General Counsel's Annual Report – 2007
Public Employment Relations Commission

Robert E. Anderson
General Counsel

Don Horowitz
Deputy General Counsel

This report contains complete information about all court actions involving Commission decisions in 2007. It also contains synopses of other cases that bear upon labor relations and public employment in New Jersey. The case summaries should not be relied upon as a basis for taking action or advocating a position; instead please read any cases of interest thoroughly and carefully.

Appeals from Commission Decisions

In 2007, the Appellate Division affirmed five Commission decisions, reversed one decision, and remanded one case at the Commission's request. It also denied motions for a stay in three cases. Two appeals were withdrawn.

Representation Cases

In *State of New Jersey and Policemen's Benevolent Ass'n Local 105 of the New Jersey State PBA and New Jersey Corrections Ass'n, affiliated with FOP Lodge 200*, D.R. No. 2006-18, 32 *NJPER* 145 (¶66 2006), rev. denied P.E.R.C. No. 2006-92, 32 *NJPER* 223 (¶92 2006), aff'd 33 *NJPER* 219 (¶82 App. Div. 2007), the Director of Representation dismissed the FOP's challenges to an election in which the PBA won the right to replace the FOP as the majority representative of State law enforcement officers. The Commission in turn denied the FOP's request for review of the Director's decision. The Court agreed with this assessment in the Commission's decision:

> The Director conducted an appropriate investigation into the eligibility list objection and issued a thorough and thoughtful opinion analyzing and dismissing every

> objection. . . . Whether the election objections are viewed individually or cumulatively as alleging a pattern of gross employer negligence, we are satisfied there is no basis or need for reviewing the Director's determination that the FOP did not precisely and specifically show conduct that warranted setting aside the election as a matter of law. *N.J.A.C.* 19:11-10.3(h).

Unfair Practice Cases

In *Bridgewater Tp. and Bridgewater Tp. PBA Local 174*, P.E.R.C. No. 2006-62, 32 *NJPER* 46 (¶24 2006), rev'd 33 *NJPER* 155 (¶55 App. Div. 2007), the Commission held that the Township was required to negotiate with the majority representatives of its police officers and superior officers before it ended a long-standing practice of allowing officers to use accumulated sick leave days for terminal leaves before they retired. A contract clause governed payment of lump sums to employees who had retired based on their unused sick days, but did not address the terminal leave benefit and thus did not negate the statutory duty to negotiate over the elimination of that benefit. While the Township Council did not know that the previous mayor had authorized officers to take terminal leave, the Commission rejected the Township's argument that continuing the benefit would be ultra vires. The Commission reasoned that the officers did not have a contractual right to have the benefit continued, just a statutory right to engage in negotiations before the benefit was ended; thus, there was no question concerning the mayor's authority to bind the Township contractually. An Appellate Division panel reversed, reasoning that the contract calling for lump sum payments governed the terminal leave benefit as well and deprived the mayor of any authority to grant a more generous benefit.

Scope of Negotiations Cases

An Appellate Division panel affirmed the agency's decision in *Rutgers, The State Univ. and FOP Lodge 62*, P.E.R.C. No. 2007-5, 32 *NJPER* 274 (¶113 2006), aff'd 33 *NJPER* 199 (¶70 App. Div. 2007). Given *State v. State Troopers Fraternal Ass'n*, 134 *N.J.* 393 (1993), the Commission held and the Court agreed that police officers at Rutgers cannot arbitrate grievances asserting that they were discharged without just cause.

Increment Withholdings

In *Bergenfield Bd. of Ed. and Bergenfield Ed. Ass'n*, P.E.R.C. No. 2006-69, 32 *NJPER* 82 (¶42 2006), aff'd 33 *NJPER* 184 (¶65 App. Div. 2007), the Commission declined to restrain arbitration over an increment withholding given its determination that the withholding was predominately based on reasons besides teaching performance. Among the reasons cited for the withholding were that the teacher did not adhere to her schedule, had unexcused absences, and slept in class one day, apparently because of a medical condition. The Court held that the agency's determination was not arbitrary or capricious.

Interest Arbitration

In *Camden Cty. Prosecutor and Camden County Asst. Prosecutors Ass'n*, P.E.R.C. No. 2007-9, 32 *NJPER* 283 (¶117 2006), and *Union Cty. Prosecutor and Union Cty. Asst. Prosecutors Ass'n*, P.E.R.C. No. 2007-10, 32 *NJPER* 286 (¶118 2006), consol. and aff'd, 394 *N.J. Super*. 15 (App. Div. 2007), the Commission held that assistant prosecutors were not engaged in performing police services so they were not entitled to invoke interest arbitration. The Court agreed with the Commission's analysis and conclusions.

