

P.E.R.C. NO. 2017-50

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2017-017

PBA LOCAL 183,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the County's request for a restraint of binding arbitration of a grievance alleging that a Sheriff's Investigator was terminated without just cause, notice, or a departmental hearing. The Commission holds that N.J.S.A. 40A:9-117a, providing that Sheriff's Investigators serve at the pleasure of the Sheriff, preempts arbitration over the termination of Sheriff's Investigators and that a departmental hearing would impermissibly infringe on the Sheriff's discretion under N.J.S.A. 40A:9-117a to immediately suspend or terminate 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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Appearances:

For the Petitioner, Essex County Counsel (Courtney M. Gaccione, County Counsel; Sylvia Hall, on the brief)

For the Respondent, Limsky Mitolo, attorneys (Merick H. Limsky, on the brief)

DECISION

On October 20, 2016, the Essex County Sheriff's Office (County) filed a scope of negotiations petition. The County seeks a restraint of binding arbitration of a grievance filed by PBA Local 183 (PBA) on behalf of a Sheriff's Investigator, "J." The grievance alleges that J was terminated without proper notice or cause.

The County filed briefs, exhibits, and the certification of James Spango, Deputy Chief of the Essex County Sheriff's Office. The PBA filed a brief.<sup>1/</sup> These facts appear.

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<sup>1/</sup> N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

The PBA represents all Sheriff's Officers, Court Attendants, Identification Officers, and Sheriff's Investigators employed by the County. The County and PBA are parties to a collective negotiations agreement (CNA) effective 2002-2005 and extended with modifications by two interest arbitration awards and several memoranda of understanding (MOA), including the current 2014-2017 MOA.

The CNA's grievance procedure ends in binding arbitration. Another article, "Retention of Existing Benefits," provides in relevant part:

Except as otherwise provided herein, all rights, privileges and benefits which employees have heretofore enjoyed and are presently enjoying shall be maintained and continued by the County during the term of this Agreement. The personnel policies and personnel regulations currently in effect shall continue to be applicable to all employees except as otherwise expressly provided herein.

Deputy Chief Spango certifies that J was hired by the County as an at-will, unclassified Sheriff's Investigator on or about March 20, 2006; that J was indicted on July 18, 2013 based upon events occurring in October 2012; that on October 2, 2014, he was convicted of a petty disorderly persons offense of harassment as a lesser included charge of terroristic threats; and that pursuant to a Preliminary Notice of Disciplinary Action, J was suspended effective July 18, 2013.

The Preliminary Notice, which is dated September 30, 2015, also advised that a departmental hearing would be held and that disciplinary action in the form of removal might be taken against J. A departmental hearing was held on November 23, 2015. The County served a Final Notice of Disciplinary Action dated January 22, 2016 upon J, but in the area of the form for listing the charges sustained, the form stated that the charges outlined in the Preliminary Notice had been "withdrawn." The Preliminary and Final Notices are the "31A" and "31B" forms developed by the Civil Service Commission.<sup>2/</sup>

Spango certifies that the disciplinary hearing was "inadvertently held" and that "because of [J's] at-will, non-classified status, and relevant legal discoveries by the County, the Disciplinary Action was withdrawn." By letter dated February 3, 2016, the Sheriff notified J that his services were "no longer required" and that his position was terminated effective July 18, 2013.

On March 4, 2016, the PBA filed its grievance. The grievance seeks J's reinstatement and the establishment of "policy/guidelines ... to avoid these incidents in the future." On June 28, 2016, the PBA filed a request for arbitration

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<sup>2/</sup> These forms are available on the Civil Service Commission's website.

alleging "failure to provide a departmental hearing for Inv. [J] in accordance with the collective bargaining agreement."<sup>3/</sup>

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

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 . . . , 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

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<sup>3/</sup> The arbitrator agreed to adjourn the hearing pending the outcome of the County's petition.

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.

The County asserts that N.J.S.A. 40A:9-117a preempts arbitration because it provides that Sheriff's Investigators "serve at the pleasure of the sheriff." It also argues that J was not entitled to any of the rights applicable to civil service, classified employees in connection with disciplinary actions and that he was not entitled to a departmental hearing under the CNA. The County contends that given N.J.S.A. 40A:9-117a, the CNA cannot be construed to entitle an at-will employee to civil service protections involving employee discipline.

