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August 9, 2019

TO: Commissioners

FROM Counsel Staff

RE: Developments in the Counsel's Office since June 19, 2019

COMMISSION CASES

Court Decisions/Orders

Statutes did not preempt method of calculating military leave

City of Perth Amboy v. Perth Amboy Police Benevolent Ass'n, Local 13, 2019 N.J. Super. Unpub. LEXIS 1639 (App. Div. Dkt. No. A-2361-16T4)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Commission's decision, P.E.R.C. No. 2017-30, 43 NJPER 226 (¶69 2016), dismissing the PBA's claim that the City committed an unfair practice when it unilaterally changed its method of calculating pay for police officers on military leave. The Court agreed with the Commission that (1) the calculation of military leave days was consistent with an agreement entered into by the City and the PBA; and (2) the calculation of military leave days did not conflict with the terms of two statutes alleged by the PBA to preempt how the leave days should be calculated.

Cases Related to Commission Cases

Members of Public Sector Labor Board immune from suit over representation fee/dues deduction claims

Diamond v. Pa. State Educ. Ass'n, 2019 U.S. Dist. LEXIS 112169

On July 8, 2019, a federal district court for the Western District of Pennsylvania granted the motion of the members of the Pennsylvania Labor Relations Board and the Attorney General of Pennsylvania to dismiss a lawsuit that had been filed against them. The Court ruled that the government officials were inappropriate defendants and were immune from suit based on the Eleventh Amendment to the United States Constitution. Diamond was initiated by public school teachers who declined to become members of Associations affiliated with the National Education Association and instead paid agency shop fees until the issuance of Janus v. American Federation of State, County, and Municipal Employees, Council 31, 138 S.Ct. 2448, 201 L.Ed. 2d 924 (2018). Similar lawsuits are pending before the federal district court in New Jersey that include the chairman and members of the Public Employment Relations Commission as defendants. Smith v. New Jersey Education Association, No. 1:18-cv-10381-RMB-KMW and Michael Thulen, Jr., et al. v. American Federation of State, County and Municipal Employees, New Jersey Council 63, et al. Case Number: 1:18-cv-14584. Motions to dismiss the PERC defendants are pending in both cases. On July 30 and August 2, 2019, respectively, a letter was submitted to the Court in Smith and Thulen, along with the Diamond decision, in further support of the motions to dismiss the PERC defendants from the litigation.

Police officer barred from arbitrating major discipline could challenge merits in court, but his filing was untimely

Edward Ruff v. Rutgers, the State University of New Jersey, 2019 N.J. Super. Unpub. LEXIS 1435 (App. Div. Dkt. No. A-2459-16)

After the Commission [P.E.R.C. No. 2015-8, 41 NJPER 101 (¶35 2014)] and the Appellate Division of the Superior Court [2016 N.J. Super. Unpub. LEXIS 2050] held that major discipline imposed on a Rutgers police officer could not be challenged through binding grievance arbitration, Officer Ruff commenced an action in trial court asserting that his 10-day suspension violated the Rutgers-FOP collective negotiations agreement. The trial court dismissed his action on several grounds. The Appellate Division affirmed, [2018 N.J. Super. Unpub. LEXIS 2717] holding that the restraint of arbitration issued by the Commission, and affirmed

on appeal, rendered Ruff's civil action moot. However, the Supreme Court [237 N.J. 174 (2019)], ordered that the case be remanded to the Appellate Division "to consider the merits." In this unpublished opinion, the Appellate Division reviews the trial court ruling holding that the Commission ruled on a question of law – whether binding arbitration could be a forum to review Ruff's major discipline – not the merits of the discipline. The Court held that once discipline was imposed on Ruff in August 2013, he could have filed his lawsuit challenging the sanction, but waited until 2016 to do so, after the statute of limitations had expired.

Other Cases

Personnel actions/Discipline

CSC Chair empowered to create new title

In re Changes in the State Classification Plan, ___ N.J. Super. ___, 2019 N.J. Super. LEXIS 113 (App. Div. Dkt. No. A-5150-16T1)

The Appellate Division of the Superior Court, in a published, thus precedential, decision, holds that the Chairperson of the Civil Service Commission (CSC), as opposed to the full Commission, was authorized to approve the creation of a new job title and did not act arbitrarily in approving the title at issue in this case.

The title request was filed by the Department of Corrections (DOC) with the CSC, but that body was unable to act for 18 months for lack of a quorum. The request was transferred to the Chairperson who issued an interim relief decision, a power available to take action if needed between CSC meetings. Subsequently, the Chairperson reconsidered, withdrew the interim relief order and concluded that under regulations adopted prior to the DOC request, the Chairperson had the authority to make a final administrative disposition of the new title request. The appellate court agreed with that analysis and affirmed the creation of the new title.

