General Counsel's Annual Report–1999
Public Employment Relations Commission

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Statistics

The Commission received 12 opinions from the Appellate Division. All were affirmances. In addition, six appeals were dismissed or withdrawn. The Chancery Division enforced one order.

Appeals From Commission Decisions

Unfair Practice Cases

In *Willingboro Tp. Bd. of Ed. v. Employees' Ass'n of Willingboro Schools*, P.E.R.C. No. 98-113, 24 *NJPER* 171 (¶24085 1999), aff'd 25 *NJPER* 322 (¶30138 App. Div. 1999), the Board violated *N.J.S.A.* 34:13A-5.4a(1) and (3) when a majority of its members refused to promote a long-time excellent employee, Joann Phelps, to the position of Supervisor of Transportation because she was a vice-president of the Employees Association and the Association had opposed the Board majority in the election held the month before. The majority's platform condemned the Association's influence; the Board president stated that she could not support an Association official; and other Board members had publicly doubted that Phelps could "switch hats" to become a management official. The Court complimented the comprehensive report of Senior Hearing Examiner Arnold H. Zudick and held that his post-hearing substitution for a Hearing Examiner who had resigned did not require a new hearing or a settlement conference. The Court also rejected a claim that the person who did get the position was an indispensable party. Finally, the Court asked the Commission to specify whether Phelps should be immediately made Supervisor of Transportation or should wait until the next

vacancy while receiving the higher salary until then.

In *Neptune Tp. Bd. of Ed. and Neptune Tp. Ed. Ass'n*, P.E.R.C. No. 98-130, 24 *NJPER* 234 (¶29110 1998), aff'd 25 *NJPER* 279 (¶30118 App. Div. 1999), the Court dismissed an unfair practice charge alleging that the Board eliminated seven teacher programmer positions so that it could transfer the Association president to another teaching position. While a few Board members had expressed anti-union sentiments, the Board majority relied on a consultant's untainted recommendations on restructuring. The Commission also held that a previous unfair practice ruling did not support a hostility finding since that ruling involved a negotiations miscommunication rather than anti-union animus. The Court found that the Commission's decision was fair, supportable, and reasonable.

In *Middletown Tp. and Middletown PBA Local 124*, P.E.R.C. No. 98-77, 24 *NJPER* 28 (¶29016 1998), aff'd 25 *NJPER* 357 (¶30151 App. Div. 1999), certif. granted, the employer was required to negotiate before changing its practice of placing newly hired police officers at step three of the salary guide if they had completed police academy training and worked for at least one year as a permanent municipal police officer. The Court recognized that the employer was not bound to maintain its practice; it simply had to negotiate in good faith before changing it. The Court also accepted the Commission's distinction between breach-of-contract claims outside its unfair practice jurisdiction and unilateral changes in employment conditions within its jurisdiction.

In *Town of Kearny and Kearny Superior Officers Ass'n*, P.E.R.C. No. 98-22, 23 *NJPER* 501 (¶28243 1997), aff'd 25 *NJPER* 400 (¶30173 App. Div. 1999), the employer unilaterally changed a 20-year practice of assigning off-duty officers to replace temporarily absent officers of the same rank and instead used lower-ranked officers on the same shift, thus reducing the overtime compensation earned by officers of the same rank as absent officers. Judge Petrella's panel deferred to the Commission's balancing of the competing interests and held

that the change involved a mandatorily negotiable subject. It approved the Commission's distinction between the mandatorily negotiable issue of whether officers in the same rank should receive overtime opportunities when their peers are absent and the (at best) permissively negotiable issue of whether lower-ranked officers should receive acting pay assignments when higher-ranked officers are absent. The latter situation may involve a decision to use better-trained and qualified personnel, but the former situation does not.

In *CWA and State of New Jersey (Rowan Univ.*), P.E.R.C. No. 99-26, 24 *NJPER* 483 (¶29224 1998), aff'd 26 *NJPER* 30 (¶31009 App. Div. 1999), the Court agreed with the Commission that the employer had a prerogative to schedule college classes on previously designated holidays and to require support staff to work on those days. A charge alleging a refusal to negotiate was dismissed. Compensation was not at issue since employees were paid time and one-half.

In *Bridgewater Municipal Employees Ass'n v. Bridgewater Tp.*, 25 *NJPER* 324 (¶30139 App. Div. 1999), the Director of Unfair Practices dismissed a charge for failure to answer status inquiries and denied two motions to reopen the record. The Association did not file a timely appeal from either decision denying reconsideration.

In *Borough of Fair Lawn and PBA Local 67*, P.E.R.C. No. 98-160, 24 *NJPER* 352 (¶29167 1998), aff'd 25 *NJPER* 310 (¶30130 App. Div. 1999), a charging party was allowed to withdraw its charge after a Hearing Examiner ruled in the employer's favor. The Commission was not compelled to issue a final decision approving or rejecting the Hearing Examiner's findings; its order dismissing the charge "with prejudice" constituted an adjudication on the merits "as fully and completely as if the order had been entered after trial."

