PUBLIC EMPLOYMENT RELATIONS COMMISSION

GENERAL COUNSEL'S ANNUAL REPORT - 1995

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1995 Statistics

The Commission received eleven decisions from the New Jersey appellate courts. All were affirmances. In five other cases, appeals were withdrawn or dismissed and in one case, a motion for lea\ve to appeal was denied and an interim relief order was enforced. The Commission decided 123 cases; 22 have been appealed.

Representation Cases

In *Essex Cty. Vo/Tech. Bd. of Ed. and Essex Cty. Vo/Tech. Administrators and Supervisors Assn.*, P.E.R.C. No. 94-48, 19 *NJPER* 584 (¶24278 1993), aff'd 21 *NJPER* 63 (¶26045 App. Div. 1995), certif. den. 141 *N.J*. 96 (1995), the Commission held that the Association was not barred from representing a negotiations unit of the employer's administrators merely because another NJEA affiliate represented a unit of teachers. The Commission also denied a pre-certification hearing on the speculative claim that the administrators' unit might be dominated by the rank-and-file unit and held that allegations of domination should be raised in unfair practice proceedings. The Appellate Division agreed and the Supreme Court denied certification. *Accord Hudson Cty. and District 1199J*, D.R. No. 85-7, 10 *NJPER* 623 (¶15297 1984), aff'd *NJPER Supp*. 2d 157 (¶138 App. Div. 1985). A contrary decision might have undermined

negotiations relationships throughout New Jersey. The New Jersey Supreme Court prohibits its probation officers from joining police unions. Judge Lechner of the federal district court in New Jersey found this ban constitutional. *Kirchgessner v. Wilentz*, 149 *LRRM* 2718 (D.N.J. 1995). An appeal is pending.

Unfair Practice Cases

In *Essex Cty. Vo/Tech. Bd. of Ed. and Essex Cty. Vo/Tech. Administrators and Supervisors Ass'n*, P.E.R.C. No. 95-14, 20 *NJPER* 333 (¶25174 1994), aff'd 21 *NJPER* 363 (¶26225 App. Div. 1995), a companion case to the *Essex* case discussed on page 1, the employer violated subsections 5.4(a)(1) and (5) of the Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq*. ("Act") by refusing to negotiate with the newly certified majority representative. Having affirmed the order certifying the Association, the Court affirmed this order as well.

In *Bridgewater Tp. and Bridgewater PBA Local No. 174*, P.E.R.C. No. 95-28, 20 *NJPER* 399 (¶25202 1994), aff'd 21 *NJPER* 401 (¶26245 App. Div. 1995), the employer violated subsections 5.4(a)(1) and (5) when it repudiated its contractual commitments to three unions to provide HMO coverage "at no charge." After withdrawing from the State Health Care Benefits Program, the employer charged its employees the difference between the cost of its self-insurance program and the cost of HMO premiums. While the contractual commitments were not enforceable as long as the employer remained in the State Health Benefits Program, *N.J.A.C*. 17:9-5.6, they were negotiated with the knowledge that the employer was leaving (or had left) that program and became enforceable once the employer did leave.

In *UMDNJ and CIR*, P.E.R.C. No. 93-114, 19 *NJPER* 342 (¶24115 1993), recon. granted and order reaffirmed, P.E.R.C. No. 94-60, 20 *NJPER* 45 (¶25014 1993), aff'd 21 *NJPER* 319 (¶26203 App. Div. 1995), certif. granted 142 *N.J.* 573 (1995), the employer violated subsections 5.4(a)(1) and (5) when it denied an intern union representation during an investigation into his allegedly poor patient care and when it withheld information concerning summary suspensions from the majority representative. The employer conceded that interns were employees under the Act, but argued that affording them *Weingarten* rights interfered with its academic freedom to decide whether they should continue in the intern program. The Commission rejected this argument and the Appellate Division affirmed for the reasons stated in the Commission's initial opinion. Certification has been granted.

In *State of N.J. (Dept. of Law & Public Safety) and Local 195, IFPTE*, P.E.R.C. No. 94-78, 20 *NJPER* 74 (¶25032 1994), aff'd 21 *NJPER* 319 (¶26202 1995), the Commission dismissed a charge alleging that the employer violated subsections 5.4(a)(1),(4), and (5) when it assigned communications duties to State troopers instead of communications operators and when it allegedly breached a contractual provision requiring it to discuss subcontracting. The Commission found that there was no unit work claim because troopers had always performed communication duties and that the contractual claim had to be pursued through the parties' grievance procedure. The Court agreed.

