



STATE OF NEW JERSEY
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April 22, 2020

TO: Commissioners
FROM: Counsel Staff
RE: Developments in the Counsel's Office
since March 17, 2020

Commission Cases

New Appeals

Rutgers University and Leslie Jones, Docket No. DA-2020-002

Detective Sergeant Jones appeals from the Director of Arbitration's decision administratively dismissing a petition for special disciplinary arbitration to review Jones' termination from the Rutgers University Police Department. The conduct on which the termination was based could constitute a violation of criminal law making arbitration unavailable.

County of Essex and Essex County PBA Local 382,
P.E.R.C. No. 2020-40

The County has appealed from that part of the Commission's order declining to restrain arbitration of the portion of the PBA's grievance asserting that the County's change in health insurance carriers reduced the level of benefits.

Cases related to Commission cases/jurisdiction

Board-Association agreement to reduce already accumulated sick leave valid; PERC's scope of negotiations jurisdiction not implicated.

Paul Barila v. Board of Education of Cliffside Park, Bergen County, 2020 N.J. LEXIS 500 (Dkt. No. A-39-18 April 20, 2020)

A divided Supreme Court of New Jersey, by a four to three vote, overturns the decisions of the Appellate Division and Chancery Division of the Superior Court in a case involving payment for accumulated sick leave.

In a decision affirmed by the Appellate Division, the Chancery Division held that the Board and Association could not enter into a collective negotiations agreement that retroactively diminished the value of accumulated, but unused, sick leave that employees with at least ten years service would be eligible to receive on retirement and employees with at least 25 years service would receive on separation from employment for any reason. The parties' 2012 to 2015 CNA and several prior agreements provided for a maximum payment of \$25,000 for accumulated but unused sick leave. In their 2015 to 2018 CNA the Board and Association agreed to lower the maximum to \$15,000. Teachers who had accumulated unused sick leave valued in excess of \$15,000 prior to July 1, 2015 filed the lawsuit.

The Supreme Court majority held that a given teacher's right to sick leave compensation did not vest until that teacher, having served the length of time required by the agreement, retired or otherwise separated from employment with his or her sick leave still unused. When the Board and the Association entered into the CNA all plaintiffs were still actively employed. The majority observed that for the Association to have agreed to the lower maximum payout, the Board presumably made concessions during "bargaining."

A dissenting opinion written by Justice Albin asserts that, under CNAs going back over 20 years, the teachers were promised deferred income and were entitled to rely on those promises. Justice Albin notes that there are no clear and unambiguous words that suggest the 2015 Agreement's sick-leave cap applies

retroactively to extinguish plaintiffs' right to compensation for accrued sick leave under prior agreements.

All seven justices agreed with the lower courts' holding that PERC did not have jurisdiction as the agency's rules provided that only an employer or union, not individual employees, could seek a scope of negotiations determination.

No direct appeal to Civil Service for disciplined employee; must use grievance procedure

In re M.M., 2020 N.J. Super. LEXIS 35 (Dkt. Nos. A-4038-17T4/A-2490-18T3)

The Appellate Division of the Superior Court, in an unpublished opinion, holds that a career service employee who is disciplined by an appointing authority for violating the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy), N.J.A.C. 4A:7-3.1, may not appeal directly to the Civil Service Commission (CSC), but instead must first appeal either in a departmental hearing or, if applicable, in accordance with the procedure in a collective negotiations agreement. The court interprets the plain language of N.J.A.C. 4A:7-3.2(n) and N.J.A.C. 4A:7-3.2(n)(3) to permit a direct appeal to the CSC from a finding an employee violated the State Policy only where no discipline is imposed.

CNA prevails over contrary term in individual contract

Watchung Hills Regional Education Association v. Board of Education of Watchung Hills Regional High School, 2020 N.J. Super. Unpub. LEXIS 659 (App. Div. Dkt. No. A-3574-18T2)

In an unpublished opinion, the Appellate Division of the Superior Court, reverses and remands for further proceedings, a trial court determination which declined to alter an arbitrator's award finding that there was no jurisdiction to arbitrate a bus driver's discharge. The Board terminated a part-time bus driver covered by the CNA which contained a just cause clause providing that challenges to terminations were to be processed through the grievance procedure. The driver also had an individual employment contract providing that he could be terminated without a reason on 30-days notice. The grievance procedure provided that "no-reason" terminations were not arbitrable. The Board

said it was exercising that option but also said it had just cause to terminate the employee who had left a voice mail on his supervisors phone calling her a bitch. The appeals court holds:

The employee is entitled to a resolution of whether the Board had good cause to terminate him. He has that right because the Board asserted a reason for his termination, and as a result, the CNA trumps the individual contract. On remand, the parties should address—by motion or otherwise—whether the CNA requires arbitration of the good-cause issue.