Scope-of-Negotiations Cases

East Brunswick Bd. of Ed. and East Brunswick Ed. Ass'n, P.E.R.C. No. 98-150, 24 *NJPER* 319 (¶29152 1998), aff'd 25 *NJPER* 306 (¶30128 App. Div. 1999), held legally arbitrable a grievance contesting the inclusion of criticisms of a third-period class in an observation report evaluating a first-period class. The Commission recognized the Board's prerogative "to have an evaluator visit and observe the third period class or comment on the third period class through a timely

informal evaluation or passing comment to the teacher," but it concluded that:

> [e]nforcement of an alleged agreement or policy restricting the first period observation report to the class being observed would not have prevented an evaluation of the third period class and the recording of the pertinent information. Such a restriction protects the employee's interest in having timely notice of what has been observed and an opportunity to know and respond to evaluative suggestions and criticisms specified in the observation.

Judge Conley's panel agreed.

Hanover Tp. Bd. of Ed. and Hanover Tp. Ed. Ass'n, P.E.R.C. No. 99-7, 24 *NJPER* 413 (¶29191 1998), aff'd 25 *NJPER* 422 (¶30184 App. Div. 1999), declined to compel arbitration of a grievance contesting the nonrenewal of a nontenured bus driver's contract. A nonrenewal is not a form of discipline guaranteeing an arbitration forum under *N.J.S.A.* 34:13A-29 unless that nonrenewal allegedly violates a clause granting tenure or job security. The Court stated: "PERC's thorough opinion on the subject speaks for itself and requires no further amplification or justification."

In *City of Newark and FOP Lodge No. 12*, P.E.R.C. No. 98-82, 24 *NJPER* 56 (¶29035 1998), appeal dismissed, 25 *NJPER* 310 (¶30131 1999), the Commission declined to restrain arbitration of two grievances claiming that police officers were entitled to legal representation in civil litigation arising out of their employment. The grievances were later withdrawn so the Court declined to consider the appeal. It added that the issue of legal representation should be addressed in a specific factual context. *See Oches v. Middletown Tp. Police Dept.*, 155 *N.J.* 1 (1998).

In *Ridgefield Ed. Ass'n. v. PERC*, 25 *NJPER* 183 (¶30084 App. Div. 1999), the Court transferred a dispute to the Commission. The Association alleged that a letter from a principal to an Association official was a reprimand mandating arbitration under *N.J.S.A.* 34:13A-29. This question was within the Commission's primary jurisdiction. A secondary question was whether the Director of Arbitration properly declined to

appoint an arbitrator since the parties had not agreed to use PERC's arbitration panel. Absent an agreement to use PERC's panel, *N.J.S.A.* 2A:24-5 is the mechanism for securing an arbitrator to hear a dispute under *N.J.S.A.* 34:13A-29.

Representation Cases

In *City of Newark v. Newark Council 21, Newark Chapter, NJCSA*, 320 *N.J. Super*. 8 (App. Div. 1999), an arbitrator ruled that the City of Newark, consistent with a federal grant, could replace police officers with civilian employees to perform clerical tasks; but the civilian employees had to be placed in the officers' negotiations unit. The City then filed a clarification of unit petition, but the Director of Representation held that the award violated the statutory prohibition against police officers belonging to the same union as civilian employees. D.R. No. 98-9, 24 *NJPER* 36 (¶29022 1998). Judge Pressler's panel affirmed this ruling. It also vacated the rest of the award since it believed the civilianization dispute was non-negotiable given *City of Jersey City v. Jersey City POBA*, 154 *N.J.* 558 (1998).

Interim Relief Decisions

An application to file an emergency appeal from an interim relief decision was denied in *Town of Secaucus and PBA Local 84*, I.R. No. 2000-6, 26 *NJPER* 83 (¶31032 1999). The Town, anticipating large parties and Y2K problems, cancelled police officer leaves on New Year's eve. The PBA filed a grievance, asserting that the cancellation violated clauses concerning leaves of absence, personal days, and overtime. The Commission designee declined to restrain arbitration, reasoning that the Town had a right to require as many officers as it wanted to work or be on call that night, but not to determine what compensation they would be paid. The Town sought leave to file an emergent appeal, but first Judge Conley and then Chief Justice Poritz denied the application.

Enforcement

Judge Anthony J. Parrillo of the Mercer County Superior Court enforced the order in *Nutley Tp. and PBA Local 33*, H.E. No. 99-18, 25 *NJPER* 199 (¶30092 1999), made final on April 19, 1999. The employer had failed to post a notice and the payment of interest.

Other Court Cases

Strikes

Judge Martin Greenberg ordered the Jersey City Education Association to pay a $300,000 fine for violating his order to return to work during a 1998 strike. *Hudson Cty. State-Operated School Dist. of Jersey City v. Jersey City Ed. Ass'n*, Chan. Div. Dkt. No. C-170-98 (11/8/99). The order required the money to be put in a college scholarship fund.

