STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PO Box 429
TRENTON, NEW JERSEY 08625-0429

www.state.nj.us/perc

ADMINISTRATION/LEGAL
(609) 292-9830
CONCILIATION/ARBITRATION
(609 292-9898
UNFAIR PRACTICE/REPRESENTATION
(609) 292-6780

For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089
EMAIL: mail@perc.state.nj.us

June 17, 2015

TO: Commissioners

FROM: Don Horowitz, Acting General Counsel

RE: Developments in the Counsel's Office Since May 13, 2015

Commission Cases

Court Decisions Received

State (Division of State Police) v. New Jersey State Trooper Captains Association, 2015 N.J. Super. LEXIS 91

In a published, thus precedential, decision, the Appellate Division of the Superior Court affirms the Commission's decision [P.E.R.C. No. 2012-71, 39 NJPER 54 (¶24 2012)] holding, with a few exceptions, that State Police Captains are neither managerial executives nor confidential employees and have the right to select a majority representative and engage in collective negotiations. While the case was in progress, the statutory definition of managerial executives in State employment was amended by the legislature. Following the Commission's decision, which applied the new definition, the case was remanded to the Director of Representation to determine (via a card check) if a majority of the eligible Captains wished to be represented by the Association. The Director so found and the Association was certified as the majority representative. The appeal by the State ensued.

Rutgers, the State University of New Jersey v. Union of Rutgers Administrators-American Federation of Teachers, et al. 2015 N.J. Super. Unpub LEXIS 1198

The Appellate Division of the Superior Court affirms the Commission's decision [P.E.R.C. No. 2014-41, 40 NJPER 289 (¶110 2013)] to grant Rutgers' application to restrain arbitration of a grievance that contests the assignment of non-unit members to perform boiler checks in the University's heating/cooling plants when unit members are on vacation. It was

undisputed that the work was performed by members of two different units of Rutgers employees although usually at different times.

Motions/Applications decided

1. On May 19, 2015, the Supreme Court denied petitions for certification seeking review of State of N.J. and Council of N.J. State College Locals, AFT, and Communications Workers of America, AFL-CIO, 2015 N.J. Super. Unpub. LEXIS 322. The Appellate Division of the Superior Court had affirmed in part and remanded in part the Commission's decision, P.E.R.C. No. 2013-52, 39 NJPER 301 (¶101 2013), dismissing a clarification of unit petition in which CWA and the Council of New Jersey State College Locals claimed that state college employees were no longer "managerial" and should be added to their respective units. The Appellate court:

1. Agreed with the Commission that the various boards of trustees of the state colleges, rather than the State, should be deemed the public employer.

2. Held that a determination should be made after a hearing to determine if the disputed titles are managerial.

The petitions filed by CNJSCL and CWA sought Supreme Court review of Issue #1.

2. The Appellate Division of the Superior Court has denied a motion to consolidate the appeals from Atlantic County [P.E.R.C. No. 2014-040] and Bridgewater Township [P.E.R.C. No. 2015-11]. While both cases involve the payment of salary increments after contract expiration, the Atlantic County appeal involves three unfair practice charges, while Bridgewater is a scope of negotiations ruling restraining arbitration. Because of the differences between the Commission's roles in unfair practice and scope of negotiations disputes, the General Counsel's office argued that the cases should not be consolidated. Several unions and employer organizations have been granted leave to participate as friends of the court in each appeal.

3. State of New Jersey and FOP Lodge 91, P.E.R.C. No. 2015-50

The Appellate Division of the Superior Court has denied the FOP's attempt to appeal the Commission's order remanding an interest arbitration award back to the arbitrator to apply the two per cent statutory cap in issuing an award that will establish the terms of a first contract.

New appeals

Essex County College, DA-2015-002

A College police officer, still in his probationary period, has appealed from the dismissal of his petition seeking arbitration of his firing. The Director of Arbitration noted that only

permanent police officers may seek review of dismissals through arbitration under N.J.S.A. 40A:14-209.

Town of Harrison, AR-2015-573

A group of retired police officers have appealed the Director of Arbitration's dismissal of a request for the appointment of an arbitrator to review their claim that a change in health insurance carriers violated the collective negotiations agreement between the Town and PBA Local 178. Unless the CNA expressly provides otherwise, only the majority representative may invoke binding arbitration.

