General Counsel's Annual Report -- 1998
Public Employment Relations Commission

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STATISTICS

The Commission received nine opinions -- seven affirmances, one reversal, and one remand -- from the Appellate Division. The Commission received one opinion -- a reversal -- from the New Jersey Supreme Court. In addition, five appeals were dismissed or withdrawn and one appeal was remanded pursuant to a stipulation.

APPEALS FROM COMMISSION DECISIONS

Unfair Practice Cases

The New Jersey Supreme Court reversed the Appellate Division and Commission decisions in *City of Jersey City and Jersey City POBA*, P.E.R.C. No. 96-89, 22 *NJPER* 251 (¶27131 1996), aff'd 23 *NJPER* 325 (¶28148 App. Div. 1997), rev'd 154 *N.J.* 555 (1998). The Commission held that the City violated the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, ("Act") when, without negotiations, it shifted work performed by police officers within a negotiations unit to civilian employees outside that unit. The Commission applied the unit work doctrine and found that the reorganization, waiver, and shared work exceptions applied to several positions but not the ones later appealed. Finding that the City was motivated by operational concerns, the Supreme Court held that the City had a managerial prerogative to civilianize the positions as part of a reorganization increasing the number of officers on the streets. The Court's opinion preserves the unit work doctrine, but requires that the interests of employees and employers be balanced in each civilianization case involving that doctrine.

In light of *Jersey City*, the parties and the Commission agreed that a unit work/civilianization appeal in *Burlington Cty. and PBA Local 249*, P.E.R.C. No. 98-139, 24 *NJPER* 276 (¶29131 1998), should be remanded to the Commission for

reconsideration. The Commission then vacated its order and held that the case was moot. P.E.R.C. No. 99-42, 25 *NJPER* 7 (¶30002 1998).

In *Piscataway Tp. Ed. Ass'n v.* Piscataway Tp. Bd. of Ed., 307 *N.J. Super*. 263 (App. Div. 1998), recon. granted and order reaff'd, certif. den. 156 *N.J*. 385 (1998), an Appellate Division panel effectively overruled *Edison Tp. Bd. of Ed. v. Edison Tp. Ed. Ass'n*, *NJPER Supp*.2d 66 (¶47 App. Div. 1979), certif. den. 82 *N.J*. 274 (1979). Rejecting *Edison*'s rule that impact issues are never negotiable, the panel held that the balancing test in *Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n*, 81 *N.J*. 502 (1980), must be applied to determine the negotiability of any impact issues arising in connection with school calendar changes caused by inclement weather. The Court remanded the case so the Commission could apply the balancing test; the Commission has done so. P.E.R.C. No. 99-39, 24 *NJPER* 520 (¶29242 1998).

In *New Jersey Transit Corp. and PBA Local 304*, P.E.R.C. No. 97-125, 23 *NJPER* 298 (¶28137 1997), aff'd 314 *N.J. Super*. 129 (App. Div. 1998), the Commission held that the employer had to negotiate before requiring police recruits to agree to repay training costs if they left employment within their first two years. The Court agreed, rejecting a contention that a pre-hire agreement to repay training costs should be viewed as an employment qualification. The Court reasoned that the repayment requirement did not bear on the skills and competencies needed to do the job and the Commission reasonably determined that the dispute focussed on the mandatorily negotiable subjects of duration of employment and compensation.

In *Borough of Island Heights and Island Heights PBA Local 352*, H.E. No. 98-6, 23 *NJPER* 554 (¶28276 1997), aff'd 24 *NJPER* 333 (¶29157 App. Div. 1998), the Hearing Examiner held that the Borough violated 5.4a(1) and (5) when it unilaterally reduced the compensation of patrol officers by moving them to lower steps on the salary guide. No exceptions were filed with the Commission. On appeal, the Court held that such downward movement cannot be considered a reduction in grade or rank as authorized by *N.J.S.A*. 40A:14-143.

In *City of Perth Amboy and PBA Local 13*, P.E.R.C. No. 98-138, 23 *NJPER* 345 (¶28159 1997), aff'd 24 *NJPER* 531 (¶29247 App. Div. 1998), the Commission dismissed a

charge alleging that workers' compensation benefits were unilaterally changed. The Commission found that some of the changes alleged were not proven and that negotiations over other changes were preempted by the workers' compensation laws. The Court agreed in a per curiam decision.