Grievance Arbitration

1. Decisions Confirming Awards

In *South Plainfield Bd. of Ed. v. South Plainfield Ed. Ass'n*, 320 *N.J. Super*. 281 (App. Div. 1999), certif. den. 161 *N.J*. 332 (1999), the Court confirmed an arbitration award holding that the school board breached ts collective negotiations agreements over a period of many years when it did not give salary guide credit to new teachers for experience in other districts. The arbitrator had not yet determined the remedy, but the Court noted that requiring the employer to make all teachers whole would result in enormous outlays and possible layoffs and service reductions. Borrowing standards for reviewing interest arbitration awards, the Court concluded that the public interest required the arbitrator, when awarding damages, to consider the fiscal impact of the award and to diminish back pay accordingly.

Hudson Cty. and PBA, App. Div. Dkt. No. A-6125-97T3 (8/9/99), upheld an award holding that the employer violated its handbook and past practice when it did not place a corrections officer on the top step of the salary guide after that officer was demoted from the rank of sergeant because he failed a Civil Service examination. Public policy does not prevent paying junior employees demoted for nondisciplinary reasons more than senior corrections officers.

In *West Windsor-Plainsboro Service Ass'n v. West Windsor-Plainsboro Reg. School Dist*., App. Div. Dkt. No. A-628-98T3 (8/31/99), certif. den. 163 *N.J*. 10 (2000), the arbitrator reinstated an employee who was discharged for allegedly violating a last chance agreement on excessive absenteeism. The Court found reasonably debatable the arbitrator's interpretation of that agreement as permitting factual challenges as to whether the employee had been absent without permission.

In *Mansfield Ed. Ass'n and Mansfield Bd. of Ed.*, App. Div. Dkt. No. A-1382-98T5 (7/2/99), certif. den. 162 *N.J*. 198 (1999), the Court upheld an award restoring a salary increment withheld from a special education teacher. The Court rejected claims that the teacher waived any rights under the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 *et seq*., and that the arbitrator could not set aside the withholding once he found a "serious lapse of judgment" on the teacher's part. The Court distinguished *Morris Cty. College Staff Ass'n*, 100 *N.J*. 383 (1985), since the *Mansfield* arbitrator did not find that the charged misconduct had occurred or that the lapse of judgment was serious enough to warrant a withholding.

An Appellate Division panel confirmed an award reinstating a custodian whose contract was not renewed after 20 years of poor work. *Essex Cty. Voc. Bd. of Ed. v. Essex Cty. Voc. Ed. Ass'n*, App. Div. Dkt. No. A-2871-97T1 (1/26/99), certif. den., 160 *N.J*. 429 (1999). Applying a clause protecting custodians against non-renewals without just cause, the arbitrator held that the custodian was entitled to some progressive discipline, such as a warning or an increment withholding, before his employment was ended.

2. Decisions Vacating Awards

In *West New York Ed. Ass'n v. West New York Bd. of Ed*., App. Div. Dkt. No. A-6152-97T3 (5/6/99), the Court vacated an award compensating child study team members for extra hours worked at home. The arbitrator found that, as a result of a reorganization, the employees worked two extra hours a week and should be paid $20 an hour under a clause setting compensation for "extracurricular activities." But the Court concluded that there was no contractual right to additional compensation.

In *Wayne Tp. Bd. of Ed. v. Wayne Ed. Ass'n*, App. Div. Dkt. No. A-2749-97T5 (1/19/99), an Appellate Division panel held that two grievances were not contractually arbitrable. The grievances contested the non-renewals of the contracts of a custodian and a bus driver. The Court rejected an argument that a clause prohibiting discipline without just cause limited the employer's discretion not to renew the contracts. Along with *Marlboro Tp. Bd. of Ed. v. Marlboro Tp. Ed. Ass'n*, 299 *N.J. Super*. 283 (App. Div. 1997), certif. den. 151 *N.J*. 71(1997), *Wayne*

puts the burden on majority representatives to negotiate explicit contractual tenure clauses for non-professional employees in order to contest non-renewals.

3. Other Decisions Concerning Grievance Arbitration

In *PBA Local 292 v. Borough of North Haledon*, 158 *N.J.* 392 (1999), the Supreme Court permitted a union to file a common-law confirmation action after the statutory time limit (90 days) for a summary action had expired. An employer may not seek to vacate an award after 90 days, but may raise affirmative defenses, including the position that the award violates a statute or public policy. The opinion tacitly accepts the Commission's amicus curiae position.

Habick v. Liberty Mut. Fire Ins. Co., 320 *N.J. Super*. 244 (App. Div. 1999), holds that the standard for reviewing arbitration awards addressing personal injury protection claims is narrower than the standards for reviewing grievance and interest arbitration awards. The latter standards are discussed at length. *Id*. at 248-252.

