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August 5, 2015

TO: Commissioners

FROM: Don Horowitz, Acting General Counsel

RE: Developments in the Counsel's Office Since June 25, 2015

Commission Cases

Court Decisions Received

Temporary layoffs/furloughs in times of fiscal crisis

Borough of Keyport v. Int'l Union, ___ N.J. ____, 2015 N.J. LEXIS 790

The New Jersey Supreme Court holds, by a vote of 4-1, that three public employers, faced with fiscal distress, were not obligated to negotiate with the majority representatives of their employees over the implementation of temporary furloughs/layoffs which reduced the work hours and compensation of their employees. The Court, applying the negotiability test of In re IFPTE Local 195 v. State, 88 N.J. 393 (1982) affirms, but modifies, the decision of the Appellate Division of the Superior Court, that had reversed the Commission's rulings holding that the employers' actions involved mandatorily negotiable subjects.[1] The Appellate Division [2013

[1] The Commission decisions are:

Borough of Belmar and CWA, AFL-CIO, P.E.R.C. No. 2011-34, 36 NJPER 405 (¶157 2010); Borough of Keyport and International Union of Operating Engineers, Local 68, P.E.R.C. No. 2011-20, 36 NJPER 343 (¶133 2010); Tp. of Mt. Laurel and Communications Workers of America AFL-CIO and AFSCME Council 71, P.E.R.C. No. 2011-35, 36 NJPER 409 (¶158 2010).

N.J. Super. Unpub. LEXIS 420] held that the changes were not mandatorily negotiable because: negotiations were preempted as the employers were acting pursuant to an emergency regulation adopted by the Civil Service Commission; and, on balance, the impact on employees was outweighed by the employers' managerial prerogatives to respond to fiscal exigencies.

The Supreme Court disagreed that the Civil Service Commission's emergency regulation (no longer in effect) preempted negotiations as it left public employers with alternatives and did not mandate that temporarily layoffs/furloughs be used to meet a fiscal crisis. However it agreed that, under the third prong of the Local 195 test the actions taken by the public employers were non-negotiable:

> In recognition of that clear expression of legitimate public policy authorizing such actions to be taken, it appears to us that a decision to reduce the workforce of employees within an identified layoff unit, even on a temporary basis in accordance with a duly authorized temporary layoff plan, is as much a managerial prerogative as the decision to layoff permanently, or to subcontract a function permanently or on a temporary basis.

Justice Albin dissented, asserting that the majority opinion overturns 50 years of public sector jurisprudence:

> This Court has never held that the process of collective negotiations of wages and hours can be bypassed by a public employer unilaterally arrogating to itself the power to reduce wages and hours.
>
> * * *
>
> Whatever else terms and conditions of employment may mean, it has been universally accepted that wages and hours are terms and conditions of employment that public employers must negotiate with their employees.

New appeals

1. Belleville Bd. of Ed., P.E.R.C. No. 2015-79
   The employer has appealed the Commission's decision finding it committed unfair practices by refusing to negotiate about the severable affects on employee working conditions affected by the installation of security cameras and electronic ID badges. The Commission also found that the Board violated the Act by taking adverse action against an employee for his protected activity in advancing employee concerns about the security measures.

2. Belleville Bd. of Ed., P.E.R.C. No. 2015-72,
The employer has appealed from the portion of the Commission's order declining to restrain arbitration over a grievance challenging the Board's decision as to which of two assistant baseball coaches should be retained after the Board eliminated one assistant coaching position.

3. Jersey City Housing Auth., ISWA and Crawford, P.E.R.C. No. 2015-70
Crawford appeals from the Commission's adoption of a Hearing Examiner's conclusion that Authority and ISWA did not collude to cause Crawford to lose seniority and be laid off.

4. Borough of Oakland and PBA Local 164, P.E.R.C. No. 2015-75
The PBA has appealed the Commission's decision affirming an interest arbitration award setting the terms of a collective negotiations agreement covering calendar years, 2014, 2015 and 2016.

Other Decisions

Discipline, Discharge and Discrimination

Craig Pierson v. Chief of Police John Scrivanic, et al., 2015 N.J. Super. Unpub. LEXIS 1462

The Appellate Division of the Superior Court affirms the decision of a trial court judge setting aside minor discipline (a one day suspension) imposed on a Tinton Falls police officer. The officer had responded to a resident's complaint about a car alarm from a vehicle in front of her house that had been going off continuously for 45 minutes. Initially the owner of the car could not be located and the officer was authorized to have the car towed and impounded. The owner then arrived with her children but without a key for the car. The officer cancelled the tow order and decided to push the car (which had a manual transmission), with the owner steering, to a non-residential area a short distance away. However, after the patrol car stopped pushing, the driver/owner lost control of the car and it went over a curb and into a pole at a slow speed.

After a second internal investigation report was issued, a one day suspension was recommended. The officer appealed the suspension to the Superior Court which found that discipline was not warranted.

Demotion motivated by political discrimination

In the Matter of Umar Salahuddin, Atlantic City , 2015 N.J. Super. Unpub. LEXIS 1668

The Appellate Division of the Superior Court overturns the decision of the Civil Service Commission declining to adopt the findings and recommendation of an Administrative Law Judge which concluded that an employee was unlawfully demoted for political reasons.

