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August 13, 2018

TO: Commissioners

FROM: Counsel Staff

RE: Developments in the Counsel's Office Since June 28, 2018

Commission Cases and Cases related to Commission Jurisdiction [1/]

Agency shop in public employment is unconstitutional

Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2018 U.S. LEXIS 4028

In a case that originated in Illinois but applies nationwide, the United States Supreme Court, by a 5-4 vote, declares that public sector agency shop (also called service fees, fair share fees, or in New Jersey, representation fees in lieu of dues) is unconstitutional. The majority reasons that such arrangements violate the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern. The Court overturns its 1977 decision in Abood v. Detroit Bd. of Ed., 431 U. S. 209 which had held that public sector agency shop was constitutional if administered with safeguards preventing the use of such fees for union expenditures for political and ideological purposes unrelated to collective bargaining. Unions representing public employees in 24 states, the District of Columbia and Puerto Rico where agency shop had been authorized, may no longer collect fees from non-members. Janus does not affect the rights of public employees to voluntarily authorize the payment of dues to unions representing public workers.

1/ No new appeals.

Lawsuit challenges N.J. agency shop law and Workplace Democracy Enhancement Act.

Ann Smith v. N.J.E.A. et. al., Dkt. No. 1:18-CV-10381-RMB-AMD (U.S. Dist. Ct. NJ)

A lawsuit filed in US District Court in Camden, two weeks prior to the issuance of Janus, names as defendants the NJEA, Clearview Education Association, National Education Association, Clearview Regional High School District Board of Education, the Governor, the Attorney General, each individual PERC Commissioner in their official capacity, and each individual PERC Appeal Board Member in their official capacity.

The lead plaintiff, Ann Smith, a public-school teacher at Clearview Regional High School in Gloucester County. The complaint asserts that Ms. Smith's constitutional rights have been violated because she has been required to pay representation fees to the NJEA.[2/]

The lawsuit also challenges some provisions of the Workplace Democracy Enhancement Act (WDEA) (the text of the WDEA is one of the documents with Agenda Item 8, the proposed rules to implement the WDEA). Specifically, it challenges as unconstitutional:

> 1) the provision which requires public employers to provide majority representatives with certain information regarding employees- - specifically name, job title, work-site location, home address, work number, any home and personal cell numbers on file with the employer, date of hire, work email, and any personal email address on file with the public employer; and

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2/ The lawsuit, as amended, lists six categories or "classes" of plaintiffs:

(1) Representation fee payers;

(2) Union members who would have resigned but for the requirement to pay Representation fees if they did so;

(3) Public employees who do not want their personal contact information disclosed to unions;

(4) Union members who would or would likely have resigned or revoked their dues authorizations but were prevented from so doing because they missed the narrow 10-day window set by the WDEA;

(5) Public employees still subject to payroll deductions of union dues who have not clearly and affirmatively consented to such assessments; and

(6) Non-union math and science teachers who wish to negotiate their own terms of employment without regard to the collective bargaining agreements made by the union.

2) the provision which limits the period within which union members may revoke their consent to the deduction of dues from their paychecks. The WDEA sets out that such revocation may only occur during the ten-day period following each employee's anniversary date.

Commission's ruling on negotiable aspects of electronic employee monitoring upheld; Procedure for seeking enforcement of Commission rulings modified

Belleville Educ. Ass'n v. Belleville Bd. of Educ., ___ N.J. Super ___, 2018 N.J. Super. LEXIS 106 (Docket Nos. A-5104-14T3, A-2956-15T3)

In a published, thus precedential, opinion the Appellate Division of the Superior Court affirms the Commission's decision [P.E.R.C. No. 2015-79, 42 NJPER 41 (¶12 2015)] determining the negotiable elements of an electronic employee monitoring system installed by the Belleville Board of Education. However, the Court holds that actions to enforce unfair practice orders shall be brought by the agency in the Appellate division as set forth in N.J.S.A. 34:13A-5.4f, rather than in trial court under R. 4:67-6 which permits either an administrative agency or the prevailing party to apply for enforcement. Applications to enforce Commission orders have been brought in the trial courts, rather than the Appellate Division for more than 30 years (copy attached).

