

**NJ PERC SPECIAL INTEREST ARBITRATION**

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**In the Matter of the Compulsory Interest  
Arbitration**

**Between:**

**County of Burlington and Burlington County  
Prosecutor's Office**

**And**

**Burlington County Prosecutor's Detectives PBA  
Local #320**

**DOCKET: IA-2012-016**

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**CLARIFICATION  
DECISION AND AWARD**

**of**

**Joseph A. Harris, Ph.D., Arbitrator**

**APPEARANCES:**

**For the Employer**

**Alan R. Schmoll, Esq.  
Capehart Scatchard, OPA**

**Daniel Hornickel, HR Director**

**Raymond Milavsky, First Asst Prosecutor**

**For the Union:**

**David J. DeFillippo, Esq.  
Klatsky Sciarrabone & De Fillipp**

**Michael Krug, PBA President**

**Joseph R. Petrucelli, Financial Expert  
PP & D Accounting Services, Inc.**

**Dates of Hearing:**

**April 2 and 5, 2012**

**Date of Arbitrator's Award**

**April 21, 2012**

**Date of Clarification Award:**

**July 31, 2012**

This case assignment by the New Jersey Public Employment Relations Commission (PERC) was accepted by Arbitrator Harris on March 8, 2012. The Parties submitted final proposals on March 28; they met at hearing on April 2 and April 5, 2012. The Parties presented written and oral evidence and argument, and they engaged in cross-examination. Witnesses testified under oath. The Parties did not submit post-hearing briefs; the record was closed on April 5, 2011.

The Arbitrator submitted his award on April 21, 2012.

The County appealed the Arbitrator's award to NJ PERC on April 30, 2012. The Union submitted its Letter Brief opposing the County's appeal on May 7, 2012. PERC issued its decision (No. 2016-61) on May 30, 2012. PERC ordered the Arbitrator to issue a Clarification Award as to the meaning of the word "qualifications" in Article XXV, Paragraph B, "in light of the multiple positions and job functions within the Prosecutor's Office."

**CLARIFICATION ISSUE:** What shall be the clarified meaning of "qualifications" in Article XXV, Paragraph B?

**ARTICLE XXV Seniority (January 1, 2007 – December 31, 2010)**

Seniority shall be given preference for purposes in internal scheduling in the Prosecutor's Office for vacations and personal leave.

**FINAL OFFERS OF THE PARTIES (In Relevant Parts Only)**

**PBA LOCAL 320**

**Seniority (Article XXV)** The Union proposes three *additional* paragraphs:

**Paragraph A:** "Seniority is defined as being as the actual date the employee became an investigator."

**Paragraph B:** "Seniority is the determining factor for layoffs, recalls, and time-off disputes. For example, in the event of a reduction in force, same shall be conducted by inverse seniority. Forty-five (45) days written notice shall be given to an investigator selected to be laid off. The laid off investigator shall then be placed on a recall list for five (5) years. Placement on the recall list shall provide preference to the laid off investigator over any other applicant in the event a vacant investigator position in the Burlington County Prosecutor's Office becomes available."

Paragraph C: "Upon written requests from the Union, the employer shall furnish a complete seniority list ranked by the actual date that the employee became an investigator. The list will also include the original date of hire."

### **BURLINGTON COUNTY PROSECUTOR'S OFFICE**

Seniority (Article XXV) Add new paragraph: "Seniority is defined as being the actual date the employee became an investigator with the Burlington County Prosecutor's Office."

### **ARBITRATOR'S ORIGINAL AWARD (April 21, 2012)**

#### **Seniority (Article XXV)**

Add three paragraphs:

Paragraph A: "Seniority is defined as being the actual date the employee began work as an investigator at the Burlington County Prosecutor's Office."

Paragraph B: "Senior employees will be given preference (inverse seniority) with regard to layoffs, recalls, and time-off disputes when the **job relevant qualifications** of employees are equal. Laid-off investigators shall be placed on a recall list for two (2) years. Placement on the recall list shall provide preference to the laid off investigator over any other applicant in the event a vacant investigative position in the Burlington County Prosecutor's Office becomes available." **(Bold added by Arbitrator)**

Paragraph C: "Upon written request from the Union, the employer shall furnish a complete seniority list ranked by the actual date that the employee began work as an investigator at the Prosecutor's Office. The list will also include the original date of hire."

### **APPEAL POSITIONS OF THE PARTIES**

#### **County (Prosecutor Office) Appeal to PERC**

The County states, in part:

The seniority language proffered by Dr. Harris creates more confusion and litigation due to the ambiguity of the provision and the Prosecutor's Office has a managerial right to determine that a less senior employee with particular skills should be retained... Management must be able to take into account various issues and qualifications in determining what employees will be subject to a

layoff, including but not limited to skill, past performance, initiative and merit and that simple reliance on seniority is detrimental to the public welfare.

Additionally, the County asserts:

The different units within the Prosecutor's Office cannot be considered similar. Each unit is tasked with a specific job, be it narcotics, homicide, sexual assault, crime scene investigation or a myriad of other units.

