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May 18, 2017

TO: Commissioners

FROM: Counsel Staff

RE: Developments in the Counsel's Office Since April 20, 2017

COMMISSION CASES

New Appeals

Judy Thorpe has filed a notice that she will petition the Supreme Court [Docket No. 079251] to review the decision of the Appellate Division of the Superior Court in re CWA, Local 1040, State of New Jersey and Judy Thorpe, 2017 N.J. Super. Unpub. LEXIS 717 (App. Div. Mar. 24, 2017) affirming the dismissal of Thorpe's unfair practice charges against her former employer, Juvenile Justice Commission, and her union, the CWA.

Joseph Isaacson has filed notice that he will petition the Supreme Court [Docket No. 079158] to review the decision of the Appellate Division in Isaacson v. Public Empl. Rels. Comm'n, A-2991-14T4, 2017 N.J. Super. Unpub. LEXIS 466 (App. Div. Feb. 27, 2017). The court affirmed the dismissal of Isaacson's request for the appointment of a special disciplinary arbitrator pursuant to N.J.S.A. 40A:14-209 to review the termination of his employment as a Hardyston Township police officer because his conduct could have provided the basis for criminal charges.

Cases related to Commission cases

Former Camden police not hired by County-wide department could not relitigate claims

McEady v. Camden County Police Department, Docket No. A-3925-15T1, 2017 N.J. Super. Unpub. LEXIS 974 (App. Div. April 21, 2017)

The Appellate Division of the Superior Court affirms the trial court's order dismissing a civil action filed by former Camden City police officers who were terminated after the city police department was absorbed into a county-wide police force and they were not hired by the new department. The courts found that the plaintiff-police officers had an opportunity to litigate their claims in a prior civil action filed by their union, to which they were added as plaintiffs, challenging the reorganization of the police department. Both the trial court and the Appellate Division held that the second lawsuit, which alleged claims of discrimination, was precluded by the entire controversy doctrine, which generally requires all claims growing out of the same controversy to be asserted in a single action.

Award holding County violated CNA and past practice by ending release time upheld

County of Hudson v. PBA Local 109, Docket No. A-0328-15T4, 2017 N.J. Super. Unpub. LEXIS 1118 (App. Div. May 8, 2017)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court decision confirming a grievance arbitration award. The arbitrator denied in part and sustained in part the PBA's grievance challenging the County's directive reassigning the PBA president from a 9-to-5 shift to a 6-to-2 shift and ending an alleged past practice of providing him full release from work duties so he could engage in union business.

The arbitrator directed that the County restore the PBA President to the 9-to-5 shift and to release the PBA President from work duty, but only between the hours of 2 p.m. and 5 p.m. The arbitrator also directed that the PBA President work a normal duty assignment from 9 a.m. through 1:30 p.m. unless he required release time during that part of his shift, in which event he would have to provide 48 hours notice and obtain approval of the release from duty.

In holding the award was reasonably debatable, the Appellate Division recited the standards for reviewing public sector arbitration awards. In response to the employer's staffing and public policy argument the court said:

> Here, the award permits one officer, in a collective bargaining unit consisting of approximately 450 officers, release time for part of his work day to attend to PBA activities. Given the limitation of release time to one officer for only a part of the work day, it is inconceivable that the award could involve an issue of safety or security or the inefficient use of taxpayer monies such as to "frustrate and thwart" public policy.

Finally, the Court held that the employer waived its public policy argument by not filing a scope of negotiations petition before PERC.

OTHER CASES

Overtime pay for unilateral schedule change

Middletown Township v. Middletown Township Police Superior Officers Association, Docket No. A-3222-15T4, 2017 N.J. Super. Unpub. LEXIS 1101 (App. Div. May 5, 2017)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court decision confirming a grievance arbitration award. The Township and the union representing the Township's patrol officers entered into a negotiated agreement whereby patrol officers worked a schedule consisting of 10 ½ hour days as of January 1, 2012. The Township then directed that superior officers in the patrol division work the same schedule necessitated by their supervision of the patrol officers. The negotiated agreement for the superior officers contained a provision allowing management to change hours worked but requiring any impact of the changes to be negotiated. The superior officers' representative (SOA) filed a grievance seeking overtime compensation for hours worked in excess of 8 per day.

In April 2012, the parties entered into an agreement to implement the schedule change but allowing the grievance to proceed. A memorandum of agreement (MOA) was signed in June providing that the modified scheduled would begin July 1 and that the SOA would seek no additional compensation in connection with the grievance after March 1. However, another provision recognized a grievance period between January 1, 2012 and March 29, 2012.

The arbitrator reconciled the apparent drafting conflict, relying on an uncontested certification from the SOA stating that the Township attorney mistakenly inserted the date of March 1, rather than March 29, into the MOA as the ending date for any relief awarded by the arbitrator. The parties' negotiated agreement contained a provision stating that lieutenants not regularly assigned to rotating shifts in the patrol and traffic divisions and detectives would be paid overtime for hours worked in excess of an 8-hour work day and any work week in a 7-day period of more than 40 hours. Another provision stated that a tour of duty would be for 8 hours. The arbitrator sustained the grievance, awarding overtime based on work in excess of 8 hours through March 29.

The court confirmed the award, finding it to be reasonably debatable.

Police Chief Not Entitled to Qualified Immunity on Claim That He Retaliated Against Union President in Connection with Promotions; But Township Not Liable for Chief's Conduct

Mrazek v. Stafford Township, Civil Action 13-1091, 2017 U.S. Dist. LEXIS 68893 (D.N.J. May 5, 2017)

This is an action filed by the police union president seeking damages from Stafford Township and its police chief for allegedly bypassing him for promotion based upon his union affiliation. In a prior decision mentioned in Counsel's October 2016 report (2016 U.S. Dist LEXIS 133257), the Court denied a summary judgment motion filed by the defendant township and chief on that claim, finding that there were disputed issues of fact requiring a trial. Here, the Court considers, and denies, the chief's motion for qualified immunity, which means that the chief may be held liable personally if the union president is able to prove his first amendment retaliation claim. In reaching that determination, the Court finds that negatively influencing a police promotion process because of an officer's union-related activities, if proven, would violate the First Amendment right to freedom to associate. The Court distinguishes a case also mentioned in Counsel's October 2016 report [Killion v. Chief, No. 13-1808, 2016 U.S. Dist. LEXIS 132175 (D.N.J. Sept. 27, 2016)], where the chief in that case was afforded qualified immunity, noting that there, the claim was not based on union affiliation, but rather, speech-related conduct.

Conversely, the Court grants Stafford's motion for summary judgment on the union president's claim that Stafford would be liable if he proves his underlying claim against the police chief, so-called Monell liability. A municipality may be liable for its employee's constitutional violation if the plaintiff shows that the employee acted pursuant to an official policy or custom. Here, the Court rejects, as erroneous, the union president's argument that the so-called "Chief's Bill of Rights's" statute, N.J.S.A. 40A:14-118, confers upon the chief authority to make policy with regard to promotions. Rather, the Court finds, the statute reserves to the governing body final authority for employment-related policy and decisions, including promotions.