In *Rutgers v. Bermudez-Gallegos*, App. Div. Dkt. No. A-3655-97T5 (6/4/99), certif. den. 162 *N.J.* 199 (1999), a grievance committee ruled that a tenure denial was procedurally unfair and tainted by personal enmity and that a remand evaluation should be conducted by "a different group constituted of outsiders free of such history with the grievant." The Court required Rutgers to exhaust the remand evaluation rather than appeal the award.

In *Colon v. City of Camden*, App. Div. Dkt. No. A-6086-97T5 (6/10/99), the City was collaterally estopped by a confirmed arbitration award from refusing to indemnify police officers for civil action judgments. The arbitration panel had concluded that the officers' actions in a barroom brawl were directly related to the lawful exercise of their police powers. Further, the City had to indemnify the officers for punitive damages since the collective negotiations agreement calling for indemnification did not distinguish between compensatory damages and punitive damages.

An Appellate Division panel dismissed a complaint in which retired corrections officers sought one day's pay for each unused sick leave day. *Rutledge v. Essex Cty.*, App. Div. Dkt. No. A-3334-97T2 (2/8/99). An arbitration award giving such relief to corrections officers at the West Caldwell jail

was not res judicata in this case involving officers of the Newark jail represented by a different majority representative. Further, the retirees could not sue without first arbitrating grievances under their collective negotiations agreement. The retirees may pursue an unfair practice charge if the County misled them about the need to file grievances.

In *High Voltage Engineering Corp. v. Pride Solvents & Chemical Co. of New Jersey, Inc*., 326 *N.J. Super*. 356 (App. Div. 1999), the Court upheld an award ordering a chemical company to pay attorneys' fees incurred by another company when the chemical company sued it in court seeking remediation of an industrial site; the chemical company had breached a settlement agreement by suing rather than arbitrating its claim. The arbitrator had authority to award counsel fees, despite a silent contract, since that award was the only way to provide complete relief for the contractual breach.

4. Arbitral Immunity

New England Cleaning Services, Inc. v. American Arbitration Ass'n, *F*.3d , 163 *LRRM* 2065 (1st Cir. 1999), holds that arbitral immunity protected AAA's decision to process a union's demand for arbitration, even though it was ultimately shown that the employer had properly terminated the labor contract. Requiring AAA to resolve potentially complex jurisdictional issues before arbitration would impose unwelcome burdens, interfere with AAA's neutrality, and add expense and delay to arbitration process.

Interest Arbitration

FOP, Penn-Jersey Lodge 30 v. Delaware River Port Auth., 323 *N.J. Super*. 444 (App. Div. 1999), certif. den. 162 *N.J*. 663 (1999), holds that DPRA police officers have a right to interest arbitration. Although the Authority is a bi-state agency not subject to the Employer-Employee Relations Act or its Pennsylvania counterpart, the two statutory schemes are substantially similar and complementary with respect to interest arbitration.

Salary Issues

In *Bogota Bd. of Ed. and Bogota Ed. Ass'n*, App. Div. Dkt. No. A-4708-97T2 (5/24/99), certif. den. 162 *N.J*. 128 (1999), an Appellate Division panel invalidated the fourth year of a collective negotiations agreement covering teachers, but not the

fourth year of the same agreement covering secretaries. The Court believed that this result was required by *Neptune Tp. Bd. of Ed. v. Neptune Tp. Ed. Ass'n*, 144 *N.J.* 16 (1996), prohibiting teacher salary schedules lasting more than three years. The Court did not find it significant that the first two years of the contract were retroactive and thus the Board was binding itself for only two years into the future. Given this decision, parties should enter separate agreements for past years and for future years if the total number of years to be settled will exceed three.

United States v. State of New Jersey, 194 *F.*3d 426, 81 *FEP Cases* 57 (3d. Cir. 1999), held that a consent decree required the State to pay step increases to persons not hired because of sex and race discrimination. Viewing step increases as essentially automatic, the Court rejected the argument that increments should not be paid because they are contingent on "satisfactory service" each year and the discriminatees had not performed any service. The decision was authored by former Appellate Division Judge Morton Greenberg.

In *Warren Cty. Voc-Tech School Ed. Ass'n v. Warren Cty. Voc-Tech School Bd. of Ed.*, 320 *N.J. Super*. 1 (App. Div. 1999), certif. den. 162 *N.J.* 487, a teacher whose position had been abolished when he was at the top step of the salary guide was reinstated seven years later. The teacher sought payment of off-guide increases during the intervening years, claiming he was due them pursuant to the parties' contract, an advisory arbitration award, and *N.J.S.A.* 18A:28-12. The Court rejected these claims, finding no contractual basis for such payments and no warrant for extending the seniority protections of *N.J.S.A.* 18A:28-12 to this context.