Subsequently, the Court relied on Mount Holly Twp. Bd. of Educ. v. Mount Holly Twp. Educ. Ass'n, 199 N.J. 319, 328 (2009) and declared:

Here, the CNA gave the employee the benefit of challenging good cause. It is settled that "[t]o the extent provisions in an individual employment contract conflict or are inconsistent with terms in a [CNA], and diminish or interfere with rights provided by the CNA, the language in the individual contract must yield to the CNA." Id. at 329.

Other Cases

Pension is property right, not contractual, but forfeiture warranted

State v. Anderson, ___ N.J. Super. ___, 2020 N.J. Super LEXIS 37 (App. Div.) Dkt. No. A-4289-18T3

The Appellate Division of the Superior Court, in a published, thus precedential, opinion affirms the ruling of the Law Division that, based on state statutes, Anderson's entire pension should be forfeited. The appeals court differs with the trial court's reasoning that the right to a pension is contractual, instead holding that a public employee's pension is a property right.

Anderson pled guilty to accepting a \$300 bribe while employed with the Jersey City Tax Assessor's Office. The State

successfully filed suit seeking the complete forfeiture of Anderson's pension benefits pursuant to N.J.S.A. 43:1-3.1.

On appeal Anderson argued that forfeiture of his entire pension (which he was already receiving) was an excessive fine in violation of the Eighth Amendment of the United States Constitution and Article I, Paragraph 12 of the New Jersey Constitution.

The trial court concluded that the conviction required a complete pension forfeiture and did not violate the Excessive Fines Clause as receipt of pension benefits was a contractual arrangement between a public employee and employer conditioned on rendering honorable service, as opposed to a property right. The appeals court concludes that the right to receive pension benefits was a property right and the total forfeiture of his pension was a fine within the meaning of the Eighth Amendment. However, the reviewing court concludes the conduct was sufficiently egregious to warrant a complete forfeiture and did not violate the Eighth Amendment.

Evidence re Officer's call to Union after shooting did not violate right to counsel; forfeiture upheld

State v. Stuart, 2020 N.J. Super. Unpub. LEXIS 430 (Dkt No. A-1627-18T4)

The Appellate Division of the Superior Court, in an unpublished opinion, upholds the conviction of a police officer for reckless manslaughter. The fatal shooting occurred at the officer's house while he was off-duty. The issue on appeal was whether the shooting was intentional, reckless or a tragic accident. At trial the prosecutor introduced evidence that the officer called his union representative after the shooting to establish that the officer was not acting like a person in a state of panic; rather, he was acting out of his own "self-preservation." The officer argued that admission of the testimony violated his right to counsel as "any reasonably-informed juror" would understand "that legal representation for a police officer is obtained through that officer's membership in the [Policemen's Benevolent Association] union." The appeals court rejects this argument:

The state did not violate defendant's Fifth or Sixth Amendment rights. The testimony elicited by

the state only referred to defendant calling his union representative. There was no reference to defendant seeking legal counsel or to hire an attorney. Instead, the state sought the testimony to show defendant's state of mind; that is, he was not in shock or panicking, but was thinking about how he should proceed. We reject defendant's unsupported contention that the jury knew that the union representative would hire an attorney for defendant. There was no support for such an inference in the limited testimony elicited from the police officer who overheard defendant making the call to his union representative.

Arbitration award applying salary statute is confirmed

Township of Wayne v. Wayne Township Primary Level Supervisors Association, 2020 703 N.J. Super Unpub. LEXIS (App. Div Dkt. No. A-4663-18T2)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court ruling confirming a grievance arbitration award. A new collective negotiations agreement (CNA) covering Calendar Years 2015 through 2018 contained pay increases for the salary guide for the position of chief sanitarian. The holder of that position, who was the Association's Vice President and a member of its negotiations team, was at the maximum step under the previous CNA. However, the Township declined to increase his pay to the amount provided in the new CNA. The Association filed a grievance. The arbitrator noted:

[T]he Supreme Court held that statutes and regulations applicable to employers in a particular bargaining unit are effectively incorporated by reference as terms of any collective agreement covering the unit.

He then held that pursuant to N.J.S.A. 26:3-25.1 payment of the negotiated increase was mandatory. That law states:

Every person holding a license issued under [N.J.S.A. 26:1A-41], who is employed in a position for which this license is required by any board of health, . . . shall receive the maximum salary in the person's range, within five years from the date of appointment to this position if the majority

of the person's job performance evaluations are satisfactory.

The arbitrator found the grievant met the statutory conditions and could not be denied the negotiated increase.

The appeals court held that both the CNA and the statute provided a valid basis for the raise and rejected the Township's argument that the law did not apply to it.