Citing the "retention of existing benefits" clause of the CNA, the PBA argues that the Sheriff granted Sheriff's Investigators all of the same benefits as regular Sheriff's Officers. The PBA argues that N.J.S.A. 40A:9-117a does not preclude negotiation of pre-termination procedures and that such procedures are permissively negotiable.<sup>4/</sup>

Initially, we note that the County is subject to the Civil Service Act, N.J.S.A. 11A:1-1 et seq., and its implementing

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<sup>4/</sup> Paterson, supra, is the only decision cited by the PBA in its brief.

regulations. The Act provides that before disciplinary action is taken "against a permanent employee in the career service or a person serving a working test period," the appointing authority must notify the employee in writing and the employee "shall have the opportunity for a hearing before the appointing authority or its designated representative." N.J.S.A. 11A:2-13. The Act also provides that within 20 days after the hearing, "the appointing authority shall make a final disposition of the charges against the employee and shall furnish the employee with written notice." N.J.S.A. 11A:2-14.

By their terms, however, these statutes apply to employees in the career service. The Civil Service Act provides for three categories of service: career service, senior executive service, or unclassified service. N.J.S.A. 11A:3-1. Sheriff's Officers are in the career service. Pursuant to N.J.S.A. 11A:3-5 as well as N.J.S.A. 40A:9-117a, Sheriff's Investigators are assigned to the unclassified service.<sup>5/</sup>

In Mercer Cty Sheriff's Office, P.E.R.C. No. 2014-26, 40 NJPER 233 (¶89 2013), the Commission held that N.J.S.A. 40A:9-

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5/ N.J.S.A. 11A:3-5 provides in relevant part:

The political subdivision unclassified service shall not be subject to the provisions of this title unless otherwise specified and shall include the following ... sheriff's investigators of any county appointed pursuant to section 2 of P.L. 1987, c. 113 (C. 40A:9-117a).

117a preempts arbitration over the termination of a Sheriff's Investigator. In reaching our determination, we took cognizance of N.J.S.A. 40A:9-117a's statement, somewhat similar to the retention of benefits clause here, that a Sheriff's Investigator shall have the same benefits as those granted to Sheriff's Officers. Although the Commission had not previously determined the preemptive effect of N.J.S.A. 40A:9-117a, the Mercer County Sheriff's Office decision relied on judicial and Commission precedent interpreting the preemptive effects of other statutes containing analogous "serve at the pleasure of" language in the context of terminations and removals.<sup>6/</sup>

Shortly after Mercer County Sheriff's Office, we considered the negotiability of several proposals made by law enforcement unions for inclusion in initial negotiated agreements between the State and various ranks of State Investigators. Pursuant to N.J.S.A. 52:17b-100.1, State Investigators are in the unclassified service and serve at the pleasure of the Attorney General. In State of N.J. and Division of Criminal Justice NCOA, SOA and FOP Lodge No. 91, P.E.R.C. No. 2014-50, 40 NJPER 346 (¶126 2014), aff'd, 42 NJPER 165 (¶41 App. Div. 2015), we held that N.J.S.A. 52:17b-100.1 preempted negotiation of two proposals; one requiring any discipline to be imposed "only for

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<sup>6/</sup> The Commission analyzed the relevant Undersheriff statutes (N.J.S.A. 40A:9-115 and 116) and the pre-2004 version of the County Investigator statute (N.J.S.A. 2A:157-10).

just cause" and another precluding an Investigator's termination "without full due process, just cause and after progressive discipline has been enlisted." We also considered in the same case a proposal that would have required the Attorney General, before suspending an Investigator without pay pending dismissal, to provide the Investigator an informal hearing at which the employee would be notified of the charges and given a synopsis of the evidence on which the State intended to rely. We found that the proposal was not mandatorily negotiable because it would impermissibly infringe on the State's prerogative to immediately suspend a law enforcement officer. Accordingly, the PBA may not challenge J's suspension pending removal or his termination in binding arbitration.

The PBA does not point us to, and we have not found any, language in the CNA that mentions the pre-termination procedures applicable to Sheriff's Officers. Nor has it pointed us to any policy that sets forth disciplinary procedures applicable to Sheriff's Officers or Investigators. Under these circumstances, we can only surmise that Sheriff's Officers are afforded the opportunity for a hearing because of the Civil Service Act and N.J.A.C. 11A:2-13. Requiring a formal, evidentiary hearing of the kind mandated by the Civil Service laws in order to terminate a Sheriff's Investigator would be inconsistent with the broad

discretion afforded to the Sheriff under N.J.S.A. 40A:9-117a and the at-will employment of Sheriff's Investigators.

ORDER

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni and Eskilson voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioner Wall recused himself.

ISSUED: February 23, 2017

Trenton, New Jersey