Other Decisions

Pension Funding

Failure to make statutory mandated pension contributions did not violate contractual rights protected by federal and state constitutions.

Burgos v. State, 2015 N.J. LEXIS 566

The New Jersey Supreme Court overturns a Superior Court decision holding that a statute passed in 2011, requiring the State to make certain annual contributions to public pension funds, created an enforceable contract that is entitled to protection under the contracts clause of either the United States or New Jersey constitutions.

The Legislature added language to the pertinent portions of L. 2011, c. 78 explicitly declaring that each member of the State's pension systems "shall have a contractual right to the annual required contribution amount" and the failure of the State to make the required contribution "shall be deemed to be an impairment of the contractual right." In Fiscal Years 2012 and 2013 the State made the required contributions and the Appropriations Act for FY2014 allocated the required amount. However just before the end of FY 2014, the Governor issued an executive order reducing the payments for that Fiscal Year. The FY2015 budget was revised to show a total contribution of $681 million, reflecting $1.57 billion less than what was required.

Most of the major unions representing public employees filed a lawsuit challenging the failure to fully make pension contributions for FY2014 and FY2015 as set forth in Chapter 78. On February 23, 2015, the trial court granted summary judgment on the impairment-of-contract claims. The trial court accepted plaintiffs' argument that Chapter 78 created a contract and that the State's failure to appropriate the full value of the required contributions for FY2015 substantially impaired plaintiffs' rights under that contract in violation of both the Federal and State Contracts Clauses.

Five justices joined in the majority opinion, written by Justice LaVecchia. The Supreme Court held that Chapter 78 did not create a legally enforceable contract entitled to constitutional protection as the Debt Limitation Clause of the New Jersey constitution prevented the creation of an enforceable contract compelling financial payments in the amounts called for by Chapter 78; and the Appropriations Clause, N.J. Const. art. VIII, § 2, para. 2, gave the legislature the sole authority to appropriate funds; and envisioned no role for the Judiciary in the annual budget-making process, therefore preventing it from having to decide in that process whether a failure to fully fund a statutory program, including one labeled a contract was reasonable and necessary.

The Court reasoned that a Contracts Clause analysis would require the annual participation by the Judiciary in spending priorities and perhaps even revenue-raising considerations. The Court found that under the Debt Limitation Clause and the Appropriations Clause the budget process remains with the Legislature and Executive, the branches accountable to the voters.

A dissenting opinion authored by Justice Albin and joined in by Chief Justice Rabner questioned the reasoning of the majority with respect to their application of the Debt Limitation Clause and Appropriations Act, but said that in any case the contracts clause of the U.S. Constitution protected the commitments made by Chapter 78.

Discipline, Discharge and Discrimination

Arbitrations of Tenured Teacher dismissals; Pre-TEACH NJ performance

Pugliese v. State-operated School District of the City of Newark
Chavez v. State-operated School District of the City of Newark, 2015 N.J. Super. LEXIS 83

In a published, thus precedential, decision addressing procedural and substantive issues arising under the tenured teacher dismissal procedures of the TEACH NJ Act, the Appellate Division of the Superior Court reverses trial court decisions upholding arbitration awards dismissing two tenured teachers. The alleged poor performance of both teachers occurred before the enactment of TEACH NJ and prior to the adoption of required evaluation rubrics. But the arbitration hearings were held under the procedures established by TEACH NJ. The two arbitrators applied different standards to determine if the teachers should be dismissed for ineffective or inefficient performance. The appeals court remands the cases to the Department of Education to determine:

- The validity of legal defenses raised by each teacher deemed appropriate for agency resolution in order to establish uniform procedures

- The appropriate standards to be used by arbitrators when adjudicating tenure hearings

- A consistent procedure for teachers who have received tenure charges after the effective date of TEACHNJ, that allege poor performance that occurred before new standards were adopted.

Twelve month school employees: eligibility for unemployment benefits.

Branchburg Tp. Bd. of Ed. v. Board of Review, et al. 2015 N.J. Super. Unpub. LEXIS 1124

The Appellate Division of the Superior Court affirms a decision holding that a custodian employed for a 12-month term was eligible for unemployment benefits during the summer. A statute bars 10-month education employees from receiving benefits during the summer recess if they have received a reasonable assurance of employment in the succeeding school year. The court agrees that the custodian had no reasonable assurance that he would have a job after the summer and holds that his initial hiring as a substitute had no bearing on benefit eligibility.