Just cause not required for termination of municipal administrator despite agreement

Ernesto Munoz v. Town of West New York, 2015 N.J. Super. Unpub. LEXIS 1795

The Appellate Division of the Superior Court upholds a trial court ruling that West New York need not have cause to terminate its municipal administrator where it acted in accordance with pertinent Title 40A statutes (N.J.S.A. 40A:9-137 and 138). Munoz was hired under a written employment agreement which read:

> [C]ommencing on October 1, 2011 and ending on October 2, 2014, unless terminated earlier by the Board of Commissioners in accordance with this agreement. Nothing contained herein shall preclude the Town from terminating Ernesto Munoz for cause, said termination to take effect 30 days following the town's issuance of notice of termination or as otherwise provided by Ordinance.

The statutes provide that a municipal administrator's term of office is at the pleasure of the governing body and allows removal by a 2/3 vote effective three months thereafter or, if the removal is immediate, salary and benefits shall be paid for an additional three months. Munoz was terminated by a unanimous vote in August, 2012, retroactive to July 1, 2012 and was paid an additional three months salary and benefits. The trial and appellate courts rejected his argument that the Township could only end his employment during the contract term for just cause.

Alleged workplace discrimination against a public employee running for office

Marrero v. Twp. of N. Bergen, 2015 U.S. Dist. LEXIS 100360

A U.S. District Court dismisses a civil rights suit filed by a North Bergen police sergeant, who had announced his candidacy for County Freeholder, alleging that North Bergen Township and other defendants retaliated against him for exercising his First Amendment rights. With respect to matters relating to his job Marrero alleged that an internal affairs complaint was filed against him for harassment in order to "punish and destroy [his] declared candidacy, professional law enforcement and political careers." He also complained that, on certain occasions, "unidentified individuals" at the North Bergen Police Department opened his personal and inter-office mail. .Additionally, Marrero alleges that while he was lawfully campaigning in front of a public school, North Bergen "caused four police vehicles and school security to...physically remove him from the area." With respect to his allegations of retaliation affecting his job the Court finds "Marrero has alleged no facts that would tend to show that his protected speech was a "substantial or motivating" factor behind those retaliatory acts.

Grievance Arbitration Cases

Time on temporary layoff counted as service time for recalled officers

Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 2015 N.J. Super. Unpub. LEXIS 1777

The Appellate Division of the Superior Court affirms a trial court decision confirming a grievance arbitration award. Based upon contract language, ordinances and past practice, the arbitrator held that the period between a police officer's layoff and the officer's recall back to active service was to be counted toward's salary guide placement and service time for receipt of longevity payments. The Court rejects the City's arguments that the award should be set aside because: (1) it was based on incomplete evidence and (2) the arbitrator did not consider the fiscal impact of the award.

On the evidence argument, the Court observes:

> Of course, the incompleteness of the information before the arbitrator was the result of the City's unexplained failure to submit it to her in the first place.

Addressing fiscal impact, the opinion notes:

> [T]his case does not present a situation in which there is any evidence that implementation of the arbitrator's award could result in layoffs or a reduction in services to the public. The award affects approximately seventeen officers and credit for approximately fifteen months of service. In addition, as the trial judge noted, in asserting that the award will be costly, the City speaks in only generalities without supporting its position with specific facts.

Discharge of custodian after contract renewal is arbitrable

Burlington County Institute of Technology, v. Burlington County Institute of Technology Education Association, 2015 N.J. Super. Unpub. LEXIS 1570

The Appellate Division of the Superior Court upholds a trial court decision granting summary judgment to the Association and denying the Board's request to restrain arbitration of a grievance challenging the Board's decision to terminate a custodian who was recommended for reappointment by the Superintendent and was offered an employment contract for the next school year. Shortly after the contract tender, the custodian was accused of making a threat against another employee and was suspended and then terminated. The collective negotiations agreement provides for binding arbitration of discipline. The Board attempted to portray its action as a "rescission" under Roberts Rules of Order. The trial court relied upon the presumption of arbitrability in N.J.S.A. 34:13A-5.3 in ruling that arbitration should not be restrained. In affirming, the appellate court holds that the employer's "basic premise that a non-renewal is the equivalent of the rescission of an awarded contract is fatally flawed."

Demotion of Supervisory Probation Officer not contractually arbitrable.

State v. Probation Ass'n of N.J., 2015 N.J. Super. Unpub. LEXIS 1614

The Appellate Division of the Superior Court upholds a trial court decision restraining arbitration of a grievance challenging the demotion of a supervisory probation officer. Both courts rely on specific contract language providing:

> [T]he Judiciary has the non-reviewable right to remove employees in Team Leader and Supervising Probation Officer positions from those positions and said actions shall not be deemed to be discipline and subject to the disciplinary appeal procedure, grievance procedure and/or arbitration procedure.

The trial court had rejected PANJ's application to have the dispute transferred to the Commission. In affirming the appeals court noted:

> The issue before us is limited to whether the demotion of a team leader pursuant to Article 9.8 can be grieved or arbitrated. The Judiciary does not argue that Article 9.8 allows it to demote team leaders for improper reasons or with impunity. Neither Article 9.8 nor our decision preclude Sant'Ana from bringing suit against the Judiciary on the basis that she was improperly demoted because she was a union member. . .