In *Jones v. State of New Jersey and CWA*, P.E.R.C. No. 94-116, 20 *NJPER* 273 (¶25138 1994), aff'd 21 *NJPER* 319 (¶26204 App. Div. 1995), pet. for certif. pending,

the Commission dismissed a charge alleging that CWA had violated its duty of fair representation by not assisting an employee seeking a recall from a layoff. The Commission held that the charge was untimely because the employee had not filed the charge within six months of the union's declining to represent her and that the already-expired statute of limitations was not tolled by CWA's later conclusion that its local should have represented the employee. The Court agreed.

In *Lakewood Bd. of Ed. and Lakewood Ed. Ass'n*, I.R. No. 95-22, 21 *NJPER* 233 (¶26149 1995), a designee ordered the employer to provide the Association with financial information concerning the employer's health insurance arrangements, information relevant to successor contract negotiations. Judge Oles of the Law Division enforced the interim order, OCN-L-1436-95, and Judge Havey of the Appellate Division denied a stay. An Appellate Division panel later denied leave to appeal. App. Div. Dkt. No. AM-1115-94T1 (7/10/95).

Scope of Negotiations

In *State of N.J. (DEP) and CWA*, P.E.R.C. No. 95-115, 21 *NJPER* 267 (¶26172 1995), aff'd, 285 *N.J. Super*. 541 (App. Div. 1995), the Commission held that the State did not have to negotiate before eliminating 40-hour a week positions of DEP employees and moving them into 35-hour a week positions as part of a layoff plan approved by the Department of Personnel. While reaffirming that workweek reductions are normally negotiable, the Commission stressed that this case involved State service where the Merit System Board regulates compensation and workweeks and where a recent MSB regulation had extended the employer's statutory and managerial power to

lay off employees to include demotions in the form of reductions in hours. Given the full panoply of MSB regulations and DOP's approval of DEP's layoff plan, the Commission agreed with the employer that this reduction was a layoff action within the meaning of *N.J.S.A*. 11A:8-1 and therefore outside the scope of negotiations. The Court agreed, stating that it was "satisfied that the regulations mandating, as they do, that the DOP Commissioner act to determine and designate lateral, demotional, and special reemployment rights for all affected titles prior to the layoff, demonstrates that a comprehensive and legitimate plan to equate the present action of the State with a layoff is legitimate and within the statutory authority. *See N.J.A.C.* 4A:8-1.1 *et seq*." 285 *N.J. Super*. at 552. The Court also affirmed the dismissal of an unfair practice charge alleging that the State had refused to negotiate.

State of N.J. (Dept. of Human Services) and CWA, P.E.R.C. No. 94-108, 20 *NJPER* 234 (¶25116 1994), aff'd 21 *NJPER* 262 (¶26165 App. Div. 1995), held legally arbitrable a grievance claiming that the employer, in basing a transfer solely on seniority, had miscalculated the transferee's seniority. Case law permits parties to agree to use seniority as a tiebreaker in personnel decisions such as promotions and transfers when other qualifications are essentially equal. The Court affirmed for the reasons stated in the Commission's opinion.

Ocean Tp. Superior Officers Ass'n and Ocean Tp., P.E.R.C. No. 95-12, 20 *NJPER* 331 (¶25172 1994), aff'd 21 *NJPER* 324 (¶26208 App. Div. 1995), held mandatorily negotiable a contract clause requiring co-payments for health insurance benefits, provided the clause would not go into effect until the same co-pay provisions

applied to all other Township employees. The Association argued that *N.J.A.C*. 17:9-5.4(b) preempted negotiations because it required uniform treatment of dependent coverage costs, but the Commission and Court held that the clause was negotiable because the proviso insured that the regulation would not be violated.

Hunterdon Central Reg. H.S. Bd. of Ed. v. Hunterdon Central Bus Drivers Ass'n, P.E.R.C. No. 94-75, 20 *NJPER* 68 (¶25029 1994), aff'd 21 *NJPER* 46 (¶26030 App. Div. 1995), certif. den. 140 *N.J* 277 (1995), held legally arbitrable a grievance contesting a bus driver's termination and non-renewal. The Court ruled that the board could agree to extend tenure to its bus drivers and that reinstatement was an available remedy because there was no difference between termination and contract non-renewal.

In *Franklin Lakes Bd. of Ed. and Franklin Lakes Ed. Ass'n*, P.E.R.C. No. 95-24, 20 *NJPER* 395 (¶25198 1994), aff'd 21 NJPER 362 (¶26224 App. Div. 1995), the Commission declined to restrain arbitration of a grievance seeking paid excess leave for religious reasons. Holding that the clause permitting paid excess leave was neutral and thus constitutional on its face, the Commission declined to speculate, before arbitration, on whether the clause could be constitutionally applied to grant paid leave in this instance since the answer would depend in part on the arbitrator's factual findings and contractual interpretations. The Court upheld this decision as prudent and consistent with the principle that constitutional issues should not be decided in advance of necessity.