Procedural irregularities entitled officer to new test period as sergeant; not permanent promotion, pay increase, or counsel fees

In re Pierce, 2019 N.J. Super. Unpub. LEXIS 1484 (App. Div. Dkt. No. A-0892-17T2)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the decision of the Civil Service Commission

(CSC). Pierce, a Hackensack police officer for 10 years, passed the exam for Sergeant and was provisionally promoted to Sergeant. The City determined that he did not complete either of two working test periods (WTP) and demoted him back to patrolman. He appealed to the CSC. An Administrative Law Judge concluded that the Department "failed to provide Pierce with adequate notice of his work performance." The ALJ faulted the Department for waiting until a week was left in his WTP before providing Pierce with written copies of his evaluation reports. The ALJ recommended the reversal of the Department's demotion of Pierce, and that he be provided another WTP. Pierce argued to the CSC that he should be promoted to the permanent position of sergeant, without having to go through another WTP. He also argued that he should be entitled to attorney's fees, back pay, and seniority status as a result of the aforementioned procedural irregularities.

The appellate court affirmed the CSC. It held that because the decision not to award Pierce permanent appointment as a sergeant was reasonable, it follows that the decision not to award Pierce seniority credit as a sergeant was neither arbitrary nor capricious. Finally it denied the officer's counsel fee request as the pertinent regulation applied to successful appeals of discipline, noting Pierce's demotion was not disciplinary.

Termination of civil service police officer upheld

In re Garcia, 2019 N.J. Super. Unpub. LEXIS 1402 App. Div. Dkt. No. A-3163-16T4

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the decision of the Civil Service Commission upholding the termination of a police officer for unbecoming conduct; insubordination in failing to follow and carry out a lawful order of a superior officer; and neglect of duty by failing to properly secure her service weapon.

Lack of required qualifications defeated discriminatory denial of promotion claim

Howard v. Cty. of Monmouth, 2019 U.S. Dist. LEXIS 108288 (D.N.J.)

A federal district court dismisses the claim of a Monmouth County police officer that the failure to promote her was discriminatory. The Court noted that the officer did not satisfy two of the County's three preferences, the five-year employment criteria and being firearms qualified. Although one-year was the absolute minimum, the Court held the County was fully within its

discretion to express a preference for an applicant with more experience. It was undisputed that at the time of her application, Howard was not firearms qualified and had not been for nearly a year.

Working Conditions/Benefits Cases

Award distinguishing between "duties" and "posts" upheld

Middlesex Educ. Ass'n v. Middlesex Bd. of Educ., 2019 N.J. Super. Unpub. LEXIS 1457 (App. Div. Dkt. No. A-4367-17T2)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court ruling upholding an arbitration award denying Association's grievances. The claim asserted that the Board assigned some teachers to excessive duties and posts.

The Court noted that the CNA expressly limits teachers with full teaching loads to the assignment of no more than two duties per week and there is no provision in the CNA limiting the number of posts per week that may be assigned to a teacher. It also observed:

> The arbitrator determined the CNA failed to specify whether the limitation imposed on duty assignments also applied to post assignments and therefore the CNA was ambiguous. Based on finding an ambiguity in the CNA, the arbitrator analyzed the parties' past conduct to define duties and posts. The arbitrator compared posts and duties, noting duties involved more "record-keeping . . . and require[d] teachers to circulate among students to better monitor them, as in recess and lunch duty." She also found the parties "consistently interpreted duty assignments to not include posts."

Prior PFRS service in titles not enumerated in 1997 law could not be transferred to SPRS

State Troopers Fraternal Ass'n of N.J., et. al. v. State Police Ret. Bd., 2019 N.J. Super. Unpub. LEXIS 1532 (App. Div. Dkt No. A-2090-17T1)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a decision of the State Police Retirement System (SPRS) which adopted the recommendation of an Administrative Law Judge. The STFA, two other unions representing state police and

five named state police officers claimed that law enforcement officers, who joined the state police directly from positions covered by the Police and Fire Retirement System (PFRS) should receive full service credit in the SPRS for their time in PFRS-eligible jobs. They based their argument in part on a 1997 law that added certain non-State police personnel (e.g. Alcoholic Beverage Control Enforcement Bureau inspectors) to the SPRS. The employees covered by the 1997 law had been members of either the PFRS or the Public Employees Retirement System (PERS) and the statute provided that their time in those pension systems would be transferred to the SPRS. The Court, viewing the specific terms of the statute and the legislative history reasoned that the law was intended to apply only to the titles enumerated therein, concluding:

> The issue here is eligibility for a specific benefit — a full service credit transfer — not the amount owed under that disputed benefit. Because appellants are ineligible for the pension benefits they seek, the rule of liberal construction does not apply.

