STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PO Box 429
TRENTON, NEW JERSEY 08625-0429

www.state.nj.us/perc

ADMINISTRATION/LEGAL
(609) 292-9830
CONCILIATION/ARBITRATION
(609 292-9898
UNFAIR PRACTICE/REPRESENTATION
(609) 292-6780

For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089
EMAIL: mail@perc.state.nj.us

August 10, 2017

TO: Commissioners

FROM: Counsel Staff

RE: Developments in the Counsel's Office Since June 22, 2017

Commission Cases

Supreme Court declines to address Dynamic Status Quo doctrine

In the Matter of County of Atlantic; In the Matter of Township of Bridgewater, __ N.J. ___, 2017 N.J. LEXIS 821 (Docket Nos. A-98/99/100-15)

The Supreme Court, on different and limited grounds, affirms the decision of the Appellate Division of the Superior Court [445 N.J. Super. 1 (App. Div. 2016)] holding the County of Atlantic and the Township of Bridgewater were obligated to pay salary increments to their law enforcement officers during the hiatus period between expired and new collective negotiations agreements. The Appellate Division had reversed Commission decisions holding that the dynamic status quo doctrine, as applied to the payment of salary increments during the hiatus period, no longer served stable public sector labor relations and conflicted with legislative budget and tax levy caps.

Justice Solomon, writing for a unanimous court, observed after reciting the procedural history:

> We need not determine whether, as a general rule, an employer must maintain the status quo while negotiating a successor agreement. In these cases, the governing

contract language requires that the terms and conditions of the respective agreements, including the salary step increases, remain in place until a new CNA is reached. Therefore, the judgment of the Appellate Division is affirmed on other grounds.

The Supreme Court held that the obligation to pay the increments following contract expiration was based upon clear language in the expired CNAs between Atlantic County, Bridgewater Township, and the unions representing their law enforcement officers. It noted that there was contract language in a collective negotiations agreement between a school board and an education association stating that increments shall not be paid after contract expiration until a successor agreement is reached. The Court ended with a note on the limit of its ruling and with advice to contracting parties:

> Our decision today does not govern future negotiations, other than to suggest that parties would be wise to include explicit language indicating whether a salary guide will continue beyond the contract's expiration date.

Two per cent cap applies to interest arbitration award creating first contract

In re State, __ N.J. Super. __ (App. Div. 2017), 2017 N.J. Super. LEXIS 83

The Appellate Division of the Superior Court, in a published opinion, affirms the Commission's decision [P.E.R.C. No. 2016-11, 42 NJPER 168 (¶42 2015)] upholding a modified interest arbitration award issued to establish the terms of a first contract between the State of New Jersey, Division of Criminal Justice (DCJ) and FOP Lodge 91. The FOP is the majority representative of DCJ investigators. The Court agreed with the Commission that the two percent cap on salary increases applies when a newly certified bargaining unit is negotiating its first collective negotiations agreement with the public employer.

Probationary officer ineligible for special disciplinary arbitration

In re New Jersey Institute of Technology and Selina Perez, 2017 N.J. Super. Unpub. LEXIS 1907 (Docket No. A-4716-15T3, July 27, 2017)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Director of Conciliation and Arbitration's dismissal of the petition filed by an NJIT police officer seeking to have her termination reviewed through a special disciplinary arbitration in accordance with N.J.S.A. 40A:14-200 et seq. Perez's first position with NJIT was Senior Security Officer, a non-law enforcement position. She was promoted to Police Officer Intern and then Police Officer. However, less than one year after her promotion, during her probationary period, she was terminated. Perez then petitioned the Director to appoint an arbitrator to review her termination. Perez' petition was dismissed based upon statutory language providing that the arbitration procedure is available to "any person who is employed as a permanent full-time member of any State, county, or municipal law enforcement agency. . . ." Perez had not achieved permanent

status. The Court used the date of her appointment as a Police Officer as the start of her probationary period. Her termination also occurred within 12 months after her appointment as a Police Officer Intern.

Isaacson v. Public Empl. Rels. Comm'n, 2017 N.J. LEXIS 766 (July 5, 2017)

The New Jersey Supreme Court declines to review the decision of the Superior Court, Appellate Division [2017 N.J. Super. Unpub. LEXIS 466] upholding the Commission's dismissal of Isaacson's request to have his termination reviewed through a special disciplinary arbitration in accordance with N.J.S.A. 40A:14-200 et seq. The facts showed that the conduct which formed the basis for the officer's termination could have been the subject of a criminal prosecution.