In *Rawitz v. Essex Cty.*, App. Div. Dkt. No. A-696-98T3 (12/2/99), the Appellate Division held that an Assistant County Counsel could seek additional compensation based on his contention, supported by three affidavits, that he had served as acting chief of the claims section for three years. He was not entitled, however, to 30 days notice of termination under *N.J.S.A.* 40A:41A-87b since he was an unclassified employee under *N.J.S.A.* 11A:3-5f.

FLSA Cases

In *Alden v. Maine*, 527 *U.S.* 706 (1999), the United States Supreme Court held that unless a state consents to be sued, state government employees cannot sue their

employers in a state court for alleged violations of the federal Fair Labor Standards Act. Such private suits are also barred in federal court. Only the federal government may sue.

In *Allen v. Fauver*, 327 *N.J. Super*. 14 (App. Div. 1999), the Appellate Division applied *Alden* in barring a state court suit under the FLSA by State of New Jersey employees. The Court held that the State had not waived its immunity to such suits. It further held that the New Jersey Wage and Hour Law does not apply to the State as an employer.

In *Brooks v. Ridgefield Park*, 185 *F*.3d 130 (3d Cir. 1999), the Third Circuit Court of Appeals held that the FLSA's requirement that overtime be promptly paid invalidated a negotiated practice of paying overtime by monthly checks. Liquidated damages need not be paid if the department acted in good faith.

Police Department Ordinances and Regulations

In *Davis v. New Jersey Dept. of Law and Public Safety*, 327 *N.J. Super*. 59 (Law. Div. 1999), Judge Parrillo granted black state troopers a preliminary injunction restraining the state police from enforcing regulations requiring approval before public disclosure of information concerning division operations. The information concerns alleged racial profiling. The Court concluded that the regulation imposed an unconstitutional prior restraint on free speech.

In *Ruark v. City of Atlantic City*, App. Div. Dkt. No. A-3889-97T3 (6/8/99), certif. den. 162 *N.J*. 486 (1999), the Court invalidated the employer's disciplinary rules and a police officer's suspension because an ordinance establishing a police department had never been adopted. A mayor's executive order adopting a department manual cannot substitute for the ordinance required by *N.J.S.A.* 40A:14-118.

In *Township of Greenwich Police Officers PBA Local No. 122 v. Greenwich Tp.*, App. Div. Dkt. No. A-7325-97T3 (3/29/99), the Court invalidated an ordinance empowering the Township's public safety committee to designate an acting police chief whenever the chief is unavailable for 10 working days or more. The ordinance arbitrarily deprived the chief of the power conferred by *N.J.S.A.* 40A:14-118 to assign an acting chief.

PBA, North Brunswick, Local 160 v. North Brunswick Tp., 318 *N.J. Super*. 544 (App. Div. 1999) held that *N.J.S.A.* 40A:14-118 permits a township to appoint a police director (rather than a police chief) and to have the director both promulgate departmental rules and oversee daily operations. The PBA had argued that such an appointment miscombined legislative and executive functions.

School Boards

Gonzalez v. Elizabeth School Dist., 325 *N.J. Super*. 244 (App. Div. 1999), holds that a board cannot appoint a superintendent whose term would begin during the term of office of the next board. That is so even though a superintendent must be notified at least one year before the superintendent's term expires that he or she will not be reappointed. "[A] board of education is a noncontinuous body whose authority is limited to its own official life and whose actions can bind its successors only in these ways and to the extent expressly provided by statute." *Id.* at 252.

Tenure Issues

Casamasino v. City of Jersey City, 158 *N.J.* 333 (1999), holds that a tax assessor in a Faulkner Act community cannot acquire tenure without undergoing the statutory reappointment process. Tax assessors cannot serve as holdovers and must vacate their office on the last day of their term. *See also Kaman v. Montague Tp.*, 158 *N.J.* 371 (1999).

In *Szewczuk v. New Jersey Turnpike Auth.*, App. Div. Dkt. No. A-771-97T5 (7/26/99), a former probationary employee asserted that she had been orally promised at least six months of employment. The trial court, relying on private sector cases, found that a contract existed; but the Appellate Division remanded for reconsideration in light of the statutory mandates imposed on the Authority and the Governor's power to veto its budget and personnel actions.

Disciplinary Issues

In re Taylor, 158 *N.J.* 644 (1999), overturned a Merit System Board decision terminating an employee at a State psychiatric hospital for physically abusing a patient. The Court accepted the agency's findings of fact, but concluded that the employee's

inappropriate contact did not rise to the level of physical abuse. The Court acknowledged the responsibility of DHS to ensure that vulnerable patients are shielded from abuse by their caretakers, but balanced that concern against protecting the rights of public employees working under extremely difficult conditions.

Kelty v. State of New Jersey, 321 *N.J. Super*. 84 (App. Div. 1999), denied back pay and other benefits to a state trooper whose criminal conviction was reversed on appeal. "[A] public officer who renders no service is not entitled to prevail in an action seeking compensation." *Id*. at 90.