Grievance Arbitration

In *Scotch Plains-Fanwood Bd. of Ed. v. Scotch Plains-Fanwood Ed. Ass'n*, 139 *N.J.* 141 (1995), the Supreme Court upheld an award restoring a teacher's salary increments. The Court concluded that the arbitrator had properly read a just clause cause into the contract and found that the employer had not proved just cause to withhold the teacher's increments for excessive absenteeism because the absences were beyond her control. The Court noted that the increments would not have been restored had *N.J.S.A*. 18A:29-14 applied instead of *N.J.S.A*. 34:13A-26 and 29. Given its holding, the Court did not consider whether the arbitrator had erred in finding that a withholding was too harsh a penalty for a first act of discipline.

In *Middletown Tp. Bd. of Ed. v. Middletown Tp. Ed. Ass'n*, App. Div. Dkt. No. A-34-94T5 (6/8/95), certif. den., an Appellate Division panel reinstated a vacated award. The arbitrator found that the Athletic Director had violated the contract by failing to interview the only applicant for girls' bowling coach and instead persuading a non-applicant to take that position. The arbitrator ordered the board to pay the grievant the coaching stipend, an order the Appellate Division held rationally related to the proven violation.

Commission Regulations

The Commission readopted its representation, unfair practice, and contested transfer rules. *N.J.A.C*. 19:11-1, 14-1, and 18-1 *et seq*. Minor revisions make the rules easier to understand. If no exceptions are filed, a Hearing Officer's report or a Hearing Examiner's report will become a final decision unless the Commission chooses to consider it. *N.J.A.C.* 19:11-7.4(c); 19:14-7.3(h).

Miscellaneous Statutes

A nontenured employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed. *N.J.S.A*. 18A:27-4.1. However, the employee has a right to receive a statement of reasons and to appear before the board to try to persuade it to offer reemployment. Appointments, transfers, and removals of school board employees must also be recommended by the chief school administrator.

United States Supreme Court Cases

In *McKennon v. Nashville Banner Pub. Co*., __ *U.S.* __, 115 *S.Ct.* 879, 66 *FEP* Cases 1192 (1995), the Court held that post-discharge discovery of wrongdoing will not cut off a Title VII suit, but may bar reinstatement and backpay once the employer discovers that evidence. The wrongdoing must be of such severity that the employee would have been terminated on that ground alone if the employer had known of it at the time of discharge.

In *NLRB v. Town & Country Electric Co*., __ *U.S*. __, 150 *LRRM* 2897 (1995), the Court held that paid union organizers seeking and having jobs with non-unionized employers are "employees" entitled to the NLRA's protections.

New Jersey Supreme Court Cases

In *Impey v. Shrewsbury Bd. of Ed*., 142 *N.J*. 388 (1995), the Court upheld a school board's power to: (1) subcontract with a county educational services commission to provide speech correction services, and (2) lay off a tenured teacher who had provided those services.

In *Craig v. Suburban Cablevision, Inc*., 140 *N.J*. 623 (1995), former employees were held to have standing to bring LAD claims alleging that they were discharged because they were friends and relatives of co-employees who had filed earlier LAD claims.

In *Young v. Schering Corp*., 141 *N.J*. 16 (1995), the Court held that by bringing a CEPA claim, an employee waived the right to bring retaliatory discharge claims under a contract or under other statutes. The employee, however, did not waive a contractual claim to severance pay or common-law claims of defamation and malicious interference with employment opportunities.

In *Tormee Constr. Inc. v. Mercer Cty. Improvement Auth*., 142 *N.J.* 511, 151 *LRRM* 2440 (1995), the Court enjoined a project labor agreement. Its order stopped the second phase of a library improvement project so that new bids could be submitted.

Appellate Division Decisions

Danese v. Ginesi, 280 *N.J. Super*. 17 (App. Div. 1995), held that a trial court lacked jurisdiction to consider the eligibility of the State PBA president for membership and office under the PBA's certificate of incorporation or the composition of the PBA's judicial committee under its by-laws. The Court concluded that the plaintiffs had not exhausted internal union remedies and that the PBA was entitled to the utmost latitude in its internal affairs.

In *Granziel v. City of Plainfield*, 279 *N.J. Super*. 104 (App. Div. 1995), a sanitary inspector trainee was illegally discharged because of his epilepsy. The Court ordered reinstatement, even though that remedy meant bumping another employee.