Civil Service Police officer; termination for feigned sickness; progressive discipline

In the Matter of Joao Barbosa, City of Newark, Police Department 2015 N.J. Super. Unpub. LEXIS 1175

The Appellate Division of the Superior Court upholds a Civil Service Commission (CSC) denying Barbosa's disciplinary termination from the Newark police department for repeated violations of its sick leave policy including feigning illness. In his third violation, Barbosa had called in sick saying he had a migraine, but was seen in a bar during what would normally be his shift for that evening. He had previously received 10 day and 60 day suspensions for similar misconduct. The Court held that the CSC's acceptance of an Administrative Law Judge's recommendation to sustain the termination was not arbitrary and the penalty was not excessive.

Ticket and arrest quotas; discipline

Phillipsburg Policemen's Benevolent Ass'n Local 56 v. Town of Phillipsburg, 2015 N.J. Super. Unpub. LEXIS 1053

The Appellate Division of the Superior Court reverses a trial court ruling upholding most of the Phillipsburg's police department's "Self Directed Patrol Index Policy." The PBA argued that the policy violates a state law banning the establishment of quotas for the issuance of motor vehicle citations. The trial court implied that the policy, which also addressed narcotics and burglary arrests as well as other matters unrelated to the vehicle code, may be invalid to the extent it addressed the issuance of motor vehicle citations. The trial court refused to set aside discipline against two officers who had allegedly not achieved the minimum score set by the index policy. The appeals court finds there are insufficient facts in the record to determine if the Index Policy establishes *de facto* quotas, and remands the case for additional fact-finding.

Police: entitlement to attorneys fees for successful defense of disciplinary charges

McCracken, et al. v. Township of Bloomfield, et al., 2015 N.J. Super. Unpub. LEXIS 1240

The Appellate Division of the Superior Court affirms an award of attorneys fees to two officers. Disciplinary charges against McCracken and another officer alleging they had failed to submit military request forms for dates they claimed they were on active duty were later dismissed by the Township. In a Superior Court action, originally filed by the officers seeking the disqualification of two Township attorneys from participating in the disciplinary process, the officers filed a motion seeking attorneys fees under N.J.S.A. 40A:14-155, asserting that the charges "[arose] out of and [are] directly related to the lawful exercise of police powers in furtherance of his official duties[.]" The trial judge awarded fees after determining that the proper reporting of leave time was part of an officer's official duties. The trial judge rejected the Township's arguments that the statute did not apply because the officers were not technically defendants and that the counsel fees were excessive. The appeals court affirms agreeing that the officers were lawfully exercising police powers in furtherance of their official duties when they completed and submitted their military leave reports.

Discharged officer's offenses warranted partial forfeiture of pension credit

Orosz v. Board of Trustees, Police and Firemen's Retirement System, 2015 N.J. Super. Unpub. LEXIS 1291

The Appellate Division of the Superior Court affirms the PFRS Board's ruling that a discharged police officer's misconduct warranted a partial forfeiture of his pension service credit. The court holds that the Board's rejection of an Administrative Law Judge's recommendation that the officer should not forfeit any pension credit was within its authority and did not violate the limitations imposed by the Administrative Procedure Act concerning an agency head's rejection or modification of an ALJ's findings. The court rejected the officer's argument that because the Attorney General's office both prosecuted the pension forfeiture case and defended the pension board's decision on appeal, an impermissible conflict of interest was created.

Termination reversed; employer did not prove that laborer psychologically unfit for duty

In re Kevin Kingston, Township of Verona, 2015 N.J. Super. Unpub. LEXIS 1286

The Appellate Division of the Superior Court affirms the Civil Service Commission's (CSC) decision reversing Verona's discharge of a laborer. After Kingston overheard a co-worker complain about his attendance record, Kingston grabbed him and pushed him against a table. No punches were thrown and no injuries occurred. Prior to the incident Kingston had no infractions during his 20 years as an employee. Ultimately Verona and Kingston entered into an agreement providing that the laborer would serve a 130 day unpaid suspension and would undergo a fitness-for-duty examination before returning to work. A psychologist hired by the Township and one

retained by Kingston, who provided therapy to him, differed on his fitness for duty. The Township adopted the views of its psychologist and issued a notice terminating the laborer.