In *Williams and IBT Local 469 and Old Bridge Tp.*, P.E.R.C. No. 97-92, 23 *NJPER* 134 (¶28066 1997), aff'd 24 *NJPER* 285 (¶29134 App. Div. 1998), the Commission sustained a decision of the Director of Unfair Practices declining to reopen charges after a settlement. The Court affirmed per curiam.

Representation Cases

No appeals.

Scope-of-Negotiations Cases

In *Morris School Dist. Bd. of Ed. and The Ed. Ass'n of Morris*, P.E.R.C. No. 97-142, 23 *NJPER* 437 (¶28200 1997), the Commission restrained the Board from implementing a factfinder's recommendation capping payments upon retirement for banked sick and personal leave, but permitting employees with excess amounts to retire immediately (if eligible) to preserve the full value of their leave banks. The Association argued that the retroactive imposition of caps unconstitutionally deprived employees of vested rights, but the Commission did not reach that question. Instead, it assumed that a majority representative could agree to waive the rights of individual employees to accumulated benefits, provided that the union waived such rights *knowingly*. There was no knowing waiver in this case since neither party had proposed to the factfinder that caps be imposed retroactively. The Commission also held, in the alternative, that the express condition that employees must retire immediately to preserve benefits constituted a non-negotiable inducement to retire early.

The Appellate Division affirmed the negotiability ruling and the Supreme Court denied certification. 310 *N.J. Super*. 332 (App. Div. 1998), certif. den. 155 *N.J*. 590 (1998). Given the agency's expertise in determining how negotiations should be conducted, the Court accepted the Commission's analysis on the knowing waiver issue. The Court agreed that the employees' right to accumulated sick leave constituted a form of deferred compensation deserving of the protection of a knowing waiver requirement. *Id*. at 345. The Court did not

resolve the early retirement issue, although it questioned the Commission's analysis. Don Horowitz represented the Commission and was praised for his oral argument.

In *State of New Jersey (OER and DHS) and CWA*, P.E.R.C. No. 97-106, 23 *NJPER* 194 (¶28096 1997), recon. granted and reaff'd, P.E.R.C. No. 97-136, 23 *NJPER* 343 (¶28159 1997), the Commission declined to restrain arbitration of grievances asserting that the employer was contractually required to negotiate before discontinuing an alleged practice of automatically advancing teacher 2's to the higher pay grade and title of a teacher 1 after three years of satisfactory service. The grievance further alleged that when hired, teachers had been informed about the automatic promotion practice. The Civil Service job specifications for the two titles provided that the duties were the same and used the same words to describe the knowledge and abilities required for the two titles. Because the duties of the two positions were the same, the Commission held that the dispute centered on the employees' claim that having performed their duties satisfactorily for three years, they were now entitled to receive a higher rate of pay and title for continuing to perform the same duties unless the employer negotiated over suspending the alleged automatic promotion practice. The Commission, however, also held that any job title changes had to be submitted to the Department of Personnel so that DOP could ensure that all eligibility requirements were met and could exercise any other regulatory authority. An Appellate Division panel reversed. 24 *NJPER* 432 (¶29200 App. Div. 1998). The fact that the duties of the two positions were the same was held to be irrelevant given the case law holding that promotional criteria are not mandatorily negotiable.

In *Wayne Tp. and AFSCME Council 52, Local 2274*, P.E.R.C. No. 97-74, 23 *NJPER* 42 (¶28029 1996), aff'd 24 *NJPER* 141 (¶29071 App. Div. 1998), the Commission declined to restrain arbitration of a grievance asserting that a qualified employee was improperly denied an overtime assignment. That assignment was given instead to an employee whom the employer had taken off the overtime list for backhoe assignments. The Commission held and the Court agreed that the dispute centered on the mandatorily negotiable subject of overtime allocation.

In *Burlington Cty. and CWA Local 1044*, P.E.R.C. No. 97-84, 23 *NJPER* 122

(¶28058 1997), aff'd 24 *NJPER* 200 (¶29092 App. Div. 1998), the Commission declined to restrain arbitration over grievances asking that sick leave days be restored to employees incapacitated because of toxic substances in the workplace. The Commission rejected a claim that the workers' compensation laws preempted contractual sick leave claims as opposed to tort-based claims for pain and suffering. The Court affirmed for the reasons in the agency's comprehensive decision.