Elimination of step increments remanded to Commission

State (Div. of State Police) v. State Troopers Fraternal Ass'n, 2018 N.J. Super. Unpub. LEXIS 1613 (Dkt No. A-0526-16)

The Appellate Division of the Superior Court reverses and remands a portion of the Commission's decision [P.E.R.C. No. 2017-20, 43 NJPER 133 (¶42 2016)] that eliminated an award of step increments by an interest arbitrator. The Court ruled that the Commission must , apply the holding of Matter of County of Atlantic, 230 N.J. 237 (2017) to language in the parties' expired collective negotiations agreement, and determine whether the system of step increments must continue. The State has petitioned the Supreme Court for review of the ruling (copy attached).

Supplementary sick leave proposal conflicts with education law

West Orange Bd. of Educ. v. West Orange Educ. Ass'n, 2018 N.J. Super. Unpub. LEXIS 1778 (A-4315-16T2)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Commission's ruling [P.E.R.C. No. 2017-60, 43 NJPER 422 (¶117 2017)] that an Association "supplementary sick leave allowance" proposal was an extended sick leave proposal that conflicted with and was preempted by N.J.S.A. 18A:30-6 (copy attached).

Rutgers police not covered by laws allowing State employees to arbitrate major discipline

In re Rutgers and Fraternal Order of Police, Lodge 62, 2018 N.J. Super. Unpub. LEXIS 1811 (A-0990-16T3)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Commission's ruling [P.E.R.C. No. 2017-17, 43 NJPER 117 (¶35 2016)] restraining arbitration of the FOP's grievance challenging major discipline (suspension of more than five days) imposed on a Rutgers police officer. The Court's opinion noted that the Commission had made the same determination in prior cases between the parties, rejecting the FOP's repeated argument that a law permitting state employees to arbitrate major discipline did not apply to Rutgers police and that the applicable law, barring arbitration of major discipline, was unchanged (copy attached).

Township not bound to follow grievance recommendation of its appointed hearing officer

Teamsters Local Union No. 469, et al. v. Stafford Township, et al. 2018 N.J. Super. Unpub. LEXIS 1842 (Dkt. No. A-4344-15T4

In a case related to a pending unfair practice charge, the Appellate Division of the Superior Court, in an unpublished decision, reverses the decision of the Chancery Division of the Superior Court. The trial court confirmed a decision of an Township-appointed hearing officer, acting in place of the Township Administrator, reducing the termination of the computer network administrator to a 60 day suspension. The grievance procedure provides that the Township Administrator shall be the last step prior to arbitration. However, because the Administrator was named in the unfair practice charge filed by Local 469 alleging that computer administrator, part of the negotiations team was the victim of discrimination, Local 469 sought to skip the Township Administrator's step and move the grievance to arbitration. The Township refused but agreed to have an attorney "serve as the hearing officer for the" Township. Her decision reducing the penalty was not accepted by the Township. The employee and Local 469 sought and were granted confirmation of the recommendation by the Chancery Division under the statute used to review grievance arbitration awards. N.J.S.A. 2A:24-1 et seq. The trial court noted that the Township selected the hearing officer and held: "[T]he Township intended to vest the Hearing Officer with the power to determine the public employment dispute and to thereby divest the parties from binding arbitration once the Union accepted the recommendations of the Hearing Officer as to discipline."

The appeals court reverses, finding that a Union-accepted recommendation of a hearing officer, even one selected by the Township, is not the equivalent of an arbitration award, even though the Court acknowledged that had the administrator issued that recommendation, the Township would have been bound, but rules "[B]ecause the hearing officer's decision was not an arbitration award . . . , and, indeed, was only a recommendation, which the Township could elect to accept or reject in its discretion, we reverse the judgment in favor of plaintiffs and remand for entry of an order dismissing their complaint."

