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February 12, 2020

TO: Commissioners

FROM Counsel Staff

RE: Developments in the Counsel's Office since January 17, 2020

Commission Cases

New Appeals

Atlantic Cty Shrff's Office and PBA Local 243), SN-2019-059, P.E.R.C. No. 2020-33, Docket No. A-2095-19T3

The PBA has appealed the Commission's decision restraining arbitration of its grievance asserting that the sheriff's staffing decisions in two buildings have created unsafe working conditions.

City of Newark and Newark Police SOA, CO-2020-065, I.R. No. 2020-7; Docket No. AM-0278-19T2.

City of Newark and Newark Police SOA, CO-2020-063, I.R. No. 2020-3, recon. den., P.E.R.C. 2020-29; Docket No. AM-0242-19.

The City of Newark is seeking leave to appeal from two decisions granting interim relief applications made by the Superior Officers Association in two unfair practices cases. Both cases allege that the City unilaterally modified, during the course of collective negotiations, disciplinary review procedures. The Appellate Division will consolidate the City's applications.

Cases related to Commission cases/jurisdiction

Grievance re attendance policy referred for negotiability ruling

Gloucester City Bd. of Educ. v. Gloucester City Educ. Ass'n, 2020 N.J. Super. Unpub. LEXIS 280 (Docket No. A-4464-18T4)

The Appellate Division of the Superior Court, in an unpublished opinion, stays an order compelling arbitration issued by the Chancery Division and refers the dispute to the Public Employment Relations Commission. The Association grieved the Board's implementation of an attendance policy which provides that whenever an employee's absence or tardiness in a given year reaches 3.5 percent, the employee's annual evaluation will include that rate and a corrective action plan will be developed to review and improve the employee's attendance. The plan may include:

- a fitness for duty evaluation,
- meetings with the administration to review attendance, or
- an examination performed by the District's physician or a consult between the District's physician and the employee's physician.

The Association's grievance asserts:

> [T]he mechanical application of [the Attendance Policy], without considering the reasons for absences, is improper. Furthermore, the [Association] finds this action to be arbitrary and capricious due to the fact that the administration is considering only the total number of absences (and applying them to a formula of their own design) and not the reasons behind such absences.

The appeals court held that trial court should have refrained from determining whether the parties had agreed to arbitrate until a ruling had been made by the Commission, pursuant to the agency's primary jurisdiction, on whether the subject of the grievance was negotiable.

Other Cases

Teaching staff member can be tenured in more than one position

Paula Melnyk v. Bd. of Ed. of the Delsea Regional High School District,___ N.J. ___ , 2020 N.J. LEXIS 109 (Docket No. A-77-18)

The New Jersey Supreme Court, reverses the decision of the Appellate Division of the Superior Court and holds that a teaching staff member is not barred from acquiring tenure in more than one instructional position. Melnyk was a tenured special education teacher with considerable seniority employed by the Board since 1991. She held an Instructional Certificate with endorsements as a "Teacher of the Handicapped and Elementary School Teacher" and with "highly qualified status in English instruction."

In September 2002, the Board first assigned Melnyk to additionally work as a "Special Education Alternative Program Teacher" to teach special education classes in the evening while maintaining her regular daytime instructional position. That program, known as "Bookbinders" required teachers to be appropriately certified, with the same credentials Melnyk already held for her daytime position. With the exception of one school year, Melnyk taught "Bookbinders" from 2002 through the 2014 to 2015 school year, more than the period required to achieve tenure. However, for 2015 to 2016, the Board removed Melnyk from Bookbinders and replaced her with a non-tenured teacher.

Melnyk's appeal to the department of education was rejected, with an Administrative Law Judge and the Commissioner of Education reasoning that the Bookbinders position was extracurricular and concluding that Melnyk was not entitled to tenure in that post because the extracurricular job did not require additional certification beyond what she already possessed. The Appellate Division affirmed.

The Supreme Court held that the lower tribunals engaged in legal error by labeling the position as "extracurricular" and then short-circuiting the requisite tenure analysis based on that classification. It held the instructional and tenure-eligible position did not become extracurricular and tenure ineligible simply because petitioner already held tenure in another position. Melnyk met the statutory criteria for tenure and was entitled to a remedy for the violation of her right not to be removed or reduced in salary while protected by tenure for her work in the BookBinders program.

Challenge to Fitness Exams after critical incidents nonarbitrable

City of Newark v. Newark Superior Officers Ass'n, 2020 N.J. Super. Unpub. LEXIS 165 (Docket No. A-3684-18T3)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a decision of the Chancery Division holding that a grievance filed by the Superior Officers Association (SOA) was not contractually arbitrable. The City issued an order mandating that any officer involved in a shooting or other critical incident to submit to a fitness for duty examination (FFDE). The SOA sought to arbitrate a grievance asserting that the order alleging that the application of the Order to one of its members violated both the collective negotiations agreement and the Americans with Disabilities Act (ADA) as well as several provisions of the CNA. On appeal, the court rejected the SOA's argument that the trial court's order failed to give deference and weight to the presumption of arbitrability reflected in the text of N.J.S.A. 34:13A-5.3.

Mere union membership no basis for parking officer's job security

Sherrill v. City of Hoboken, 2020 U.S. Dist. LEXIS 3090

In an unpublished opinion, the U.S. District Court for New Jersey dismisses a multi-count federal lawsuit filed by a discharged parking officer who asserts that he was harassed, disciplined and ultimately fired because he was African-American and gay. In its opinion, the federal court discusses Sherrill's arguments based on his union membership:

> Equally deficient is Plaintiff's assertion that he "was a union member and party to a collective bargaining agreement." . . . Plaintiff provides no facts or details about the asserted collective bargaining agreement, nor does he provide any explanation as to how this assertion means he has a legitimate entitlement to remaining at his job. . . Indeed, Plaintiff does not even allege that the collective bargaining agreement contained a provision stating that Plaintiff could only be discharged for cause. The mere fact that Plaintiff was a union member and party to a collective bargaining agreement does not, by itself, mean that he has a legitimate entitlement to remaining at his job. . .
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> [2020 U.S. Dist. LEXIS 3090 at 13; citations omitted]