Tamburelli v. Hudson Cty. Police Dept., 326 *N.J. Super*. 551 (App. Div. 1999), upheld a police lieutenant's termination based on a positive test for cocaine. The Court rejected administrative findings that there were not reasonable grounds for suspecting drug use. That the department waited four months to act on a tip did not make the information so unreliable as to negate reasonable suspicion.

In *Hoffman v. Hudson Cty. Dept. of Public Safety*, App. Div. Dkt. No. A-4124-96T2 (6/22/99), the Court upheld an MSB decision reducing a corrections officer's disciplinary penalty from termination to a six-month suspension. The Court, however, declined to reduce the back pay award by the amount of time resulting from scheduling delays attributable to the officer's attorney.

In *Hammond v. Monmouth Cty. Sheriff's Dept*., 317 *N.J. Super*. 199 (App. Div. 1999), the Court affirmed an MSB decision dismissing charges against a corrections officer. On appeal, the employer argued that the ALJ and the MSB erred in not allowing relitigation of two charges that had been dismissed after a departmental hearing. Judge Kestin's opinion disagreed, concluding that it is the employee, not the appointing authority, that has the right to appeal to the MSB and that broadening the charges on appeal "violates any decent sense of due process or fair play." *Id*. at 206.

Keyer v. Department of Corrections, App. Div. Dkt. No. A-6205-97T1 (1999), held that removal was an appropriate punishment for a carpenter employed at a correctional facility since his misconduct impaired prison security.

Nelsen v. East Jersey State Prison, App. Div. Dkt. No. A-5821-96T5 (1999), remanded an MSB disciplinary decision for a hearing on whether the disciplined employee's

supervisors knew about and approved his use of prison stationery to order two 30-round magazines for a handgun.

In re Campbell, App. Div. Dkt. No. A-5017-97T1 (12/27/99), upheld an MSB order conditionally reinstating a school board custodian discharged for shooting a gun while drunk in a park at night. The MSB found that discharge was not justified given the employee's success in an alcoholism rehabilitation program, but ordered the employee to undergo counselling for six more months before reinstatement.

CEPA Issues

CEPA prohibits an employer from retaliating against an employee who blows the whistle on a co-employee. *Higgins v. Pascack Valley Hosp.*, 158 *N.J.* 404 (1999). The whistleblower must have a reasonable basis for objecting to the legality of a co-employee's activity.

In *Kolb v. Burns*, App. Div. Dkt. No. A-6502-96T3 (4/27/99), the Mansfield Board of Education withheld an increment from a special education teacher who testified at an OAL hearing. The employee filed both a CEPA action, now reinstated by the Appellate Division, and a grievance, resulting in an arbitration award also upheld by the Appellate Division, *supra* at p. 9.

In *Cedeno v. Montclair State Univ.*, 319 *N.J. Super*. 148 (App. Div. 1999), app. pending, a split panel held that a person who is statutorily disqualified by a criminal conviction from obtaining or keeping public employment may not maintain an action asserting that his discharge violated CEPA or LAD. The plaintiff was fired from his job as Director of Purchasing at Montclair State University. After he filed a lawsuit alleging CEPA and LAD claims, the employer learned that he had been convicted of bribery 20 years ago. The majority holds that the conviction terminated the plaintiff's right to maintain his lawsuit. The dissent would have permitted plaintiff to maintain the lawsuit and perhaps to recover back pay, but not to be reinstated or receive front pay.

Privatization

The Appellate Division dismissed an appeal challenging a contract between the State and a private sector company to operate the motor vehicle inspection program. *CWA v. DiEleuterio*, App. Div. Dkt. No. A-7073-97T3 (1/15/99). The Court had earlier refused to stay the contract;

discontinuing the contract now would jeopardize meeting a Clean Air Act deadline and receiving federal funds.

Mid-Contract Bargaining

In *National Federation of Federal Employees v. Department of Interior*, 526 *U.S.* 86, 160 *LRRM* 2577 (1999), the Supreme Court concluded that the statutory duty to bargain in the federal sector, 5 *U.S.C.* §7101 *et seq.*, neither compels nor prohibits mid-contract bargaining. The Federal Labor Relations Authority must initially define the existence and extent of any mid-contract bargaining obligation involving federal agencies.

Residency Requirements

In *Newark Council No. 21, NJCSA v. James*, 318 *N.J. Super*. 208 (App. Div. 1999), Newark was allowed to enforce a residency requirement, even though it had not been strictly enforced before. The City had not engaged in a studied policy of non-enforcement.

Disability Payments

Brown v. Old Bridge Tp., 319 *N.J. Super*. 476 (App. Div. 1999), certif. den. 162 *N.J.* 131 (1999), rejected a police officer's claim for long-term disability payments exceeding his salary at the time he was shot in the line of duty. *N.J.S.A.* 40A:14-154 preempted enforcement of a contractual provision that would have resulted in the officer receiving a greater amount; the statute overrode a judicially-enforced arbitration award involving a different employee; and the statute was not unconstitutional. *See also Old Bridge Tp.*, P.E.R.C. No. 98-53, 23 *NJPER* 622 (¶28301 1997)(prohibiting direct disability payments beyond those authorized by *N.J.S.A.* 40A:14-154).

