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February 14, 2018

TO: Commissioners

FROM: Counsel Staff

RE: Developments in the Counsel's Office Since January 18, 2018

Commission Cases

New appeals

City of Jersey City and Police officers Benevolent Association, P.E.R.C. No. 2018-022 ___ NJPER ___ (¶____ 2017)

The Police Officers Benevolent Association (POBA) has appealed the Commission's decision affirming an interest arbitration award issued to settle the terms of a successor collective negotiations agreement between Jersey City and the POBA.

Court Decisions

State Dept. of Transportation v. Lyons, 2018 N.J. Super. Unpub. LEXIS 246 (Docket No. A-5655-13T2)

The Appellate Division of the Superior Court affirms the Commission's decision [P.E.R.C. No. 2014-85, 41 NJPER 48 (¶12 2014)] dismissing an unfair practice charge as untimely. The charge, filed by Jane Lyons, a senior Department of Transportation engineer, was prompted by her transfer from a supervisory, on site, assignment at a road construction project to a position in a DOT regional office. The Court's opinion notes that Lyons had filed unsuccessful appeals from earlier, related determinations by PERC and the Civil Service Commission as well as a United States District Court lawsuit that was dismissed.

State Troopers Fraternal Ass'n v. State, 2018 N.J. Super. Unpub. LEXIS 153 (Docket No. A-0532-15T4)

The Appellate Division of the Superior Court determines that it lacks jurisdiction to hear a lawsuit filed by unions representing State Troopers (STFA) and State Police Non-Commissioned Officers (NCOA). After the Division of State Police advised the Unions that it would not pay step increments after the contracts between the State Police and the STFA and the NCOA expired, the unions appealed to the Appellate Division asserting that the Division's statement was a final action of a state administrative agency and was appealable as of right. The Court holds:

> We conclude that the Division's decision, embodied in [a] letter, does not constitute a final action or inaction of a state administrative agency or officer for purposes of conferring jurisdiction upon the Appellate Division. We further conclude appellants failed to exhaust their administrative remedies. For these reasons, we dismiss the appeal.

Explaining that the Unions did not exhaust available administrative remedies, the Court noted: (1) both unions had participated in interest arbitration and the STFA's appeal from the arbitrator's award and the Commission's decision [P.E.R.C. No. 2017-20, 43 NJPER 133 (¶42 2016)] was pending; and (2) a suit had been filed in the Superior Court, Mercer County [STFA, et. al. v. State, et. al., Docket No. MER-L-2285-15] challenging failure to pay the increments.

Other Cases

Discipline: Law Enforcement Personnel

In the Matter of Angelo Andriani, City of Hoboken, Department of Public Safety, 2018 N.J. Super. Unpub. LEXIS 316 (Docket No. A-3111-14T4)

The Appellate Division affirms the Civil Service Commission's decision to uphold the termination of a Hoboken police officer who was a weapons instructor and commander of the City's SWAT team. The removal was based on charges stemming from Andriani's conduct during two trips to Louisiana to provide aid to alleviate the effects of Hurricane Katrina. Sustaining some, but not all, of the charges filed by Hoboken against Andriani, an Administrative Law Judge recommended the officer be dismissed because the evidence showed:

- He gave his unloaded weapon to the female host of a private dinner party given for the Hoboken officers on their first trip to the town in 2005.

- In a second trip to the town during Mardi Gras 2006, at a restaurant and in the presence of host municipal officials and Hoboken police personnel, Andriani put a handkerchief over his face to simulate a Ku Klux Klan mask. The Louisiana officials chastised him for doing so.

- During the drive back in a Hoboken SWAT vehicle, Andriana and other Hoboken officers, while eating at a Hooters restaurant, retrieved their service weapons, unloaded them, and gave them to some of the waitresses who posed for pictures with the guns, both in the restaurant and in front of the SWAT vehicle.

Addressing the officer's defenses the Court held: The charges were timely under the 45-day time limit set by N.J.S.A. 40A:14-147, equitable estoppel did not apply, there was no disparate treatment in disciplining Andriani (and not other officers) for the third incident as he was the senior officer present, and the principle of progressive discipline was not violated as Andriani's actions were egregious enough to warrant removal despite no prior disciplinary record.

Federal court lacks jurisdiction to hear DFR claims of public employee

Brandt v. Walsh, 2018 U.S. Dist. LEXIS 15391 (Civil Action No.: 17-5251)

The United States District Court dismisses for lack of subject matter jurisdiction a complaint filed by a terminated school district employee against his former public employer and his education association in federal court alleging a violation of the National Labor Relations Act's duty of fair representation requirement. The Court declines the former employee's request to amend his lawsuit to add a state law claim.

