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June 22, 2018

TO: Commissioners

FROM: Counsel Staff

RE: Developments in the Counsel's Office Since May 30, 2018

Commission Cases

No new appeals

Court Decisions

No decisions received

Other Cases

Dismissed inefficiency tenure charge did not bar pursuit of corporal punishment charge.

Leonard Yarborough v. State Operated School District of the City of Newark, Essex County, ___ N.J. Super. ___ , 2018 N.J. Super. LEXIS 89 . Dkt No. A-1343-16T4

In a published, thus precedential, opinion, the Appellate Division of the Superior Court, determines that the entire controversy doctrine (ECD) did not preclude the State Operated School District of Newark, from prosecuting a conduct-unbecoming tenure charge against a third-grade teacher based on his infliction of corporal punishment on two students, even though the corporal punishment predated tenure actions instituted against the teacher for inefficiency. The two charges had not been joined. The Court reasoned that Legislatively mandated procedures specific to arbitrations of inefficiency charges under the TEACHNJ Act, are not conducive to the inclusion of other charges, including conduct unbecoming. Further, there was little or no nexus between the inefficiency and conduct-unbecoming charges to warrant application of the ECD.

The arbitrator's imposition of a 120-day unpaid suspension was upheld by the Court which applied the review criteria of N.J.S.A. 2A:24-8 as required by the TEACH NJ law, N.J.S.A. 18A:6-17.1e.

Misuse of Union funds grounds to terminate civil service employee

Villalobos v. N.J. State Parole Bd., 2018 N.J. Super. Unpub. LEXIS 1362, Dkt No. A-1605-16T4

The Appellate Division of the Superior Court upholds the termination of a civil service employee who used union funds to pay for personal legal expenses. Disciplinary charges were filed against Villalobos, a parole officer who had held several positions with PBA Local 326 during his nearly 20 years on the job. He was charged with misappropriating PBA funds to pay legal expenses in connection with his divorce and expenses of immigration proceedings involving relatives.

Villalobos, was charged with conduct unbecoming a public employee. After a hearing an ALJ recommended termination. The Civil Service Commission adopted that recommendation. The appeals court finds that the agency decision was supported by a preponderance of the evidence and opines that termination was the appropriate penalty. It dismisses Villalobos' arguments that he did not receive adequate notice of the charges.

Eleventh Amendment Immunity barred State Trooper candidate's federal law claims

Bodrog v. N.J. State Police, 2018 U.S. Dist. LEXIS 88707 Civil Action No. 3:17-CV-03956

The United States District Court for the District of New Jersey, dismisses for lack of jurisdiction causes of action based on federal law, that are part of a lawsuit filed by Bodrog who sought appointment as a member of the New Jersey State Police (NJSP).

In February 2014, Bodrog applied for a position with the NJSP. In April 2014, he passed the NJSP online initial entrance application. In June 2014, he passed the Physical Qualification Test, placing in the top ten candidates in the physical testing. In August 2014, he also passed the written examination. He authorized release of his medical records and was found medically fit. However, after he underwent a psychological evaluation he was told, without further explanation, that he could not continue as a candidate.

The District Court holds that Bodrog's federal Americans with Disabilities Act (ADA) and Uniformed Services Employment and Re-employment Rights Act ("USERRA") claims against the State Police are barred by Eleventh Amendment. It holds that he may pursue his remaining non-federal claims, including an alleged violation of the New Jersey Law Against Discrimination, in state court.

Monetary Penalties for police leaving employment before serving five years unenforceable

Borough of Madison v. Kevin Marhefka, 2018 N.J. Super. Unpub. LEXIS 1468, Dkt. No. A-5206-15T1

The Appellate Division of the Superior Court, in an unpublished opinion, holds, applying contract law principles, that the Borough of Madison could not impose monetary penalties against its police officers who took jobs in other municipalities before serving five years with the Borough. The collective negotiations agreement between the Borough and PBA Local 92 set compensation but did not provide either for any incentive if an officer remained on the police force, or for any penalties if an officer left the police force. A letter from the Borough Administrator to Marhefka advising that he had been hired as a police officer, provided:

> If you decide to leave your position with the Borough of Madison Police Department to accept another law enforcement position outside of the Borough of Madison you will be assessed the following penalties in accordance with relevant years of service: (1) $5,000 for the first year; (2) $4,000 for the second year; (3) $3,000 for the third year; (4) $2,000 for the fourth year; and (5) $1,000 for the fifth year. No penalty will be assessed against you if you decide to leave your position at the conclusion of your fifth anniversary of employment with the Borough of Madison Police Department. Upon completing your fifth year of service you will receive a $5,000 retention stipend.

Marhefka stayed on the Borough police force less than a year before taking a position in another municipality. The Borough demanded that Marhefka pay a $5,000.00 penalty and filed a lawsuit to collect it. A trial court ruled in favor of the officer and the Borough appealed.

The Court finds the agreement unenforceable based on contract law precedents. At the end of its opinion it notes that the trial court had cited N.J. Transit Auth. v. N.J. Transit PBA, 314 N.J. Super. 129 (App. Div. 1998) holding that Transit's requirement that new police officers repay training costs if they did not serve at least two years with NJT was "an impermissible imposition of a term or condition of employment." Transit affirmed P.E.R.C. No. 97-125, 23 NJPER 298 (¶28137 1997).