Cases related to collective negotiations activities and negotiability disputes

Ban on signs in school addressing collective negotiations did not violate free speech

Parsippany-Troy Hills Educ. Ass'n v. Parsippany-Troy Hills Bd. of Educ., 2018 N.J. Super. Unpub. LEXIS 1751 (Dkt No. A-0992-16T4)

The Appellate Division of the Superior Court, in an unpublished decision, affirms the ruling of the Chancery Division of the Superior Court, Morris County. During a period of collective negotiations with the Board, the Association directed its members post hundreds of signs on classroom windows and doors that stated "I AM PROUD TO BE A TEACHER[.]" The Board citing its policy providing "A teaching staff member shall not engage in any activity in the presence of pupils while on school property, which activity is intended and/or designed to promote further or assert a position on labor relations issues[,]" the Board ordered the signs to be removed from school property. The Association filed a lawsuit asserting the Board's actions violated the free speech rights of its members. The trial court disagreed. Both the trial and appellate courts found Green Twp. Educ. Ass'n v. Rowe, 328 N.J. Super. 525 (App. Div. 2000), about a similar Board policy and teachers wearing buttons with a negotiations-related message, to be a pertinent precedent. In Green Twp., the court found that the part of the policy, as applied to classroom settings, did not violate teachers' free speech rights.

Paid leave statute for police and fire conventions sets event, not daily, attendance limits

Rutherford PBA Local 300 v. Borough of Rutherford, 2018 N.J. Super. Unpub. LEXIS 1701 (Dkt. No. BER-C-068-18)

The Chancery Division of the Superior Court, Bergen County, in an unpublished decision, interprets N.J.S.A. 40A:14-177, the statute that limits how many police officers may obtain paid leave to attend a state or national police convention. PBA Local 300, which represents a unit of 40 police officers, argued that the statutory limit could be applied on a daily, rather than per convention basis. It sought paid leave to attend the state PBA convention for four officers (10 per cent of the department) on one day, and then paid leave for different officers on another day but acknowledging that no more than 10 officers total could attend. The court rejects the PBA's "per day" interpretation noting that the law provides: "Leave of absence shall be for a period inclusive of the duration of the convention. . . "

Legislative authority to review administrative agency rules

Legislature had authority, subject to court review, to veto agency rules inconsistent with statute or constitution. Veto of Civil Service Rules upheld

Communications Workers of Am. v. N.J. Civ. Serv. Comm'n in re Banding, 2018 N.J. LEXIS 998 (Dkt No. A-47-16)

The Supreme Court affirms the decision of the Appellate Division of the Superior Court holding that the Legislature had, and properly exercised, its power under the Legislative Review Clause of the State Constitution [N.J. Const. art. V, § 4, ¶ 6] to void administrative rules adopted by the Civil Service Commission (CSC) because they were inconsistent with the Civil Service Act and the "merit and fitness" requirements of the state Constitution.

In 2013, the CSC published rules creating allowing the use of a "job band" grouping titles with similar duties and qualifications into a single broad band. It would allow employees to advance between banded titles without exams. An employer could select any competent candidate, rather one of the three highest-ranking eligibles. The CSC opined there was "no Constitutional or statutory impediment" barring its proposal." The Court's opinion summary reads:

> A court may reverse the Legislature's invalidation of an agency rule or regulation pursuant to the Legislative Review Clause if (1) the Legislature has not complied with the procedural requirements of the Clause; (2) the Legislature has incorrectly asserted that the challenged rule or regulation is inconsistent with "the intent of the Legislature as expressed in the language of the statute which the rule or regulation is intended to implement," N.J. Const. art. V, § 4, ¶ 6; or (3) the Legislature's action violates a protection afforded by any other provision of the New Jersey Constitution, or a provision of the United States Constitution. To determine legislative intent, the court should rely exclusively on statutory language. It should not apply a presumption in favor of either the Legislature's findings or the agency's exercise of its rule-making authority. Here, the Court finds no procedural defect or constitutional infirmity in the Legislature's actions. The Legislature correctly determined that N.J.A.C. 4A:3-3.2A conflicts with two provisions of the Civil Service Act.[3/]

Cases related to continuation, suspension, or termination of employment

Statute on renewal of Superintendent's contract bars contrary term in individual contract.

