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June 22, 2017

TO: Commissioners

FROM: Counsel Staff

RE: Developments in the Counsel's Office Since May 18, 2017

COMMISSION CASES

New Appeals

Paterson State Operated School District, P.E.R.C. No. 2017-63 (Dkt. No. SN-2016-083)

The District has appealed from the Commission's denial of its request for a restraint of binding arbitration of a grievance contesting alleged procedural violations in the implementation and submission of observation and evaluation reports.

West Orange Board of Education, P.E.R.C. No. 2017-60 (Dkt. No. SN-2017-013)

The West Orange Education Association has appealed the Commission's decision restraining arbitration of its grievance asserting that the Board violated a contractual provision and past practice when it denied an Association member's request to use supplementary sick leave so that her employer-provided health insurance coverage would continue during her extended leave of absence.

Superior Court, Appellate Division

Regulation mandates proration or reduction of leave allowances for employees on unpaid leaves

State of New Jersey v. New Jersey Law Enforcement Supervisors Association, 2017 N.J. Super. Unpub. LEXIS 1357 (Dkt No. A-4723-15T4)

The Appellate Division of the Superior Court, in an unpublished decision, affirms the Commission's determination [P.E.R.C. No. 2016-81, 42 NJPER 561 (¶156 2016)] that arbitration of grievances filed on behalf of two corrections superior officers was preempted by a civil service regulation. The regulation, N.J.A.C. 4A:6-1.5(b) , mandates the proration, or reduction, of leave time of employees who go on a leave of absence without pay before the end of the year except where the leave is a voluntary furlough. The officers had taken leave and collected workers compensation after being injured at work. The State deducted from their leave the vacation and sick days that would have otherwise accumulated during their leaves. The Commission held, and the Appellate Division concurred, that the proration was mandated by the regulation (decision attached).

Cases related to Commission Cases/Jurisdiction

Retroactive application of payout limit on accumulated sick leave violated vested rights; Individual employees cannot invoke PERC's scope jurisdiction

Barilla v. Board of Education of Cliffside Park , [Dkt No. BER-C-161-16 Ch. Div. 05/24/17)]

The Chancery Division of the Superior Court holds that the Cliffside Park Board of Education and the Cliffside Park Education Association could not enter into a collective negotiations agreement that retroactively diminished the value of accumulated, but unused, sick leave that employees would be eligible to receive on retirement. The parties' 2012 to 2015 CNA and several prior agreements provided for a maximum payment of $25,000 for accumulated but unused sick leave. To be eligible an employee must have retired with at least 10 years service in the district or have worked for 25 years in the district and separated from employment for any reason. In their 2015 to 2018 CNA the Board and Association agreed to lower the maximum to $15,000. Teachers who had accumulated unused sick leave valued in excess of $15,000 prior to July 1, 2015 filed a lawsuit in the Chancery Division of the Superior Court alleging:

1. The Board deprived the individual teachers of their vested contractual rights to deferred compensation in the form of payment for earned but unused accumulated sick leave; and

2. The Board violated Article IV, Section VII, Paragraph 3 of the New Jersey State Constitution and the New Jersey Civil Rights Act by impairing the earned, vested, and constitutionally protected contractual rights of the

individual teachers.

The parties stipulated the pertinent facts and moved and cross-moved for summary judgment. The Board asserted that the Court lacked jurisdiction as the case raised a negotiability issue within the primary jurisdiction of PERC. In a lengthy opinion, the Judge first rejects the Board's jurisdictional defense. The Judge notes that N.J.S.A. 34:13A-5.4(d) and PERC regulations allow only public employers and majority representatives, not individual employees, to file scope of negotiations petitions and points out that the Board has not invoked PERC's scope jurisdiction. The court finds that the suit involves a claim of vested contractual rights, not a negotiability dispute.

Applying prior cases, particularly Morris School District Bd. of Ed. and The Ed. Ass'n of Morris, P.E.R.C. No. 97-142, 23 NJPER 437 (¶28200 1997), aff'd 310 N.J. Super. 332 (App. Div. 1998); certif. den. 156 N.J. 407 (1998), the court grants summary judgment to the teachers on Count I holding that the Board, even with the agreement of the Association, could not diminish payment for accumulated sick leave. According to the Judge, such payments are a form of deferred compensation. Finding no pertinent New Jersey case discussing whether the constitutional ban on contractual impairment clause applies, summary judgment is denied on Count II.