In *North Bergen PBA Local No. 18 v. North Bergen Tp.*, App. Div. Dkt. No. A-0582-97T1 (10/23/98), an Appellate Division panel vacated a lower court order enjoining the employer from terminating accrued vacation benefits owed retirees and employees. The employer argued that the accrued benefits violated N.J.S.A. 11A:6-3e, a Civil Service statute stating that "vacation not taken in a given year because of business demands shall accumulate and be granted during the next succeeding year only." Because that argument presented a scope-of-negotiations question within the Commission's primary jurisdiction under *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, 78 *N.J.* 144, 154 (1978), the lower court lacked jurisdiction to enter its order.

Interim Relief Decisions

In *Wildwood City Bd. of Ed. and Wildwood Ed. Ass'n*, I.R. No. 98-13, 24 *NJPER* 32 (¶29018 1997), a Commission designee entered an interim relief order requiring the employer to pay teachers salary increments during negotiations to replace a one-year contract. The Appellate Division denied leave to appeal. App. Div. Dkt. No. AM-2304-97 (1/20/98).

STATUTES AND REGULATIONS

N.J.S.A. 52:14-17.32 was amended to require the State to pay 80% of the health insurance premiums or periodic charges for qualified retirees from the Police and Firemen's Retirement System, the Consolidated Police and Firemen's Pension Fund, or the Public Employees' Retirement System. The bill also amended *N.J.S.A.* 34:13A-18 to prohibit an interest arbitrator from diminishing the benefits available through a negotiated agreement because the Legislature had provided this statutory benefit.

The Commission adopted a regulation regarding the fees to be paid interest

arbitrators appointed by lot or by mutual agreement. *N.J.A.C.* 19:16-5.11.

OTHER COURT CASES

Grievance Arbitration

1. Decisions Confirming Awards

In *State of New Jersey (OER) v. CWA*, 154 *N.J.* 98 (1998), an arbitrator held that if the State dismisses an unclassified employee with at least six years of service, it need not give a statement of reasons for the dismissal; but if it does not give reasons, CWA may arbitrate a grievance asserting that the employee was really discharged for misconduct instead of poor performance or other reasons. The arbitrator also held that if CWA prevailed on that assertion in arbitration, the State would then have the burden of proving just cause for the discharge. Even though the parties had stipulated the issues before the arbitrator, an Appellate Division panel *sua sponte* held that the grievance was not contractually arbitrable. 296 *N.J. Super*. 223 (App. Div. 1997). The Supreme Court reversed, holding that the lower court should not have reached that question without notice to the parties and that it resolved that question incorrectly. *Id*. at 108-111. The Court also held that the award was reasonably debatable and did not offend the law or public policy. *Id*. at 111-117.

In *Town of Kearny v. Kearny Council No. 11*, App. Div. Dkt. No. A-4537-96T5 (3/26/98), the Appellate Division panel confirmed an award ordering extra pay for employees who worked on a "snow day," even though a travel emergency had been declared. The Court also held that the employer was not required to pay interest. The Court held that the award was a reasonably debatable interpretation of the contract and "a fair resolution of an ambiguous situation in the context of this particular labor agreement and dispute."

In *N.J. Transit Mercer v. ATU, Local 540*, App. Div. Dkt. No. A-3243-97T2 (7/29/98), the Court essentially confirmed an award finding no just cause to discharge a bus driver because his neck injuries allegedly made him unfit to drive a bus. The Court rejected arguments that the arbitrator could not determine whether the bus driver was medically fit; the arbitrator's determination of fitness should be subject to plenary review rather than the "reasonably debatable" standard; and arbitration should be barred because the driver had lost a Department of Labor proceeding in which he claimed he was

terminated for pursuing a workers' compensation claim. The Court, however, ordered one more medical examination to ensure that passengers would not be put at risk by the driver's reinstatement.