Equal Protection and Collective Bargaining

Central State Univ. v. AAUP, 526 *U.S.* 124 (1999), upheld the constitutionality of a law requiring Ohio public universities to develop standards for instructional workloads and exempting these standards from bargaining. The law was a response to a decline in the time professors spent teaching instead of researching, but the Ohio Supreme Court found no evidence that collective bargaining caused the decline. The United

States Supreme Court, however, ruled that the Legislature could rationally decide that a uniform workload policy was needed.

Retiree Health Benefits

In *Wood v. Borough of Wildwood Crest*, 319 *N.J. Super*. 650 (App. Div. 1999), a police officer retired with 25 years of creditable service, but not actual service, with the employer. Pursuant to a collective bargaining agreement and as promised by several administrators, the employer initially paid for the officer's medical benefits, but it discontinued coverage in 1996 when *Wolfersberger v. Borough of Point Pleasant Beach*, 305 *N.J. Super*. 446 (App. Div. 1996), aff'd o.b. 152 *N.J.* 40 (1997), held that 25 years of actual service was statutorily required to qualify for this benefit. The employer then discontinued coverage and, when the officer sued, demanded repayment of $62,772.62. The Court estopped the employer from discontinuing coverage or demanding repayment.

Pensions

Hudson County employees who withdrew from a voluntary contribution pension fund did not become ineligible for a non-contributory pension under the General Non-Contributory Pension Act. *Bounds v. Prospero*, 319 *N.J. Super*. 277 (App. Div. 1999). The County may deny applications for a non-contributory pension, but cannot act arbitrarily.

Indemnification

Chasin v. Montclair State Univ., 159 *N.J.* 418 (1999), held that a professor was not entitled to State reimbursement of attorneys' fees incurred in defending a lawsuit. A student sued her, claiming the Desert Storm Law required that he receive the grade -- an "A" -- he had earned at the time he was called up. Despite the clear terms of the law and the Attorney General's advice, the professor invoked academic freedom and refused to issue a grade so the student sought an injunction. After the suit settled, the professor sought reimbursement. The Supreme Court held that the Tort Claims Act applies only to tort-based lawsuits, not to this suit for an injunction. Even if that act applied, the professor's willful disregard of the Attorney General's legal advice forfeited any right to a defense and indemnification. For another

case on indemnification, see *Colon v. City of Camden, supra*.

Public Employees

Lowe v. Zarghani, 158 *N.J.* 606 (1999), held that for purposes of the Tort Claims Act, UMDNJ faculty members remain public employees, rather than become independent contractors, when they operate on patients at private hospitals affiliated with UMDNJ. The Court applied two tests used to distinguish employees from independent contractors: the control test and the relative nature of the work test.

Sexual Harassment and Picket Lines

In *Baliko v. Operating Engineers Local 825*, 322 *N.J. Super*. 261 (App. Div. 1999), certif. den. 162 *N.J.* 199 (1999), a new trial was granted to three female construction workers who asserted they were sexually harassed by male union members picketing their work site. Employees crossing a picket line need not expect or accept sexual harassment. This case was later settled.

LAD and Reasonable Accommodation

In *Svarnas v. AT&T Communications*, 326 *N.J. Super*. 59 (App. Div. 1999), the Court held that an employee's termination for excessive absenteeism did not violate the LAD. The employer was entitled to insist that an employee with asthma and car accident injuries show up for work consistently and reliably; it was not required to permit her to work part-time or guarantee her a smoke-free environment.

Workers' Compensation

A physical education teacher may prevail on an occupational disease claim that he contacted tonsil cancer from a co-employee's second-hand cigarette smoke. *Magaw v. Middletown Bd. of Ed*., 323 *N.J. Super*. 1 (App. Div. 1999), certif. den. 162 *N.J*. 485. The workers' compensation judge, however, cannot consider a claim that statutory sick leave benefits must be restored. That claim must be presented to the Commissioner of Education. *Accord Burlington Cty. and CWA*, P.E.R.C. No. 97-84, 23 *NJPER* 122 (¶28058 1997), aff'd 24 *NJPER* 200 (¶29092 App. Div. 1998)(claim for contractual sick leave benefits is not

preempted by workers' compensation laws and may be arbitrable).

Punitive Damages

The LAD permits awards of punitive damages against public entities based on deliberate acts of "upper management." *Cavuoti v. New Jersey Transit Corp.*, 161 *N.J.* 107 (1999). "Upper management" consists of the employees responsible for formulating anti-discrimination policies, providing compliance programs, insisting upon performance, controlling daily operations, exercising broad supervisory powers, or executing policies to ensure a safe, productive, and discrimination-free workplace.