Other decisions

Unauthorized past practice did not estop City from refusing to pay for unused comp time

Hailey v. City of Camden, 2017 U.S. Dist. LEXIS 94771 (Civil Action No. 14-1018, June 20, 2017)

The U.S. District Court for New Jersey denies the summary judgment motion of a former Deputy Fire Chief in Camden's Fire Department who argued that the deduction of his compensatory ("comp") time from his accrued vacation and sick time was a breach of his employment contract. Hailey asserted that based on past practice, Chiefs and Deputy Chiefs were entitled to and could accumulate comp time in lieu of overtime. The Court found that the awarding of comp time, in the absence of a supporting ordinance, statute, or collective negotiations agreement, was not authorized by law and that the business administrator who authorized the comp time lacked the authority to bind the City to such an obligation. Although noting that no City official questioned the practice until 2009, the Court also stated, "The record simply does not reflect any instance of a knowing and intentional misrepresentation by an authorized officer of the City of Camden requiring the remedy of estoppel against this governmental entity."

Discipline after economic demotion could bar automatic reinstatement to former rank

Chenier v. Township of Medford, 2017 N.J. Super. Unpub. LEXIS 1638 (Docket No. A-3814-15T1, June 29, 2017)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the ruling of a trial court holding that the Township's refusal to re-promote an officer did not violate state statutes. Chenier, a police sergeant, had been demoted as a result of an economic layoff. He was placed on a list for restoration to his prior rank when a vacancy arose. However, when that time came he was not re-promoted as he had been twice disciplined while in the lower rank. N.J.S.A. 40A:14-143 provides that when an officer is demoted for reasons of economy, that officer "shall be placed on a special employment list, and in the case of subsequent promotions, a person so

demoted shall be reinstated to his [or her] original rank." But N.J.S.A. 40A:14-129, applying to promotions of police officers, requires that "[d]ue consideration shall be given to the member or officer so proposed for the promotion, to the length and merit of his [or her] service." The Township argued that given the facts surrounding the discipline, automatic promotion to Chenier's former rank would be untenable, an argument accepted by the trial judge. The appellate court held that the two statutes must be read together in a way that gives full effect to both laws.

Statutory obligation to represent police officers not equivalent to obligation to indemnify

Esmay Parchment v. City of East Orange, et al., 2017 N.J. Super. Unpub. LEXIS 1810 (Docket No. A-3150-14T3, July 17, 2017)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the ruling of a trial court holding that the City's contractual and statutory obligation to provide police officers with a defense against a civil lawsuit did not extend to indemnifying them against adverse judgments. Two East Orange police officers used excessive force when they arrested plaintiff in her home. Plaintiff prevailed in a civil rights lawsuit against the officers and then sued the City asserting that it was obligated to indemnify the officers and pay the judgment against them. The City paid for the defense of the officers but denied responsibility to pay the judgment rendered against them, reportedly claiming that the officers had acted outside of the scope of their employment. The Appellate court held:

> Here, the City . . . has not assumed the responsibility, or demonstrated . . . the capacity, to pay claims. The City has not agreed to indemnify its employees. Instead, it has decided to "go bare" — obtaining no commercial insurance coverage — for its own potential liability, at least for amounts below which excess coverage is triggered.

Orders compelling or denying arbitration are final for purposes of appeal

Ocean County Util. Auth. v. United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied-Indus., and Serv. Workers Int'l Union AFL-CIO Local 1-149, 2017 N.J. Super. Unpub. LEXIS 1726 (Docket No. A-2466-15T2, July 12, 2017)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the ruling of a trial court holding that a court order either denying or compelling arbitration is a final, as opposed to interlocutory, order for purposes of appeal. An arbitration award reduced the termination of an Authority employee to a suspension. The Authority sought to vacate the award on the grounds that it had been issued six months after the hearing closed rather than 30 days afterward as required by the collective negotiations agreement. The Court vacated the award and

sent it back to the State Board of Mediation for the appointment of a new arbitrator to hear the grievance.

The case sat dormant. The Authority unsuccessfully moved to dismiss it and the Union asked the trial court to reconsider its original decision vacating the award asserting that the order was interlocutory and could be reconsidered at any time. The Appellate Division held that Rule 2:2-3(a) and cases construing it, particularly Wein v. Morris, 194 N.J. 364 (2008), established that orders compelling or denying arbitration are final and may only be reconsidered within 20 days.

> The sole issue before us is whether an order compelling arbitration (in this case re-arbitration after the initial award was vacated by the court) is a final order. Rule 2:2-3(a) provides that "any order either compelling arbitration, whether the action is dismissed or stayed, or denying arbitration shall also be deemed a final judgment of the court for appeal purposes."