Where public employee's federal "Free Speech" is a defense to discipline, case belongs in state court

Galgano v. Twp. of Old Bridge, 2018 U.S. Dist. LEXIS 9587 (Civil Action No.: 17-cv-772)

The United States District Court grants the Township's request to dismiss, and remands to state court, a complaint challenging minor disciplinary action against a police officer. The officer had initially filed the complaint in State Court, but the Township removed it to federal court based on the officer's claim that the discipline violated his right to free speech under the United States Constitution. The Court holds:

> Here, the sole reason for removal was the First Amendment. The underlying action is to review and dismiss the disciplinary charges. The First Amendment rights are a defense rather than a cause of action. . . . As such, the Court has no subject matter jurisdiction over the case.

Placement on re-employment list is not a 14th Amendment property interest

Tundo and Gilgorri v. Passaic Cty., 2018 U.S. Dist. LEXIS 18923 (Civil Action No.: 09-5062)

The United States District Court for New Jersey denies the plaintiff/corrections officers' motion for reconsideration, finding it untimely, and grants defendant/Passaic County's motion for summary judgment. Plaintiffs alleged that the County violated their right to procedural due process under the 14th Amendment to the U.S. Constitution by not maintaining their names on a civil service re-employment list.

The officers had been laid off in March 2008. That August, the County requested the Civil Service Commission ("CSC") to revive the eligible list for plaintiffs' position to permit the reappointment of officers who had been laid off. The County initially sought to remove the plaintiffs' names from the revived list based upon their work history. However, the CSC decided that "absent any disqualifications ascertained through an updated background check, [the plaintiffs] should be appointed" subject to completion of a new working test period. The County offered to rehire the plaintiffs after they submitted new employment applications. After Tundo and Gilgorri refused to do so, the County removed their names from the eligible list.

Addressing the procedural due process claim, the Court holds:

> Plaintiffs therefore have failed to demonstrate that they have been deprived of property to which they have a legitimate claim of entitlement. Plaintiffs' presence on the eligibility list entitles them to nothing more than consideration for employment, not a guaranteed position. And as noted above, the CSC and the New Jersey Administrative Code afford Defendants the ability to review an eligible's candidacy and apply discretion in hiring. In light of these undisputed facts, the Court concludes that Plaintiffs did not have a property interest in the eligible list. Accordingly, the Court grants Defendants' motion for summary judgment on this claim.

Focus on hourly rates insufficient to protect part-time teachers' tenure rights

Beryl Zimmerman, et al. v. Sussex County Educational Services Commission, ___ N.J. Super. ____, 2018 N.J. Super. LEXIS _____ (Docket No. A-1003-16T4)

In a published, thus precedential, decision, the Appellate Division reverses a decision of the Commissioner of Education. The hours of two part-time tenured teachers employed by the Sussex County Educational Services Commission (SCESC) were reduced, decreasing their overall annual compensation. The teachers were paid an hourly rate. Citing Theresa Alfieri and Therese Mezak v. Board of Educ. of the Township of Saddle Brook, Bergen County, Comm'r Dec. No. 320-01 (Sept. 17, 2001), aff'd, State Board (Jan. 8, 2003), affirmed, No. A-3105-02

(App. Div. June 14, 2004), certif. denied, 181 N.J. 547 (2004); Lucy Kourtesis, et al. v. Board of Educ. of the Bergen County Special Services School District, Bergen County, Comm'r Dec. No. 535-11 (Dec. 5, 2011), aff'd, No. A-2139-11 (App. Div. Nov. 19, 2012), certif. denied, 213 N.J. 535 (2013), the Commissioner stated:

> It is also well established that, in the absence of a guarantee of a minimum number of hours for part-time teachers, a reduction in hours does not equate to a reduction in compensation under *N.J.S.A.* 18A:28-5, thereby triggering tenure rights.

Noting that the part-time teachers' contracts only guaranteed an hourly compensation rate, which was not reduced, the Commissioner concluded that the decision to reduce the petitioners weekly hours did not violate the teachers' tenure rights.

The Court disagreed:

> Once petitioners obtained tenure, the Tenure Act required that tenure be a mandatory condition of their employment. The failure to guarantee a minimum number of hours in the contract documents cannot strip petitioners of their tenure rights, specifically the protection against reduction in compensation. To hold otherwise would render their undisputed tenure and seniority status meaningless. We therefore reverse the Commissioner's decision that petitioners are without protection under the Tenure Act.

Finding the record developed during the administrative proceedings to have been inadequate, the Court remanded the case for determination of the teachers' "seniority percentage" as compared to other SCESC part-time teachers and to develop the reasons for the reduction in hours, the latter to determine whether the reduction in hours triggered the teachers' seniority rights.