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October 13, 2016

TO: Commissioners

FROM: Counsel Staff

RE: Developments in the Counsel's Office Since September 14, 2016

Commission Cases

New Appeals

State and State Troopers Fraternal Association, P.E.R.C. No. 2017-20

The Association is appealing the Commission's decision that modifies a remanded interest arbitration award (IA 2016-003). The Commission's decision removed a provision from the award that required the State, on the final day of the new successor agreement, to advance Troopers on the salary guides of the agreement as though step movement had never been frozen on account of the 2% hard cap and the cost of step movement under the expired agreement. All other aspects of the remanded awarded were affirmed.

Decisions in Commission Cases

Appeal over health care contribution rates dismissed as moot

In re Clementon Bd. of Educ. & Clementon Ed.Ass'n, 2016 N.J. Super. Unpub. LEXIS 2163

The Appellate Division of the Superior Court dismisses as moot the Association's appeal from P.E.R.C. No. 2016-10. The parties were negotiating a successor agreement, the first year of

which would have been the fourth (top) tier of employee health care contribution levels mandated by L. 2011, c. 78. The Association proposed that in subsequent years of the successor agreement, the contribution rate be lowered to 1.5 per cent, the minimum level mandated by L. 2010, c. 2 or alternatively to another rate below the top tier. The Commission held that because of Chapter 78's reference to "the next collective negotiations agreement" after the top tier had been reached, the Association's proposal was preempted by the statute. However, the Commission's opinion hypothesized that if the parties entered into a one-year agreement containing the top tier contribution rate, they were free to negotiate different rates in the next CNA after the one-year contract. While the case was pending on appeal, the Board and the Association executed a one-year agreement containing the top tier rate, followed by a three-year agreement with contributions below the top level. In light of those circumstances, the Court held that the dispute was moot and observed that the issues raised "are best litigated and decided in another case with an actual, unresolved dispute between the litigants and in which affected interest groups from both sides might appear as [friends of the Court]." (decision attached)

Township lacks standing to appeal from dismissal of retirees' grievance arbitration request

In re Township of Harrison, 2016 N.J. Super. Unpub. LEXIS 2164

The Appellate Division of the Superior Court dismisses the Township's appeal from a decision of the Director of Conciliation and Arbitration declining to appoint a grievance arbitrator. A group of retired PBA members filed a grievance challenging the Township's change of health care provider. After the Township denied the grievance, the retirees filed an action in Superior Court to contest the change of carrier. That suit was dismissed without prejudice with the judge ruling that the retirees could seek relief from the Commission. The retirees then filed a request for appointment of a grievance arbitrator, which the Director denied, advising that unless arbitration was requested by the majority representative, they could not pursue arbitration as they were no longer employees. The retirees did not appeal from the Director's action. Instead the Township filed an appeal. The Court held that as the Commission's order did not harm the Township, it lacked standing to challenge the agency's action. (decision attached)

Other Cases

Retaliation against PBA President seeking promotion may violate First Amendment

Mrazek v. Stafford Twp., 2016 U.S. Dist. LEXIS 133257

The U.S. District Court for the District of New Jersey denies the Township's motion to dismiss the portion of a lawsuit alleging that the Township retaliated against Mrazek, the president of the local PBA, by ranking him last among candidates seeking promotion to sergeant because of his union activities, in violation of the First Amendment to the U.S. Constitution. The procedure adopted by the Township, a non-civil service municipality, called for eight candidates to advance to the second phase of the process based upon the scores of a written test (Phase I). However,

because of ties, the Chief allowed eleven of the sixteen candidates to advance to Phase II. After both Phase I and Phase II, which amounted to 80 per cent of the promotional process, Mrazek was ranked first. The last phase was a roundtable discussion by supervisors about the candidates. Following that phase, Mrazek was dropped from first to eleventh, or last place. The Court reviewed the protections afforded by the first amendment and noted that speech and conduct with the union are protected by the First Amendment right of association. The Court's ruling means that Mrazek can continue to pursue his First Amendment claim in the federal action.

Not all union speech/activity is protected by First Amendment

Killion v. Chief, 2016 U.S. Dist. LEXIS 132175

Applying the "matter of public concern" standard, the U.S. District Court for the District of New Jersey distinguishes between union speech/conduct that is pursued in the context of collective bargaining and other related activities, and union-related actions that are protected by the First Amendment. Pennsauken police officers alleged that they were subject to retaliation for having urged the implementation of twelve hour shifts. The Court rejects the officers' contention that all union activities are automatically protected by the First Amendment. It finds that the support of twelve hour shifts related only to the officers' working conditions and a dispute with management about an internal workplace policy, namely the length and scheduling of the officers' shifts, and that the officers did not seek to communicate to the public or advance a political or social point of view beyond the employment context. As such, the Court found that the activity was unprotected by the First Amendment.

Deviation from Attorney General's IA investigation rules did not taint disciplinary process

In re Biazzo, Pennsauken Police Department, 2016 N.J. Super. Unpub. LEXIS 2132

The Appellate Division of the Superior Court upholds major disciplinary sanctions imposed on Pennsauken police officers stemming from a physical altercation involving two of the officers at a local bar and subsequent violations of rules about reporting such incidents and officer locations. An Administrative Law Judge recommended that the charges be sustained and the Civil Service Commission (CSC) adopted that recommendation. On appeal, the officers argued that the discipline should be set aside because the Department's probe of the charges violated Attorney General (AG) guidelines on internal affairs investigations. While upholding the disciplinary sanctions, the Court commented:

- A law enforcement agency must implement and comply with the AG's guidelines;
- Normally, but not always, procedural irregularities at the departmental level are 'cured' by a subsequent plenary hearing before the CSC;
- If deficiencies in following the Guidelines taint the process, the discipline cannot stand.

The ALJ found the Department's non-compliance with several Guideline elements did not deprive the officers of a fair investigation or a fair hearing. The CSC accepted the ALJ's findings, and the Court held that the irregularities did not taint the process.

Discipline of officer unrelated to her request for FMLA leave does not establish willfulness for purposes of FMLA statute of limitations

Denson v. Atlantic County Dep't of Pub. Safety, 2016 U.S. Dist. LEXIS 132181

Claims of a county corrections officer that she was improperly denied FMLA leave and was subjected to retaliation for seeking the leave are held to have been barred by the statute of limitations for FMLA claims. The officer wanted to attend her aunt's funeral and asked if she had any leave remaining. She did not. Two days later, the officer called out sick and when a captain of her unit called to inquire about her absence, she told him she was not feeling well and was going to see a doctor. The officer did seek medical treatment. The next day, the day of the funeral, the officer called out sick again and sent a fax to work indicating that she was going to apply for FMLA leave. She left her residence that day without notice to her superiors and attended the funeral. When she returned to work four days later, the public employer issued two disciplinary notices to the officer for her alleged unauthorized absences. The officer was issued a one-day suspension for not providing all of the requested information when her superior asked her why she had called out sick the first day. The officer received a three-day suspension for leaving her home the second day without notifying her employer. On the employer's motion for summary judgment, the Court found that the discipline was unrelated to the officer's request for FMLA leave. The Court also found that there were disputed facts as to the viability of the claims, but nevertheless dismissed the action because the officer filed her complaint after the applicable two-year statute of limitations expired. The statute is extended to three years for willful violations of the FMLA, but the Court found no evidence of a willful violation.