In *Neptune Tp. Bd. of Ed. v. Neptune Tp. Ed. Ass'n*, App. Div. Dkt. No. A-1184-93T2 (5/15/95), certif. granted, the Commissioner of Education, the State Board of Education, and the Appellate Division agreed that N.J.S.A. 18A:29-4.1 neither prohibits nor requires paying salary increments during successor contract negotiations. The Court did not consider whether the Employer-Employee Relations Act required payments.

In *CWA v. State*, App. Div. Dkt. No. A-5444-94T5 (6/9/95), an Appellate Division panel vacated an order that had restrained CWA affiliates from conducting a strike authorization vote. Leave to appeal was denied. S. Ct. Dkt. No. 40,563 (6/16/95).

Brown v. Port Authority Superior Officers Ass'n, 283 *N.J. Super*. 122 (App. Div. 1995), held that the Port Authority is a "political subdivision" excluded from NLRA coverage.

In *Chou v. Rutgers, The State Univ*., 283 *N.J. Super*. 524 (App. Div. 1995), the Court held that a tenure denial was not disciminatorily motivated. It reversed the Division on Civil Rights.

In *Smith v. Andover Tp*., 283 *N.J. Super*. 452 (App. Div. 1995), the Court concluded that *N.J.S.A*. 40A:14-179 entitles a police chief to receive at least a 5% higher salary than the next ranking officer, but does not require that a chief receive the same percentage increase as that officer.

Ridgewood Ed. Ass'n v. Ridgewood Bd. of Ed., 284 *N.J. Super*. 427 (App. Div. 1995), held that a majority representative could challenge an employment policy even

though that policy did not affect any current employees. The policy limited reemployment of supplemental teachers to two consecutive years.

A Look Ahead

The New Jersey Supreme Court will review two Commission cases. The Court will determine whether the discipline amendment permits a public employer to agree to arbitrate a suspension based on an allegation of sexual harassment. *New Jersey Turnpike Auth. v. New Jersey Turnpike Supervisors Ass'n*, 276 *N.J. Super*. 29 (App. Div. 1994). And the Court will decide the *UMDNJ and CIR* case discussed at page 3 of this report.

No question of public sector relations law has been more unsettled than the power of public employers to agree to arbitrate disciplinary disputes. Eleven appeals in disciplinary cases have been consolidated and are awaiting Appellate Division decision. *Boro. of Hopatcong and PBA Loc. 149*, P.E.R.C. No. 95-73, 21 *NJPER* 157 (¶26096 1995), recon. den. P.E.R.C. No. 96-1, 21 *NJPER* 269 (¶26173 1995); *Hudson Cty. and District 1199J*, P.E.R.C. No. 95-48, 21 *NJPER* 73 (¶26051 1995); *Hudson Cty. and PBA Loc. 51*, P.E.R.C. No. 95-69, 21 *NJPER* 153 (¶26092 1995); *Monmouth Cty. and CWA*, P.E.R.C. No. 95-47, 21 *NJPER* 70 (¶26050 1995); *City of Orange Tp. and FMBA Local No. 10,* P.E.R.C. No. 95-53, 21 NJPER 78 (¶26056 1995); *So. Brunswick Tp. and PBA Local 166,* P.E.R.C. No. 95-45, 21 *NJPER* 67 (¶26048 1995); *Union Cty. and PBA, Union Cty. Correction Officers, Local No. 199, Inc.*, P.E.R.C. No. 95-43, 21 *NJPER* 64 (¶26046 1995); *Woodbridge Tp. and IBT,* P.E.R.C. No. 95-49, 21 *NJPER* 74 (¶26052 1995); *Woodbridge Tp. and AFSCME Local 3044*, P.E.R.C. No. 95-50, 21

NJPER 75 (¶26053 1995); *Woodbridge Tp. and AFSCME Local 3044,* P.E.R.C. No. 95-51, 21 *NJPER* 76 (¶26054 1995); and *Woodbridge Tp. and AFSCME Local 3044*, P.E.R.C. No. 95-52, 21 *NJPER* 77 (¶26055 1995). Some or all of these cases will likely end up in the New Jersey Supreme Court.

Two other important appeals have been consolidated and are pending in the Appellate Division. *New Jersey Turnpike Auth. and AFSCME Locals 3912, 3913, and 3914*, P.E.R.C. No. 94-24, 19 *NJPER* 461 (¶24218 1993) and D.R. No. 94-29, 20 *NJPER* 295 (¶25149 1994). These appeals involve the representational rights of Authority employees above the primary level of supervision and the reach of the "managerial executive" and "confidential employee" exclusions from the Act's coverage.