In *Port Authority Police Sergeants Benevolent Ass'n, Inc. v. Port Authority of New York and New Jersey*, App. Div. Dkt. No. A-1569-97T1 (12/30/98), the Court upheld an award prohibiting the employer from changing the designation of the weapon carried by officers while off-duty or as a second weapon while on duty. The officers would have been required to pay $400 each to purchase the new weapon. The Court found, under the circumstances, that public policy did not warrant "any judicial veto of the Agreement negotiated by the parties and enforced by the arbitrator. Slip opinion at 12. The Court relied on these factors: a long history of the Authority's negotiating with its employees concerning weapons; the minor expense the Authority would incur if it paid for the new weapons; and a memorandum from the Superintendent of Police indicating that veteran officers would feel more comfortable if they were allowed to continue to use their old weapons.

In *New Jersey Transit Corp. v. New Jersey Transit PBA Local 304*, Dkt. No. C-99-98 (11/17/98), Judge Julio M. Fuentes of the Essex County Superior Court confirmed an award ordering the employer to stop changing the work schedules of police officers assigned to cover special events such as the St. Patrick's Day parade. Rejecting the employer's argument that it had a prerogative to change the schedules to deploy officers to cover these events, the Court found that the deployment needs could have been met by other means. The Commission declined to restrain arbitration in a related case. *New Jersey Transit*, P.E.R.C. No. 99-33, 24 *NJPER* 509 (¶29236 1998).

In *Mansfield Ed. Ass'n v. Mansfield Bd. of Ed.*, Dkt. No. WRN-C-16013-98 (8/20/98), Judge Wilfred P. Diana of the Somerset County Superior Court confirmed an award overturning an increment withholding involving a child study team member. The Court agreed with the arbitrator that the employee's filing of a claim under the Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 *et seq.*, did not waive the grievance. The Commission did not have jurisdiction to consider that issue. P.E.R.C. No. 98-33, 23 *NJPER* 544 (¶28269 1997).

In *Milk Drivers and Dairy Employees Local 680, IBT v. Tuscan Dairy Farms,* D.N.J. Civ. Action No. 98-376 (AJL) (12/01/98), Judge Lechner of the federal district court confirmed an arbitration award ordering the employer to stop transferring bargaining unit work to a company affiliated with the employer. The Court held that *N.J.S.A.* 2A:24-7 did not preclude a common-law confirmation action more than 90 days after the award, but did preclude a belated motion to vacate. On the same day Judge Lechner issued this opinion, the New Jersey Supreme Court heard argument about similar issues in *PBA Local 292 v. Borough of North Haledon,* 305 *N.J. Super.* 454 (App. Div. 1997), app. pending.

2. Decisions Vacating Awards

In *City Ass'n of Supervisors and Administrators v. State-Operated School Dist. of City of Newark,* 311 *N.J. Super.* 300 (App. Div. 1998), the issue was whether 12-month administrators who were terminated or assigned to 10-month positions after the State takeover of the Newark school district were entitled to have their annual allotment of vacation days credited at the beginning of a contract year and thus to be paid for all annual vacation days rather than to have the days earned as the year progressed and payments pro-rated. The arbitration panel relied on a 30-year practice that required crediting at the beginning of the year, but the Court held that past practice could not be considered given a contract clause prohibiting the actual use of vacation days until the next year. The Court also held that pro-ration of vacation time was consistent with sound public policy and that the State-operated district could not be required to continue a costly administrative practice not bargained for or mentioned by the parties' agreement and draining money essential for education.

In *City of Jersey City v. Police Officers Benevolent Ass'n,* App. Div. Dkt. No. A-0876-97T1 (12/1/98), a two-judge panel vacated an award holding that the employer was bound by past practice to grant a police officer five days of leave when he or she got married. The Court held that a contractual clause on maintaining work rules did not apply since the marital-leave practice was not codified in a written regulation or directive. The Court then found that the grievance was a non-contractual one and could not be arbitrated under the negotiated grievance procedures.

Caldwell-West Caldwell Bd. of Ed. v. Caldwell-West Caldwell Ed. Ass'n, App. Div. Dkt. No. A-2443-97T5 (10/1/98), affirmed a trial court order vacating an award. The Court concluded that an award concerning intercolumn salary guide movement was not reasonably debatable.

