STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PO Box 429
TRENTON, NEW JERSEY 08625-0429

www.state.nj.us/perc

ADMINISTRATION/LEGAL
(609) 292-9830
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For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089
EMAIL: mail@perc.state.nj.us

September 22, 2005

M E M O R A N D U M

TO: Commissioners

FROM: Robert E. Anderson
General Counsel

SUBJECT: Monthly Report on Developments in the Counsel's Office Since July 28, 2005

Commission Cases

The Appellate Division has scheduled oral argument for October 18 in Warren Hills Reg. Bd. of Ed. and Warren Hills Reg. H.S. Ed. Ass'n, P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), App. Div. Dkt. No. A-001747-04T5. The Commission held that the Board violated 5.4a(1) and (3) when it subcontracted its bus operators in retaliation for the drivers' organizing.

On September 14, an Appellate Division panel heard oral argument in Rutgers, The State Univ. and Rutgers Council of AAUP Chapters, P.E.R.C. No. 2004-64, 30 NJPER 109 (¶44 2004), App. Div. Dkt. No. A-004837-03T1. The Commission determined that certain aspects of Rutgers' patent policy were mandatorily negotiable while other aspects of the policy were not negotiable.

The PBA has filed an appeal in Piscataway Tp. and Piscataway PBA Local No. 93, P.E.R.C. No. 2005-79, 31 NJPER 176 (¶71 2005). The PBA asserts that the Commission erred in not rescinding promotions made pursuant to a policy that included two procedures that were unilaterally adopted. The Commission found that the results of the promotional process would not have been any different had the PBA's positions on the two procedural issues been adopted by the Township and incorporated into its promotional policy. The Township in turn has filed a cross-appeal asserting that the Commission should not have found an unfair practice at all.

Other Cases

In Lomack v. City of Newark, Dkt. No. 2:04-CV-6085 (8/25/05), __ F. Supp.2d ___ (D.N.J. 2005), Chief Judge Bissell of the New Jersey federal district court upheld the constitutionality of the City's plan to desegregate its fire companies by involuntarily transferring some firefighters after new firefighters had been assigned and all voluntary transfers granted. The Court found that the City had a compelling interest in eliminating segregation and had narrowly tailored its remedial plan to that goal. As part of its analysis, it stressed that the City had a non-negotiable managerial prerogative to transfer and reassign firefighters and cited Newark Firefighters Union, Inc. v. City of Newark, App. Div. Dkt. No. A-000 493-04T3 (6/23/05), __ NJPER ___ (¶___ 2005), aff'g P.E.R.C. No. 2005-2, 30 NJPER 294 (¶102 2004).

In Potente v. Hudson Cty., 378 N.J. Super. 40 (App. Div. 2005), the Appellate Division held that a successful plaintiff in a LAD action is entitled to collect prejudgment interest, regardless of whether the respondent is a private sector or public sector employer.

In State v. Williams, 184 N.J. 432 (2005), the Supreme Court held that a mediator appointed by a court pursuant to Rule 1:40 could not testify in a subsequent criminal proceeding regarding a participant's statements during mediation. The Court reasoned that the defendant who wished to call the mediator had not shown a need for that testimony sufficient to overcome the privilege of mediation confidentiality under the Court rule or that the evidence was not available from other sources. The Court stated:

> Successful mediation, with its emphasis on conciliation, depends on confidentiality perhaps more than any other form of ADR. See Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc., 25 P.3d 1117, 1126 (Cal. 2001) ("[C]onfidentiality is essential to effective mediation . . . ."). Confidentiality allows "the parties participating [to] feel that they may be open and honest among themselves . . . . Without such assurances, disputants may be unwilling to reveal relevant information and may be hesitant to disclose potential accommodations that might appear to compromise the positions they have taken." Final Report of the Supreme Court Task Force on Dispute Resolution 23 (1990); see also Prigoff, supra, 12 Seton Hall Legis. J. at 2 ("Compromise negotiations often require the admission of facts which disputants would never otherwise concede."). Indeed, mediation stands in stark contrast to formal adjudication, and even arbitration, in which the avowed goal is to uncover and present evidence of claims and defenses in an adversarial setting. Mediation sessions, on the other hand, "are not conducted under oath, do not follow traditional rules of evidence, and are not limited to developing the facts." Rinaker v. Superior Court, 74 Cal. Rptr. 2d 464, 467 (Ct. App. 1998). Mediation communications, which "would not [even] exist but for the settlement attempt," are made by parties "without the expectation that they will later be bound by them." Prigoff, supra, 12 Seton Hall Legis. J. at 2, 13. Ultimately, allowing participants to treat mediation as a fact-finding expedition

would sabotage its effectiveness. See id. at 2 (warning that routine breaches of confidentiality would reduce mediation to "discovery device").