Kingston's appeal to the CSC was heard by an Administrative Law Judge who concluded, based in part, on testimony from both therapists that the laborer was not suffering from a mental illness that would render him unfit to return to duty. He recommended that Kingston be reinstated with back pay. The CSC adopted that recommendation. The Court rejected the Township's claim that the termination was justified because Kingston did not carry out all of his obligations under the settlement agreement, noting that the settlement addressed his suspension and not a termination. It held:

> [T]he ALJ applied the correct standard in requiring that Verona "demonstrate by a professionally acceptable validation method that the traits or characteristics used to disqualify [Kingston] were actually related to job performance.". . . Verona had the burden of proving Kingston's psychological unfitness for work.

Major Discipline/Demotion for sexual harassment reversed and remanded for hearing

In re F.P., Department of Corrections, 2015 N.J. Super. Unpub. LEXIS 1375

The Appellate Division of the Superior Court holds that factual disputes bearing on whether a supervisor sexually harassed a subordinate should have been resolved through an evidentiary hearing, preceded by an opportunity for discovery. It remands the charges to the Civil Service Commission. The Court holds:

- That, as a matter of due process and CSC regulations, a hearing is necessary to resolve critical, disputed issues of material fact;
- The CSC's ruling, that a hearing was unnecessary, was arbitrary and capricious;
- The Departmental decision was made on a broader record than was considered by the CSC or disclosed to the disciplined employee;
- Because the sanction constituted major discipline, the employee is entitled to proceedings "conducted with fundamental fairness, including adequate procedural safeguards."

Discharge of Civil Service Laborer; Progressive Discipline; No Review through arbitration

In re Dabney, Atlantic City Municipal Utilities Authority, 2015 N.J. Super. Unpub. LEXIS 1337

The Appellate Division of the Superior Court affirms a Civil Service Commission decision upholding the disciplinary removal of a laborer employed by the Utilities Authority. The employee had a long history of discipline. The Court held that the past infractions could not be questioned and also ruled that the employee had no recourse to challenge his termination

pursuant to the grievance procedure of the collective negotiations agreement that covered him. Citing the "alternate statutory appeal procedure" portion of N.J.S.A. 34:13A:5.3, the court holds:

> [I]f a local public employee facing major discipline is in the civil service, or otherwise has an alternative statutory remedy against alleged unjust discipline, then binding arbitration of that grievance, otherwise authorized as part of negotiated disciplinary procedures, may not be invoked.

Age and political affiliation discrimination claim by HVAC tech

Keogh v. Passaic Valley Sewerage Commission, et al. 2015 N.J. Super. Unpub. LEXIS 1164

The Appellate Division of the Superior Court reverses a trial court's dismissal of a lawsuit filed by a discharged HVAC technician. In a meeting prior to his termination, the H.R. Director told Keogh that, although he had done nothing wrong, he was being fired. Shortly thereafter a younger person was hired into Keogh's position. Keogh was widely known to be a Democrat, while most of the Authority members were Republicans. The appeals court holds that Keogh's amended complaint stated prima facie cases of age discrimination and political discrimination. The case was remanded to allow Keogh to pursue his claims.

Discharged Port Authority police officer may not file CEPA action in N.J.

Alpert v. Port Authority, 2015 N.J. Super. Unpub. LEXIS 1215

A Port Authority police officer filed a lawsuit alleging he was discharged for reporting that candidates for promotion were given the answers to a written exam by a superior officer before it was administered. He also asserted that the candidates were given private training sessions. The Port Authority is a bi-state agency governed by federal compact. The Law Division of the Superior Court held that no applicable term of the compact, as amended, addressed whistle-blower lawsuits. The court noted that if both New York and New Jersey had adopted substantially similar whistle-blower laws, a lawsuit might be maintainable. However, she concluded that there were numerous substantive, procedural and remedial differences between the whistle-blower laws of New York and New Jersey that prevented their applicability to the Port Authority or its employees.

