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January 20, 2016

TO: Commissioners

FROM: Counsel Staff

RE: Developments in the Counsel's Office Since December 9, 2015

Commission Cases

In the Matter of the State of New Jersey and New Jersey Law Enforcement Supervisors Ass'n, __ N.J. Super. ___ (App. Div. 2016)

In a published opinion, the Appellate Division of the Superior Court affirms State of New Jersey, P.E.R.C. No. 2014-60, 40 NJPER 495 (¶160 2014), where the Commission affirmed a compulsory interest arbitration award, I.A. 2014-003. The Court rejected the Association's argument that the arbitrator should have used its scattergram and methodology, rather than the State's, to calculate the cost of the salary award in determining whether the award complied with N.J.S.A. 34:13A-16.7(b), commonly known as the 2% salary cap. The Court also rejected the Association's argument that the Commission's decision contravened earlier ones interpreting the Interest Arbitration Reform Act not to provide for the majority representative to be credited with savings that a public employer receives from retirements or other cost reduction due to changes occurring after the scattergram is prepared, nor for the majority representative to be debited for any increased costs to the public employer on account of promotions and other costs associated with maintaining the workforce reflected in the scattergram. A copy of the Court's decision is attached.

In the Matter of the City of Newark, App. Div. Dkt. Nos. A-003904-14T3 and A-003905-14T3 (Nov. 23, 2015)

The Appellate Division issues a form order granting the Commission's motion to dismiss the City of Newark's appeal from City of Newark and Newark Police Superior Officers' Ass'n, H.E. No. 2015-8. A Hearing Examiner, in a consolidated unfair practice case, concluded that the City violated the Act by repudiating a grievance decision issued by its Police Director. The decision settled and sustained grievances asserting the City violated its contract with the SOA with regard to the amount and timing of lump sum payments due to retiring officers. The City did not file exceptions to the Hearing Examiner's decision.

Rutgers, the State University and Brian Clancy, App. Div. Dkt. No. A-_____.

A former Rutgers University police officer, Brian Clancy, appeals from a decision of the Director of Conciliation & Arbitration to dismiss, as untimely, Mr. Clancy's request pursuant to N.J.A.C. 19:12-6.1 to -6.8 for appointment of a member of the Special Disciplinary Arbitration Panel.

Other Cases

Reprimand of shop steward upheld: listing of co-employee's name deprived e-mail of protection

In re Jeffrey Burdsall, Judiciary, Vicinage 15, 2015 N.J. Super. Unpub. LEXIS 2862

In an unpublished decision, the Appellate Division affirms the decision of the Civil Service Commission upholding the Judiciary's finding that Burdsall engaged in conduct unbecoming a public employee, but reducing a 15-day suspension to a written reprimand.

Burdsall, a senior probation officer and shop steward for the Probation Association of New Jersey, was sent an e-mail that forwarded a message from the vicinage chief probation officer addressing concerns about adherence to attendance and timekeeping procedures. The person forwarding the e-mail referred to D.K., a supervisory employee, questioning whether D.K. adheres to the policies mentioned in the chief's message. Burdsall then composed an e-mail to the vicinage chief probation officer and many others that mentioned D.K. by name and which questioned whether corrective actions were being pursued regarding all those with attendance issues. He identified himself as a PANJ shop steward.

After D.K. complained about the e-mail, an investigation was conducted resulting in a 15-day suspension. On appeal, an Administrative Law Judge recommended that the charges be dismissed. The Appellate Division rejects Burdsall's arguments, including his claim that the sending of the email was a protected union activity. The Court commented:

> [T]he Commission properly focused on appellant's "superfluous inclusion"of D.K.'s name in the email in question and the fact that

> appellant's email was sent to both union and non-union officers. These circumstances belie any suggestion that appellant did not single out D.K. for harassment or that appellant was merely acting in his capacity as a shop steward in sending the email. Moreover, as the Commission noted in its written decision, even if appellant intended to pursue an issue of importance to the union, he showed poor judgment "in needlessly including [D.K.'s] name in his widely-circulated email."

Police Discipline: stipulation as to departmental hearing made Court fact-finding unnecessary

Carnevale v. Borough of Roseland Police Department, 2015 N.J. Super. Unpub. LEXIS 2910

The Appellate Division affirms a trial court's decision imposing discipline on a non-civil service police officer pursuant to the appeal procedures set forth in N.J.S,A. 40A:14-147 *et seq*. The officer's contention that the trial judge failed to make independent findings of fact is rejected as his counsel and the employer's attorney agreed to reconstruct the record of the internal disciplinary hearing conducted by the Borough. The Court also finds that the five-day suspension imposed on the officer was not "wholly excessive and disproportionate," as claimed by the officer, as he had served a one-day suspension for a previous offense. The discipline resulted from the officer's misapplication of policy regarding access to Borough Hall on nights of public meetings.

Fair Labor Standards Act: "Muster Time" compensable; time commuting in police vehicle is not

Hughes v. Twp. of Franklin, 2015 U.S. Dist. LEXIS 171252

In their complaint, current and former Township law enforcement officers allege that the Township "fail[ed] and refus[ed] to properly compensate [them] for otherwise compensable pre-shift work, in accordance with an 'established' practice incorporated into the parties' collective bargaining agreement that required officers 'to report' ten minutes prior to their scheduled shift." They also allege that the Township violated the Fair Labor Standards Act (FLSA) by:

> (1) unlawfully requiring them to report to work ten minutes in advance of their assigned shifts and not paying them at either regular or overtime rates of pay;
>
> (2) requiring and/or permitting them to work beyond the end of their shift without compensation; and
>
> (3) failing and/or refusing to pay them for duty work performed on the way to the police station pre-shift start time.

The Township moved for summary judgment asserting that (1) it operates in accordance with the FLSA; (2) police officers are compensated for muster time as a component of their base salaries; and (3) the officers' use of Township police vehicles for commuting to and from the police station is not compensable time under the FLSA. The federal district court denies summary judgment regarding the "muster time" claims, finding that genuine issues of material fact exist as to that claim, but dismisses the complaint as it relates to official duties allegedly performed on the way to the police station.