Despite Constitutional Claim, Association was Required to Contest Discipline via Arbitration

Belleville Educ. Ass'n v. Bd. of Educ. of Belleville, 2017 U.S. Dist. LEXIS 89656 (Civil Action No.: 17-1892)

The United States District Court dismisses, for failure to exhaust administrative remedies, a lawsuit filed by the Association alleging that a Board policy prohibiting political activity on District property is unconstitutional. On election day, 2015, when schools were closed, the Association President distributed campaign material at Belleville High School in support of a school board candidate. He received a letter of reprimand that warned of further discipline if the conduct was repeated in the future and referenced two policies. One of these outlined guidelines concerning political participation that stated "[a] teaching staff member shall not engage in public activity on school premises unless permitted in accordance with Board Policy 7510. Policy 7510, in turn, prohibits the "use of school facilities for the advantage of any commercial or profit-making organization, partisan political activity, or any private social functions."

The Association grieved the reprimand but canceled and did not reschedule an arbitration hearing, opting to file a lawsuit. In a motion to the Court for dismissal, the Board asserted that the Association was required to pursue arbitration under the collective negotiations agreement. The Association responded that the arbitrator could only determine whether there was just cause to discipline the President and not whether his constitutional rights had been violated. The opinion states:

> The Court finds that the instant complaint falls squarely within the scope of the CBA's arbitration provisions. . . . [A]lthough Plaintiff alleges a constitutional violation, that alleged violation is rooted in Plaintiff's disagreement with the Board over its interpretation and application of the District Policies vis-à-vis Plaintiff. Plaintiff is correct, however, in arguing that if the ... arbitrators find that the Board properly applied the District policies in [the President's] case, then Plaintiff may still have a viable constitutional claim. However, the Court notes that, if the arbitrators were to find that the Board misinterpreted and/or misapplied the District policies in the first instance, then Plaintiff's request for declaratory relief may be moot.

Administrator was required to exhaust arbitration procedure before filing lawsuit

Westberry v. Newark State Operated Sch. Dist., 2017 U.S. Dist. LEXIS 76432, (Civ. Action No. 15-07998)

The U.S. District Court for the District of New Jersey dismisses four counts of a lawsuit filed by a school district administrator. The Court finds that the counts in question are contractually based or related and should have first been pursued through the grievance arbitration procedure in the collectively negotiated agreement between the District and the City Association of Supervisors and Administrators (CASA). The arbitration clause provides:

> In the event a grievance unresolved under the provision of Step 2, Article III, the grievant or CASA may have the grievance submitted to final and binding arbitration within seven (7) days of receipt of the decision of the Superintendent, or his/her designee.

The Court rejects Westberry's argument that the language is ambiguous and makes pursuit of arbitration optional. The Court concludes that the use of the word "may" in the arbitration clause of the CBA's grievance procedure means that Westberry had the option of submitting his grievance to arbitration or abandoning his claim. In this context, "may" does not mean that arbitration was a permissive step of the grievance process that could be circumvented by the filing of a lawsuit.

NOTE: Most CNA's reserve to the majority representative, not the affected employee(s), the right to take a grievance to arbitration. See D'Arrigo v. N.J. State Bd. of Mediation, 119 N.J. 74, 80-82 (1990)

Officers lobbying activities regarding work schedule did not implicate free speech rights

Killion v. Chief of Police and Township of Pennsauken , 2017 U.S. App. LEXIS 10776 (No. 16-3909)

The Court of Appeals for the Third Circuit affirms the U.S. District Court's dismissal [No. 13-1808, 2016 U.S. Dist. LEXIS 132175 (D.N.J. Sept. 27, 2016)] of a lawsuit filed by several Pennsauken police officers. The officers asserted that their first amendment rights as private citizens were implicated when they advocated for a twelve-hour shift work schedule. Both the trial and the appeals court held that the officers did not show they were acting as private citizens when advocating for the work schedule and, therefore, their first amendment rights were not implicated.

Imposition of written reprimand not subject to statutory time limit or due process guarantees

Upchurch v. City of Orange Twp., 2017 N.J. Super. Unpub. LEXIS 1423

The Appellate Division of the Superior Court holds that a municipality is not barred from issuing a written reprimand to a police officer beyond the 45-day time limit set forth in N.J.S.A. 40A:14-147, which refers to "suspensions, removals, fines, reductions in rank from or in office, employment, or position," but not to reprimands.

The Court also addressed, and ultimately rejected, the plaintiff/officer's due process claim, stating:

> [The officer] was not entitled to formal due process before or after the issuance of the reprimand, even though the [collectively negotiated] contract required "just cause" whenever any disciplinary action is imposed. A reprimand is not a suspension, with the attendant loss of pay and advancement potential because of the loss of a day of service. A reprimand is nothing more than a warning advising an employee of conduct with which the employer is dissatisfied. That is not the equivalent of a compensable loss. It has no certain consequence to the employee, at the time of the issuance, or in the future.