Grievance Arbitration Cases

Trial court is forum to review public sector grievance arbitration awards

County of Hudson v. PBA Local, 109, 2015 N.J. Super. Unpub. LEXIS 1263

The Appellate Division of the Superior Court reverses an order of Law Division dismissing the County's application to vacate a grievance arbitration award. The trial court held

that the application had to be filed under R. 4:67-6 which applies to actions to enforce administrative agency orders. Both the County and the PBA agreed that the trial court's ruling was incorrect and the appeals court concurred. It held that a grievance arbitration award is not an administrative agency decision and applications to vacate, confirm or modify an award are to be heard in trial court pursuant to N.J.S.A. 2A:24-7.

Compensation for teaching classes in excess of negotiated limit

Willingboro Bd. of Ed. v. Willingboro Ed. Assoc., 2015 N.J. Super. Unpub. LEXIS 1276

The Appellate Division of the Superior Court affirms a trial court order confirming an arbitration award sustaining an Association grievance. The most recent collective negotiations agreement explicitly provided that when teachers were assigned to work a sixth period, they would receive specified additional compensation. After the agreement expired the Board implemented a block scheduling system, which did not change the number of minutes normally worked and did not exceed the extra compensation threshold (225 minutes). However, in the next school year, the Board unilaterally modified the schedule of all secondary school teachers resulting in the regular assignment of 270 minutes. The Association grieved the Board's action. In the interim a new CNA was reached which did not change the pertinent sections of the prior contract. The appeals court relied upon the reasoning of the trial judge. The opinion discusses N.J.S.A. 34:13A-33 providing that, during negotiations for a successor agreement, school employers may not "unilaterally impose, modify, amend, delete or alter any terms and conditions of employment as set forth in the expired or expiring collective negotiations agreement, or unilaterally impose, modify, amend, delete, or alter any other negotiable terms and conditions of employment, without specific agreement of the majority representative."

Public Records

Investigatory records concerning fatal police shooting of burglary suspect

North Jersey Media Group, Inc. v. Township of Lyndhurst, et al., 2015 N.J. Super. LEXIS 96

Applying public records exemptions regarding ongoing criminal investigations and criminal investigatory records, the Appellate Division of the Superior Court, in a published, thus precedential opinion, reverses a trial court order directing that the records custodians of three municipalities and the New Jersey State Police release additional records requested by reporters from two newspapers. The incident sparking the requests, made under the Open Public Records Act (OPRA) and the common law right of access, was the fatal shooting of a burglary suspect following a high speed chase through three municipalities. After the chase ended when the suspect crashed his car, he allegedly attempted to ram police cruisers, at which point he was fatally shot. The case was remanded to the trial court to apply the appeals court's construction of OPRA, the common law the exemptions thereto and procedures regarding in camera inspection of the requested documents.

Data concerning mandatory school security drills

WNBC v. Allendale, et al., 2015 N.J. Super. Unpub. LEXIS 1330

A Superior Court judge holds that a New York City television station is not entitled to unredacted records showing when mandatory fire drills and school security drills were conducted by various school districts. A WNBC reporter sought, pursuant to the Open Public Records Act and a common law right of access, the records to gather data for a story on whether and how the various school districts were carrying out the drills. Some districts responded that based on the security exemption in OPRA, the records could not be released unless data showing the "date, time and duration" of past drills were redacted. The Court upheld the position of the districts as to both OPRA and the common law right of access. Judge Contillo reasoned:

> [D]efendants' interest in protecting school safety and security outweighs plaintiffs interest in receiving unredacted records. The court's concern is aptly summarized by counsel for the Allendale defendants. Although the day/time/duration data for one drill in isolation might not jeopardize safety or security, there is a greater risk such interests will be infringed where, as here, disclosure is sought from twelve separate school districts over a period of more than two years. In such a case, the chances are greater an ill-intentioned individual could utilize that information to facilitate execution of a malevolent plan on school premises. At the same time, the court is cognizant of this State's strong public policy favoring access to government records. Surely, some benefit could derive from compelling unredacted access to the day/time/duration data. Having this information, in addition to the unredacted data, certainly provides a more transparent window into these drills, but at a cost to the safety and security of the schools. That cost is not imaginary or de minimis. Specific and material harm may flow from and/or be facilitated by disclosure, which settles the issue in favor of defendants.