> If mediation confidentiality is important, the appearance of mediator impartiality is imperative. A mediator, although neutral, often takes an active role in promoting candid dialogue "by identifying issues [and] encouraging parties to accommodate each others' interests." Id. at 2. To perform that function, a mediator must be able "to instill the trust and confidence of the participants in the mediation process. That confidence is insured if the participants trust that information conveyed to the mediator will remain in confidence. Neutrality is the essence of the mediation process." Isaacson v. Isaacson, 348 N.J. Super. 560, 575 (App. Div. 2002) (interpreting Rule 1:40). Thus, courts should be especially wary of mediator testimony because "no matter how carefully presented, [it] will inevitably be characterized so as to favor one side or the other." Prigoff, supra, 12 Seton Hall Legis. J. at 2 (emphasis added); see also In re Anonymous, 283 F.3d 627, 640 (4th Cir. 2002) ("If [mediators] were permitted or required to testify about their activities, . . . not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other." (alteration in original) (quoting NLRB v. Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980)); Ellen Deason, The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?, 85 Marq. L. Rev. 79, 82 (2001) ("[I]f a mediator can be converted into the opposing party's weapon in court, then her neutrality is only temporary and illusory.").

In Freehold Reg. H.S. Dist. Bd. of Ed. v. Freehold Reg. H.S. Dist. Ed. Ass'n, App. Div. Dkt. No. A-3719-03T2 (7/15/05), an Appellate Division panel restrained arbitration over a grievance contesting the non-renewal of an annual employment contract of the varsity baseball coach. The coach was not renewed "due to his inappropriate handling of school funds." Applying Camden Bd. of Ed. v. Alexander, 181 N.J. 187 (2004), the Court restrained arbitration absent any clear contractual language calling for arbitration of non-renewal decisions.

In Borough of Alpha Bd. of Ed. v. Alpha Ed. Ass'n, App. Div. Dkt. No. A-0155-04T5 (7/21/05), an Appellate Division panel vacated an arbitration award requiring a school board to pay health insurance benefits to part-time professional employees who work at least 20 hours per week. The Court found that the grievance was untimely and that the union erred by raising the issue in the context of collective bargaining rather than filing a timely grievance. The Court rejected the arbitrator's conclusion that the board had committed a continuing contractual violation, stating that this doctrine was not intended to rescue a defendant "from the consequence of its deliberate ill-fated strategy."

In ATU Local 1317 v. DeCamp Bus Lines, Inc., __ N.J. Super. LEXIS ___ (Law Div. 2005), Judge Goldman confirmed two arbitration awards granting back pay to a bus driver who had been unjustly suspended and to a bus driver who had been improperly denied the opportunity

to drive a charter run. The opinion subjects the back pay awards to deductions for FUTA, FICA and other employment taxes and withholdings and grants interest from the date of the awards at the post-judgment rate set by R.4:42-11(a)(ii).

In New Jersey Transit Corp. v. PBA Local 304, App. Div. Dkt. No. A-6516-03T3 (4/25/05), an Appellate Division panel reversed a trial court order vacating a grievance arbitration award. The arbitrator held that the employer violated the parties' contract when it required a NJT police officer to pass a physical agility examination before returning to full duty after he had been on light duty. The contract called for NJT to submit the issue of physical fitness to a panel consisting of a doctor appointed by management, a doctor appointed by the union, and a neutral doctor, but it did not do so. NJT did not file a pre-arbitration scope petition and instead asked the arbitrator to find that it had a prerogative to order a physical agility test under Bridgewater Tp. v. PBA Local 174, 196 N.J. Super. 258 (App. Div. 1984). The arbitrator declined to consider that contention because it had not been brought up at the arbitration hearing and the PBA did not have a chance to respond to that argument. The trial court held that the arbitrator should have considered Bridgewater, but the Appellate Division disagreed. It reasoned that the award should not have been vacated based on the arbitrator's procedural decision and that the basis for the arbitrator's decision had nothing to do with negotiability.

In Williams v. Local 54, Hotel Employees and Restaurant Employees Union, App. Div. Dkt. No. A-5801-03T3 (8/17/05), an Appellate Division panel held that a former business agent could bring a CEPA claim against Local 54. The agent was allegedly fired because she complained that Local 54's president misappropriated union funds for his own political and personal reasons. Distinguishing Dzwonar v. McDevitt, 348 N.J. Super. 164 (App. Div. 2002), aff'd on other grounds, 177 N.J. 451 (2003), the Court held that the Labor Management Reporting and Disclosure Act, 29 U.S.C. sections 401-531, did not preempt this CEPA claim because it was based on alleged criminal conduct rather than a matter of internal union policy.

In Caver v. City of Trenton, 2005 U.S. App. LEXIS 18342 (3d Cir. 2005), the Third Circuit Court of Appeals affirmed summary judgment against a plaintiff police officer in a case alleging that he was retaliated against in violation of his rights under Title VII, CEPA, and the LAD. In analyzing the CEPA claim, the Court concluded that referring the officer for a psychiatric evaluation was not an adverse employment action, but that transferring the officer to light duty was an adverse employment action. In analyzing the Title VII claim, the Court held that Supreme Court case law prohibits the use of collateral estoppel to give preclusive effect in a Title VII action to an unreviewed state administrative determination -- in this case, an ALJ's ruling in plaintiff's favor on his Civil Service appeal of his termination.

REA:aat