Regarding the crime scene investigation unit, the County notes:

It is easy to see that the detectives...must have very specific and specialized job requirements and must be specially trained in crime scene investigations... Application of Dr. Harris' contract provision is for the most part clear cut in this instance.

The County contrasts the crime scene investigation unit with:

...two units that appear to be "equal," the homicide unit and the narcotics unit... The detectives have probably attended similar training classes. On paper, the detectives would likely be considered to have the same or similar "qualifications." However, under Dr. Harris' contract provision, management would not be able to take into account differences such as the ability of the detectives to perform undercover work... or whether the more senior detective had been previously assigned to the narcotics unit, but had been reassigned due to poor performance... Management would not be able to take into account the skills or the individual detectives, their initiative or merit...

Outside of the Narcotics Unit, none of the other detectives perform any daily preventative policing that local police do. They do not drive around in police cars or walk police beats; they do not respond to crimes in progress or handle domestic disputes; they do not have a "community presence," but instead work mostly inside an office building looking into what transpired after an act has been committed...

Dr. Harris' contract provision ties the Prosecutor's hands. As have been explained above, detectives cannot simply be moved from one unit to another, but under the seniority provision of the contract, that is exactly what would be required, regardless of whether the more senior detective has the proper skill or would be a proper fit into the unit....

The union position [in Passaic Prosecutor's Office, P.E.R.C. No. 2009-24, 34] demanded that only seniority be taken into account for layoff purposes. Dr. Harris' provision does much the same as the term "qualifications" is ambiguous.

#### Union Appeal to PERC

The Union contends that the Arbitrator's language "does allow factors other than seniority to be relevant, including the 'qualifications' of employees." It provided excerpts from various collective bargaining agreements between Prosecutors and Detectives to show that other CBAs include an assortment of seniority/layoff clauses. Examples include:

*PBA Local #316 and Camden County Prosecutor (January 1, 2010 – December 31, 2012):* "Seniority is defined as being the actual date the employee became an investigator. Seniority is the determining factor for layoffs, recalls, and in time disputes in each respective unit."

*PBA Local #122 and Gloucester County Prosecutor (January 1, 2010 – December 31, 2014):* "For purposes of layoffs and recalls, seniority shall be the determining factor, with seniority defined as the Employee's date of hire as an Investigator/Detective with the Gloucester County Prosecutor's Office."

*PBA Local 339 and Mercer County Prosecutor (January 1, 2006- December 31, 2009):* "Seniority is defined as an Employee's continuous length of service with the County beginning with his last date of hire. Seniority shall be given preference in layoffs, recall, vacation and scheduling."

*PBA Local 265 and Superior Officers's Association and Passaic County Prosecutor (MOA, November 23, 2010):* "In the event of a lay-off and recall of a bargaining unit member, the Prosecutor shall consider the following factors, including but not limited to, seniority, skill sets and qualifications, requirement of operational and financial efficiencies, structure of the office, or any other factor relevant at the time of the layoff."

*PBA Local 307 and Somerset County Prosecutor (January 1, 2007 – December 31, 2011):* "Layoffs shall be in reverse order of seniority within the bargaining

unit...Notwithstanding anything else to the contrary in this Article, the Prosecutor shall have the right to deviate from reverse seniority in implementing layoffs when, in the Prosecutor's discretion, good cause exists to deviate."

### **PERC Decision**

The final basis for the appeal set forth by the Prosecutor was the award of new seniority provisions. The arbitrator analyzed the positions of the parties, and determined that the language which he awarded reflected an appropriate compromise between their positions. Indeed, the Commission, in examining the use of seniority has repeatedly held that a proposal which provides for seniority as a determining factor in such matters as layoffs, recalls, and time-off disputes is negotiable provided that the employer retains the managerial prerogative to deviate from strict application of seniority where it determines that special skills are involved. Union County Prosecutors Office, P.E.R.C. No. 2011-74, 37 NJPER 166 (¶53 2011). The Prosecutor argues that the term "qualifications" in the language formulated by the arbitrator is ambiguous, and therefore undermines the validity of the award. While the arbitrator's discussion of this proposal and his awarded language is somewhat ambiguous as to the meaning to be attached to the word "qualifications", nonetheless it is appropriate to remand this issue to the arbitrator so that he may clarify the meaning of his award regarding the new seniority provision which he awarded in light of the multiple positions and job functions within the Prosecutor's Office.

### **ARBITRATOR'S ANALYSIS**

The relevant part of my award states: "Senior employees will be given preference (inverse seniority) with regard to layoffs, recalls, and time-off disputes when the **job relevant qualifications of employees are equal.**" (Emphasis added.) PERC ordered me to clarify the meaning of this language.

PERC approved the legality of this wording, as follows: "The Commission, in examining the use of seniority has repeatedly held that a proposal which provides for seniority as a determining factor in such matters as layoffs, recalls, and time-off disputes is negotiable provided that the employer retains the managerial prerogative to deviate from strict application of seniority where it determines that special skills are involved."