Lorenzo Richardson v. Vidya Gangadin, et al. v. Board of Education of the City of Jersey City, et al., 2018 N.J. Super. Unpub. LEXIS 1493 (A-1572-16T3)

The Appellate Division of the Superior Court, in an unpublished decision, affirms the Commissioner of Education's decision dismissing two petitions, including one filed by members of the Jersey City Education Association. The petitions asserted that the Jersey City Superintendent of Schools could not continue in her position because the Jersey City Board of

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3/ Justice Patterson authored the opinion as to as to both the standard of review and the result of the case. Three Justices agreed with her disposition of the case, but not the her standard for review, while a different three justices agreed with the standard, but not the outcome.

Education had not affirmatively reappointed her. The Superintendent and the Board had entered into a contract covering August 2012 through June 30, 2016. The agreement contained renewal/non-renewal language providing that by October 15, 2015 the Superintendent would notify the Board if she wished to remain in her position. The Board was required to state by December 31, 2015 if it wanted to renew the agreement including any proposed new terms. The last line read: "Failure to notify the [s]uperintendent by that date of an intention to renew will mean that an offer of renewal is not being made."

However, a pertinent statute, N.J.S.A. 18A:17-20.1., provides for a superintendent's automatic reappointment unless the Board provides written notice 120 days before contract expiration that [he/she] will not be reappointed at the end of the current term. The Board did not meet that deadline. Using a preemption analysis, Court holds that the statute, providing for automatic renewal based on the facts present, prevailed over the terms of the contract.

Certificate suspension upheld for teacher who resigned on short notice to join FBI

In re Suspension of the Certificates of Chae Hyuk Im, School District of the Township of Wayne, 2018 N.J. Super. Unpub. LEXIS 1748 (Dkt No. A-3847-16T3)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Commissioner of Education's 's ruling suspending Im's certificate for one year because he did not give 60 days notice before leaving his teaching position to take a job (he had been seeking for several years) as an agent for the Federal Bureau of Investigation. Despite the existence of possible mitigating factors which resulted in an Administrative Law Judge recommending a six-month certificate suspension, the Court upheld the Commissioner's action suspending the certificate for one year, the maximum penalty allowed by N.J.S.A. 18A:28-8.

Partial pension forfeiture for holding two full-time public employment jobs simultaneously

Willie Jetti v. Board of Trustees of the Police and Firemen's Retirement System (PFRS), 2018 N.J. Super. Unpub. LEXIS 1790 (Dkt. No. A-4018-15T1

The Appellate Division of the Superior Court, in an unpublished decision, affirms the decision of the Board of the PFRS that: 1. denied Jetti's application for accidental disability benefits; and 2. Ordering a partial forfeiture of Jetti's pension benefits. For three years, Jetti was employed full time as an Essex County Corrections Officer and a Newark City fire fighter. On at least eight occasions during that period Jetti called out sick as a firefighter but worked his full shift as a corrections officer. He was disciplined and his sanctions were upheld by the Civil Service Commission and the Appellate Division of the Superior Court.

Public Records and Public Meetings Act requirements regarding minutes

Minutes of meetings of public bodies must be promptly available to public

Kean Federation of Teachers v. Morell, __ N.J. ___. 2018 N.J. LEXIS 829 (Dkt. No. A-84-16)

The New Jersey Supreme Court holds, modifying the decision of the Appellate Division of the Superior Court, that the Open Public Meetings Act (OPMA) does not require a public body to adopt a set regular meeting schedule, but does require that minutes of all meetings, including executive or private sessions, be made "promptly available" to the public. The Court also holds that where a public body determines to consider personnel actions in a public session it need not send a (Rice) notice to affected employees.

Draft minutes not a public document

Paff v. Township of Moorestown, 2018 N.J. Super. Unpub. LEXIS 1641 (Dkt No. A-5001-16T2)

The Appellate Division of the Superior Court, in an unpublished decision, affirms the decision of the Law Division of the Superior Court dismissing an Open Public Records Request, but holding that under the Open Public Meetings Act (OPMA) the Township acted unreasonably in not having minutes of a Township Board available where the meeting was held three years before the request was filed. The Court held, citing Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 92, (App. Div. 2018), that draft minutes are not public records under OPRA, but under OPMA as construed by Kean Federation of Teachers, that meeting minutes must be promptly available.