The New Jersey Supreme Court has affirmed an Appellate Division decision reinstating a teacher discharged in violation of CEPA and holding that the teacher may receive punitive damages if he can prove that upper management participated in egregious conduct or was willfully indifferent. *Abbamont v. Piscataway Bd. of Ed.*, *N.J.* , 1999 *N.J. LEXIS* 1644 (1999), aff'g 314 *N.J. Super*. 293 (App. Div. 1998). The Supreme Court applied the "law of the case" doctrine in holding that *Abbamont v. Piscataway Bd. of Ed.*, 138 *N.J.* 405 (1994), answered the punitive damages question. Three justices agree that the "law of the case" doctrine applied, but added their view that punitive damages were not clearly authorized by CEPA.

Association Membership

Stowell v. New Jersey Ass'n of Chiefs of Police, 325 *N.J. Super*. 512 (App. Div. 1999), allows the State Association of Chiefs of Police to expel a retired member who became an attorney and now provides legal representation to municipalities that have disputes with their police chiefs.

Settlement Agreements

In *DeMattia v. New Jersey Merit System Board*, 325 *N.J. Super*. 368 (App. Div. 1999), the Court ruled that a 1987 settlement agreement granting an employee a 40-hour work week did not preclude the Department of Environmental Protection from reducing his work week to 35 hours as part of a 1996 layoff/work week reduction. DEP did not and could not bargain away its layoff power.

Psychological Evaluations

In *Valentin v. Bootes*, 325 *N.J. Super*. 590 (Law Div. 1998), Judge Payne held that the psychologist-patient privilege did not protect a detective's psychological evaluations. The evaluations had to be provided to a plaintiff suing the detective for accosting him off-duty and suing the City for negligent hiring and retention.

Entire Controversy Doctrine

An employee who persuaded the MSB to reduce a termination to a 10-day suspension was not precluded from filing a new LAD claim in court contesting the suspension. *Long v. Lewis*, 318 *N.J. Super*. 449 (App. Div. 1999). The Court relied on *Thornton v. Potamkin Chevrolet*, 94 *N.J*. 1 (1983), holding that the entire controversy doctrine does not block administrative or court adjudications of discrimination claims following grievance determinations.

In *Massa v. Bergen Cty. Utilities Auth.*, Civ No. 97-3455 (DRD) (3/10/99), Judge Debevoise of the federal district court of New Jersey dismissed a Complaint alleging that a sanitation inspector was laid off because of his political activities. This claim was precluded by an MSB decision and an Appellate Division affirmance upholding the layoff as made in good faith.

Statutes

The Legislature has provided State aid to encourage local governments to regionalize, consolidate, and share services. Chapters 58-61 of the 1999 New Jersey Session Laws. Local government employers may offer early retirement incentives to affected employees. P.L. 1999, c. 59.

State Commission of Investigation employees have been legislatively declared to be confidential employees under the Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq*. P.L. 1999, c. 88.

The Employer-Employee Relations Act has been supplemented by *N.J.S.A.* 34:13A-30. Under 29 *U.S.C.* §504, persons convicted of certain crimes are disqualified from serving in these capacities in the private sector: as an adviser, official, representative, or employee of a labor organization; as an adviser to an employer; as an official or employee of an employee organization; in a position with an employer involving collective bargaining or labor-management relations; in

a position permitting the individual to receive a share in the proceeds from sales to a labor organization; as an official of any provider of goods or services to a labor organization; or in any position involving authority over funds or property of a labor organization. *N.J.S.A.* 34:13A-30 extends these prohibitions to the New Jersey public sector. The forum for enforcing its prohibitions is not specified.

The Governor has signed a bill, P.L. 1999, c.48, permitting a collective negotiations agreement to specify the amount a local government employer will pay to provide retirement benefits under the State Health Benefits Program to employees in that negotiations unit and their dependents. A similar law covers State employees. *N.J.S.A.* 52:14-17.28b. The new bill also conforms the age and service eligibility requirements for employer payments for SHBP coverage to the age and service eligibility requirements for employer payments for non-SHBP health insurance coverage under *N.J.S.A.* 40A:10-23. School boards are not included among the local governments that can negotiate over payments for SHBP coverage for retirees.

AJR-49 establishes a "Public Officers Salary Review Commission." The Commission will recommend changes in salaries for the Governor, cabinet officers, the Legislature, Supreme and Superior Court judges, workers' compensation judges, administrative law judges, county prosecutors, and members of the Board of Public Utilities, the SCI, and the Casino Control Commission.

Regulations

The Commission readopted its contested transfer regulations, *N.J.S.A.* 19:18, and its regulations concerning definitions, service, and rules construction. *N.J.S.A.* 19:10. It declined to adopt a proposed regulation declaring certain documents, including showings-of-interest, to be public documents. The Commission will continue to respond promptly to requests for documents under the standards set forth in the Right-to-Know Law and common law cases.