3. Other Arbitration Decisions

The United States Supreme Court recently held that a collective bargaining agreement did not require a union-represented longshoreman to arbitrate a claim of discrimination under the Americans with Disabilities Act. *Wright v. Universal Maritime Service Corp.*, ___ *U.S.* ___, 159 *LRRM* 2769 (1998). The arbitration clause of the agreement did not explicitly waive the employees' right to sue in federal court. The Court chose not to answer the broader question of whether an explicit union contract clause could ever waive such an individual right. *Compare Morris School Dist., supra* at 4-5 (requiring knowing waiver before divestiture of accrued benefits and declining to reach broader constitutional issue).

Under *Arista Marketing Associates, Inc. v. The Peer Group,* 316 *N.J. Super*. 517 (App. Div. 1998), a party to an arbitration before a tripartite panel may seek removal of the other party's appointed arbitrator on grounds of "evident partiality," and may do so before the arbitration begins. Further, the disqualification of the party-appointed arbitrator did not require removal of the neutral arbitrator and other party-appointed arbitrator and a new selection process. Declining to overrule the AAA's determination that the neutral arbitrator should not be disqualified, the Court stated: "Procedural issues are for determination in the arbitration forum, in accordance with the parties' agreement, free from judicial interference." *Id.* at 535.

In *Orr v. American Arbitration Ass'n,* App. Div. Dkt. No. A-5964-96T5 (5/22/98), eight days of arbitration hearings were held in a construction industry dispute. The arbitration proceeding was then held in abeyance until an individual defendant paid his share of the arbitration fees or the plaintiffs paid the fees, subject to repayment by the defendant as part of the award. The plaintiffs declined to pay defendants' fees and then sued, seeking an order requiring the AAA to issue a decision or an order requiring the defendant to pay his share of the fees. The lower court ordered the defendant, in part, to pay his fees or to be considered to have rested his case.

The Appellate Division vacated the latter part of the order as interfering with the arbitrators' control of the proceeding and their resolution of an administrative issue. The arbitrators had substantive authority to resolve the fee payment issue by ordering the defendant to pay the fees or, alternatively, permitting plaintiffs to pay the defendant's fees as a condition to continuing the proceedings.

In *Ridgefield Ed. Ass'n v. Ridgefield Bd. of Ed. and PERC*, Dkt. No. BER-C-244-97 (3/24/98), Judge Marguerite Simon dismissed a Complaint in which the Association alleged that the Commission was compelled by *N.J.S.A.* 34:13A-29 to appoint an arbitrator even though the parties' contract did not authorize the Commission to make arbitration appointments. While the Association asserted that its grievance sought to contest a reprimand, the Court held that it was unclear whether the letter in question was a reprimand and that a scope-of-negotiations petition should be filed to resolve that question. An appeal is pending. App. Div. Dkt. No. A-4710-97T2.

CEPA Cases

An employer will not be liable for damages under CEPA based on a plaintiff's complaints about misconduct by non-supervisory co-workers unless supervisors condone or ratify that misconduct by whitewashing an investigation. *Higgins v. Pascack Valley Hosp.*, 307 *N.J. Super*. 277 (App. Div. 1998). Certification has been granted. 155 *N.J. Law Journal* 20.

In *Abbamont v. Piscataway Bd. of Ed.*, 314 *N.J. Super*. 293 (App. Div. 1998), the Court held that a school board may be liable for punitive damages under CEPA based on its administrators' conduct, even if the board did not know of their retaliatory motives. The Court also held that the trial court erred in denying a wrongfully discharged plaintiff reinstatement upon the next job opening. In denying that remedy, the trial court improperly relied upon animosity between the parties resulting from the CEPA violations. An appeal is pending. 155 *N.J. Law Journal* 21.

Discipline Cases

1. Supreme Court Cases

Oches v. Middletown Tp. Police Dept., 155 *N.J.* 1 (1998), held that the Merit System

Board may award counsel fees to a police officer who prevailed in a disciplinary proceeding in which he was charged with tape-recording a promotion interview. The Court rejected an argument that *N.J.S.A.* 40A:14-155 precludes payment of counsel fees in any proceeding not "arising out of and directly related to the lawful exercise of police powers in the furtherance of his [or her] official duties." In dictum, the Court observed that under the discipline amendment to *N.J.S.A.* 34:13A-5.3, a collective negotiations agreement may provide for reimbursement of counsel fees for officers who have disciplinary charges dismissed or resolved in their favor. *Id.* at 8-9.