PERC ruled that "the meaning to be attached to the word 'qualifications' is "somewhat ambiguous," given "the multiple positions and job functions within the Prosecutor's Office." The following remarks are intended to constructively respond to PERC's ruling.

Modified seniority clauses include some variety of a balancing act between union seniority rights and management rights. Necessarily, they do lead to uncertainty and grievances. Especially in service and professional work, "special skills," as well as the more inclusive term "job relevant qualifications," may be impossible to quantify. In constructing contract language, however, the goal is to reduce ambiguity.

Modified seniority clauses "involve some of the most troublesome questions confronting arbitrators. Unions tend to overemphasize seniority and forget merit and ability, while management tends to overemphasize supervision's personal judgment of merit and ability and forget seniority." (Elkouri & Elkouri, *How Arbitration Works*, 5<sup>th</sup> Edition, 1997, p. 841)

Although neither party introduced them, there must be minimum "job relevant qualifications" for hiring or promotion into this public sector department. These minimum qualifications are actually minimum "departmental relevant qualifications" that all detectives must have. These include having a certain minimum level of formal education, holding various licenses (driver, weapons) and certificates, being physically fit, having the ability to work alone and in teams, and to exert initiative. If, over time, a detective fails to maintain minimum qualifications, that detective is properly subject to termination.

If the Prosecutor's Office has prepared job specification sheets, or if it utilizes job specification sheets developed elsewhere, these might give valuable guidance to Management and the Union on the instant issue.

I used the term "job relevant qualifications," not simply "qualifications." This is not a semantic difference. There are a number of "jobs" in the bargaining unit. The County states: "The different units within the Prosecutor's Office cannot be considered similar. Each unit is tasked with a **specific job**, be it narcotics, homicide, sexual assault, crime scene investigation or a myriad of other units." (**Emphasis added.**)

I disagree with the County's statement that the "different units...cannot be considered similar." They are similar in that all are detective work, but some require one or more "special skills" and "job relevant qualifications." Management assigns and reassigns detectives to these units ("specific jobs") at its discretion, as the CBA is silent about bidding for units or specific jobs.

Experience as a detective hones detective knowledge and skills. Thus, experience (seniority) is a major factor in "job relevant qualifications." However, "special skills" must also

be considered, as well as certain other items which I have included in "job relevant qualifications." Thus, the narcotics unit requires the ability to do undercover work, which is a "special skill." The crime scene investigation unit requires the ability to identify and analyze certain types of evidence, which is a "special skill." Other "special skills" may also be present.

Some units require extensive night and weekend work while in others, detectives work a weekday day shift. The ability to work a particular shift or weekends is not a "special skill," but it is a "job relevant qualification."

Depending on the tasks assigned to a unit, other "special skills" and "job relevant qualifications" may exist. For example, if the population of the county comes to include large numbers of other-than-English speaking residents, the department may determine that it needs a unit that has detectives who are fluent in the languages of those residents. The ability to speak those languages would be a "special skill." Or, the department determined it needed a female detective to effectively conduct undercover investigations into certain prostitution activities, being a woman would become "job relevant qualification" for that position. Or, the department might decide it needs a unit in which superior hand-to-hand combat skills, or sniper skills, or financial analysis skills, are necessary. These are "special skills" within the larger category of "job relevant qualifications."

In a downsizing situation, management must eliminate a particular position (or positions) as well as lay off an employee. The two actions are related but not necessarily identical. If the person holding the position to be eliminated is not #1 (in reverse seniority order), then that person has bumping rights. In departmental seniority, bumping rights extend to the department. Inasmuch as the instant contract has departmental seniority, bumping rights are departmental. Thus, management must reassign the affected worker, which may involve making other reassignments as well, as management reshuffles the workforce for maximum efficiency and effectiveness.

With a strict seniority clause, management must automatically lay off the employee with the least seniority (#1, in reverse seniority order). However, with the instant modified seniority clause, if management determines that employee #1 has greater "job relevant qualifications" than another departmental detective, the department has the right to lay off detective #2. The "job relevant qualifications" being compared are those required to perform the "job" assigned to detective #1 when the layoff occurs. (If management decided not to lay off detective #1,



management then pursue the same evaluation process on detective #2 that is conducted regarding #1. And so on to #3, if that becomes necessary.)

July 23<sup>rd</sup> 2012

*Joseph A. Harris*

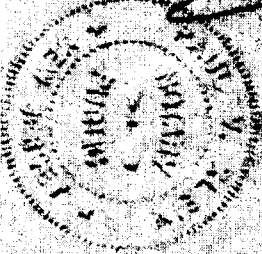
Joseph A. Harris, Ph.D., Auditor

STATE OF NEW JERSEY  
COUNTY OF BERGEN

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On this 23<sup>rd</sup> day of July 2012, before me, the undersigned, personally appeared \_\_\_\_\_ who is duly qualified to be sworn, and he declared to me that the foregoing is true and correct.

*[Handwritten signature]*



**[Redacted signature]**

