. 202, 212 (1991); Malone v. Fender, 80 N.J. 129, 137 (1979).

instant case indicate that they were in some form of holdover status and remained employed for several years until July 13, 2012 when Sheriff Kemler eventually terminated them in order to appoint more of his own Sheriff's Investigators within the 15% cap. The statute does not clearly dictate a time frame for dismissal of holdover Sheriff's Investigators once a new Sheriff assumes office. However, as the Court found in Ackley v. Norcross, supra,<sup>5/</sup> that logistical issue of timing is not germane to resolution of the dispute at hand.

ORDER

The request of the Mercer County Sheriff's Office for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Jones and Voos voted in favor of this decision. None opposed. Commissioners Wall and Eskilson recused themselves. Commissioner Bonanni was not present.

ISSUED: October 31, 2013

Trenton, New Jersey

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<sup>5/</sup> The Court speculated on the timing of dismissals: "It may well be that the meaning is that in the event of a new sheriff not making a new appointment of an under-sheriff the incumbent in office will hold over." [Id. at 572]