The Court also upheld a 48-day unpaid suspension of a firefighter in *Karins v. City of Atlantic City*, 152 *N.J.* 532 (1998). The off-duty firefighter was found guilty of directing a racial slur at an on-duty police officer. The slur was not protected by the First Amendment. The Court also held that a disciplinary regulation is not void for vagueness simply because it contains, in addition to specified offenses, a catchall provision proscribing unbecoming conduct.

2. Appellate Division Decisions

In *Golden v. Union Cty. Prosecutor's Office*, 317 *N.J. Super.* 64 (App. Div. 1998), Judge Sylvia Pressler wrote an opinion holding that the Prosecutor's employment manual contractually entitled an assistant prosecutor to a hearing before being discharged. Relying on *N.J.S.A.* 34:13A-5.3 and the public policy favoring formalized disciplinary procedures, the Court concluded that the procedural right to a hearing did not interfere with the substantive right of Prosecutors to remove assistant prosecutors serving at their pleasure. *See also State of New Jersey (OER) v. CWA*, *supra* at 8. The Court also found that the contractual principles set forth in *Woolley v. Hoffman-LaRoche*, 99 *N.J.* 284, mod. 101 *N.J.* 10 (1985), apply in the public sector as well as the private sector.

In *Kyer v. City of E. Orange*, 315 *N.J. Super.* 524 (App. Div. 1998), a provisional employee performed superbly for seven years and would have achieved permanent status if the employer had not been negligent in complying with DOP requirements for processing appointments. The employer then summarily discharged her, but the Court, in an opinion written by Judge Pressler, held that DOP had the authority to grant a retroactive competitive examination (or waiver thereof) and to determine that the employee should

have been given permanent status and accompanying protections.

In *Ferraro v. City of Long Branch*, 314 *N.J. Super*. 268 (App. Div. 1998), an Appellate Division panel held that a Superintendent of Parks and Public Property was not entitled to due process before he was assigned non-supervisory tasks. The superintendent was not reduced in pay, rank, or status within the civil service hierarchy so he suffered no deprivation of a property interest by being reassigned.

In *Bennett v. New Jersey Dept. of Law and Public Safety*, App. Div. Dkt. No. A-6607-96T3 (11/13/98), the Court reaffirmed that untenured State troopers cannot contest the merits of non-reenlistments through court suits or arbitration. *See Dunbar v. Kelly*, 114 N.J. Super. 450 (App. Div. 1971), certif. den. 59 *N.J*. 528 (1971).

In *State-Operated School Dist. v. Gaines*, 309 *N.J. Super*. 327 (App. Div. 1998), the Court set aside an administrative decision reducing the dismissal of a school security guard to a six-month unpaid suspension. The employee claimed that much of his misbehavior and absenteeism was due to psychological damage suffered when gunshots were twice fired at his patrol car and that he justifiably refused to return to his patrol duties. The Court found his behavior and absenteeism to be indefensible and his rehabilitation prospects to be remote. The decision contains strong language about management's right to manage and the absence of a constitutional or statutory right to a government job. *Id*. at 333-334.

In re Disciplinary Hearing of Mark Noll, Roxbury Tp. Police Chief, App. Div. Dkt. No. A-3684-96T3 (3/27/98), upheld a four-day suspension. The chief was suspended for circulating a "Rumor Control" memorandum; the memorandum prohibited police officers from leaking false or confidential information to the Township Council and press and warned officers who did not support him that he could retaliate. The Court held that such a memorandum is "subversive of good order and discipline."

3. Federal Cases

In *International Union of Operating Engineers, Local 716 v. Delaware River Port Auth.*, 160 *LRRM* 2102 (D.N.J. 1998), the parties agreed to authorize the Honorable Jerome Simandle of the Federal District Court to issue a final and binding "disposition" of a labor relations dispute. The judge ordered the reinstatement of 12 employees who were terminated after protesting DRPA labor

relations policies by marching across the Benjamin Franklin bridge and causing traffic to be stopped for 70 minutes. The employees were off-duty so the judge reasoned they were not "striking" in violation of the collective negotiations agreement. Further, the union had obtained permission from the DRPA police to march over the pedestrian walkway, but the parties and the police failed to communicate that option to the marchers who instead used the road. Applying the parties' just cause clause, the Judge concluded that suspensions rather than discharges were warranted.