Arbitration award on health benefits upheld; retiree benefits controlled by CNA in effect at time of retirement

City of S. Amboy v. Mun. Emples. Union of S. Amboy, 2019 N.J. Super. Unpub. LEXIS 1414 (App. Div. Dkt. No. A-5087-17T1)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court ruling rejecting the City's challenge to an arbitration award holding: (1) Because the City's switch to the State Health Benefits Plan as its insurance provider required a two-month delay in starting coverage, the City was required to secure coverage for that gap; (2) employees retiring with specified years of service would continue to be insured, with Medicare as the primary coverage, and City health insurance as secondary; and (3) retirees would pay for Medicare Part B premiums, but those who had retired under prior CNAs would be subject to the terms of those agreements. In rejecting the City's challenge to the award, the Court noted:

> In his decision, the arbitrator did not state that all retirees who retired before this CBA was ratified (prior retirees) were entitled to have the City pay for their Medicare Part B premiums. Rather, the arbitrator merely stated the general legal proposition that the rights of prior retirees to specific retirement-related

> contractual benefits are controlled by the terms of the contracts that were in effect at the time they retired. Those prior CBAs were not before the arbitrator, and he was not called upon to construe their terms. The 2014-2018 CBA was before him, and he reasonably construed that CBA as applying to future retirees (those who retire after the contract was ratified), not prior retirees.

Award properly held terminated employee eligible for retiree benefits but not pay for accumulated leave

City of Hoboken v. Hoboken Mun. Supervisors Ass'n, 2019 N.J. Super. Unpub. LEXIS 1616, (App. Div. Dkt. No. A-2884-17T2)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court ruling upholding an arbitration award that was challenged both by the City and the Supervisor's Association. Following 35 years of public service, including 25 with Hoboken, a supervisor was terminated for cause. That action was upheld by the Civil Service Commission and affirmed on appeal. The employee applied for retirement, but the City declined to provide him with retiree health benefits, retroactive pay, terminal leave pay and vacation pay. The arbitrator held that the collective negotiations agreement guaranteed the retiree would receive health benefits and vacation pay. However, the language on terminal leave and vacation pay entitlements provided that an employee must voluntarily terminate employment. Because the employee was fired, the award concluded the CNA did not entitle him to those payments.

On appeal the Court finds the trial court properly applied the narrow standard of review for grievance arbitration awards. It held that the award of retiree health benefits was consistent with the pertinent statute.

Constitutional and protected interests of public employees

Just cause for discipline clause gave officers protected interest in continued employment

Saranchuk v. Lello, 2019 U.S. App. LEXIS 21639 (3rd Cir. 2019)

The United States Court of Appeals for the Third Circuit, whose jurisdiction includes Pennsylvania, New Jersey and Delaware, in an unpublished, thus non-precedential, opinion, affirms in part and reverses and remands in part, the ruling of a federal

district court. Police officers whose employment was terminated or had their hours severely cut sued their employer alleging that the personnel action was a retaliation for their union membership and violated their property interests under the union-Borough collective negotiations agreement and the Due Process Clause of the Fourteenth Amendment. The trial court dismissed the claims. The appeals court holds that the lower court erred in its determination that the officers had no constitutionally protected property interest under the CBA, because the CBA guaranteed that the borough could not discharge, suspend, demote or otherwise discipline the officers without just cause; that guarantee conferred a constitutionally protected property interest; whether the officers arbitrated their claims did not affect whether the officers had a property interest entitling them to a pre-deprivation hearing. In reaching its decision, the court relied on one of its published precedents in a New Jersey case in which the Commission's General Counsel had participated as a friend of the court, Kelly v. Borough of Sayreville, 107 F.3d 1073, 1077 (3d Cir. 1997) holding state law creates the property rights protected by the Fourteenth Amendment.

Constitution deems union membership "a matter of public concern."

Baloga v. Pittston Area Sch. Dist., 2019 U.S. App. LEXIS 18922 (3rd Cir.)

The United States Court of Appeals for the Third Circuit overturns a federal district court ruling on a school employee's claim that his first amendment rights were violated. The appeals court holds that a claim of retaliation based on an employee's union membership necessarily involved a matter of public concern. It held that the school employer failed to show that their interest in maintaining an efficient workplace and avoiding disruption outweighed the employee's associational interests, and there remained disputed issues of fact as to whether the employee's transfer constituted an adverse action and whether the employee was transferred because of his union activities. It also holds that a claim of first amendment violations based on both free speech infringement and interference with freedom of association must be separately analyzed. The Court relies on a similar case it decided involving a New Jersey public employee, Palardy v. Twp. of Millburn, 906 F.3d 76 (3rd Cir. 2018) (Digested in October 2018 General Counsel Report).