Employment Contracts

In *Craffey v. Bergen Cty. Utilities Auth.*, 315 *N.J. Super*. 345 (App. Div. 1998), the Court held that a contract for a fixed term of employment may not be presumed as a matter of law to be renewed as a contract of employment from year to year if the employee continues to work after the fixed term. The Court thus rejected a claim that the provision of an expired five-year contract calling for raises of at least 5% a year carried forward into subsequent years.

In *DeLitta v. Nutley Tp.*, App. Div. Dkt. No. A-1552-97T3 (11/13/98), one of the Township's five commissioners, the Director of Public Safety, entered into a 1995 agreement with the chief and deputy chief of police setting such employment conditions as their salaries and wages, clothing and maintenance allowances, hours of work, holidays, vacations, personal days, sick leave and retirement benefits, medical insurance, and legal defense rights. The Board of Commissioners later passed a resolution disapproving the agreement and refusing to ratify it. The chief and deputy chief sought to enforce the agreement, but the trial court held the agreement was null and void and the Appellate Division affirmed. The Court reasoned that such an agreement must be ratified formally in order to be effective; an agreement cannot be created by implicit ratification or estoppel.

Drug Testing

In *Reames v. Dept. of Public Works, City of Paterson*, 310 *N.J. Super*. 71 (App. Div. 1998), an Appellate Division panel held, in an opinion by Judge Pressler, that a public works employee could not be discharged for failure to submit to a random drug test given the employer's gross deviations from federal regulations governing such tests for employees

holding commercial driver's licenses. Those regulations require a written policy, a statement of procedures, educational materials, and certain safeguards designed to protect the integrity and privacy of the collection process. Without compliance with these requirements, the random drug test was unconstitutional and the employee could not be considered insubordinate for refusing to take the test.

Miscellaneous

In *CWA v. New Jersey Dept. of Personnel*, 154 *N.J.* 121 (1998), the Supreme Court upheld the authority of the Commissioner of Personnel to start two pilot programs effective for one year. One program increased the number of appointment-eligible candidates from three to ten; the other program extended working test periods from four months to twelve months. An appointing authority must consult with affected "negotiations representatives" before participating in a pilot program. *N.J.A.C.* 4A:1-4.3(c).

In *Alford v. Buena Reg. School Dist. Bd. of Ed.*, 310 *N.J. Super.* 147 (App. Div. 1998), the Court held that *N.J.S.A.* 18A:28-6.1 requires that teachers transferred from a sending district to a receiving district be treated the same as receiving district teachers for purposes of being paid unused sick time upon retirement or other separation from employment. The Court confirmed that the subject of payment for accumulated sick leave is mandatorily negotiable, but held that the equal treatment mandated by *N.J.S.A.* 18A:28-6.1 cannot be bargained away. *Id.* at 155, 158.

In *Wilson v. PFRS Bd. of Trustees*, App. Div. Dkt. No. A-002123-96T2 (2/2/98), the Court held that pension statutes and regulations required the exclusion of certain longevity payments from the base pay used to calculate pension benefits. The Borough had allowed employees who had worked at least 20 years to choose including longevity payments in base salary. The Division of Pensions and the Appellate Division held that the 20-year option was an individual salary adjustment granted primarily in anticipation of retirement and represented an impermissible unfunded pension liability. The Court rejected an argument that the longevity payments could be included in base pay for pension purposes because they were paid through bi-weekly paychecks rather than in a lump sum.

Spencer v. Bristol-Myers Squibb Co., 156 *N.J.* 455 (1998), was an employment discrimination case. The Court held admissible

a statement by a personnel director to the effect that the employee was denied promotion because her immediate supervisors did not wish a woman of her age and race to hold the position sought. The double hearsay problem was overcome because the statement by the personnel director concerned a matter within the scope of his employment and the statements made by the supervisor to the personnel director concerned matters within the scope of their employment.