Remand

The Appellate Division granted the Commission's motion for a remand in *Berkeley Tp. and Berkeley Tp. Police SOA*, P.E.R.C. No. 2007-25, 32 *NJPER* 344 (¶144 2006). The Commission had held that a State Health Benefits Program ("SHBP") regulation preempted a proposal to modify health benefits to include premium sharing for dependents. While this decision was on appeal, the Legislature amended the statute governing the SHBP and the parties and the Commission agreed the case should be remanded so the Commission could consider the significance of the amendment. The Commission subsequently held that the amendment allowed the negotiations that the regulation had prohibited. P.E.R.C. No. 2008-8, 33 *NJPER* 214 (¶78 2007).

Stays

The Appellate Division denied stays pending appeal in these cases:

1. *City of Newark and SEIU, Local 617*, P.E.R.C. No. 2007-24, 32 *NJPER* 342 (¶143 2006) (Court denied request to stay arbitration of a grievance contesting a decision to end a provisional employee's longevity payments and to recoup previous payments).

2. *State of New Jersey Judiciary and Probation Ass'n of NJ, Case-Related Prof. Unit*, I.R. No. 2007-14, 33 *NJPER* 138 (¶49 2007) (Court denied Judiciary's emergency stay application and motion for leave to appeal interim relief order requiring it to negotiate over certain safety matters; Judiciary did not first ask the Commission to stay the order as required by *R*. 2:9-7).

3. *Somerset Cty. Sheriff's Office and Somerset Cty. Sheriff FOP, Lodge No. 39*, P.E.R.C. No. 2007-33, 32 *NJPER* 372 (¶156 2006), app. pend. App. Div. Dkt. No. A-1899-06T3 (Court denied request to stay implementation of interest arbitration award affirmed by Commission).

Enforcement

N.J.S.A. 34:13A-16f(5)(b) requires an employer to implement an interest arbitration award that is affirmed by the Commission within 14 days unless a stay is obtained. In the *Somerset Cty.* case cited in the previous paragraph, the FOP began an enforcement action. After the Appellate Division denied a stay, Judge Ciccone of the Somerset County Superior Court ordered the award implemented and the employer did so. Judge Ciccone then denied the FOP's motion for pre-implementation interest and for counsel's fees and the FOP appealed that ruling. App. Div. Dkt. No. A-5789-06T3.

In a case involving the City of Hoboken and PBA Local No. 2, Judge Charles of the Hudson County Superior Court enforced a subpoena duces tecum issued by an interest arbitrator.

Amendments to Employer-Employee Relations Act

N.J.S.A. 34:13A -16g lists the factors to be assessed by an interest arbitrator. The Legislature has added a new factor:

> (9) Statutory restrictions imposed on the employer. Among the items the arbitrator or panel of arbitrators shall assess when considering this factor are the limitations imposed upon the employer by section 10 of P.L. 2007, c. 62 (C 40A:4-45.45)

Section 10 of the referenced law caps the increase in the property tax levy from one year to the next at 4%, but adds certain exclusions to the calculation of the adjusted tax levy. The exclusions include increases in amounts for debt services; lease payments with county improvement authorities; amounts raised to replace reduced State formula aid; certain increases in pension contributions and health care costs; and uncollected taxes.

Statutes Expanding PERC's Authority

P.L. 2007, c. 63 is a new law promoting shared services, joint meetings, and municipal consolidations. Sections 12, 19, and 27 authorize PERC to provide technical advice and mediation services to integrate separate labor agreements into a single agreement and to order interest arbitration if necessary. Section 27 also states that PERC may adjust the structure of collective negotiations units. Section 34 authorizes PERC to promulgate regulations to effectuate these powers and to establish a fee schedule to cover the actual costs of providing its services under the law.

Commission Regulations

The Commission has proposed readoption of its regulations, *N.J.A.C.* 19:19, governing the processing of petitions to deduct representation fees from the paychecks of non-members. A majority representative may obtain a Commission order requiring such deductions when a majority of negotiations unit employees are members of the majority representative and it has a valid demand-and-return system.

Court Rules

The Supreme Court has recognized a "Mediator Privilege." New Jersey Rules of Evidence 519. The rule will be effective July 1, 2008. This rule is consistent with Commission regulations recognizing mediator confidentiality. *N.J.A.C.* 19:12-3.4 and 4.4(f), and 19:16-3.4, 4.3, and 5.7(c).

Court Cases Involving Grievance Arbitration

1. Decisions Concerning Contractual Arbitrability

The Supreme Court addressed the contractual arbitrability of grievances contesting mid-year terminations of school

board employees in *Pascack Valley Reg. H.S. Bd. of Ed. v. Pascack Valley Reg. Support Staff Ass'n*, 192 *N.J.* 489 (2007), and *Northvale Bd. of Ed. v. Northvale Ed. Ass'n*, 192 *N.J.* 501 (2007). In *Pascack*, the Court held that the mid-year termination of a custodian was contractually arbitrable. In *Northvale*, the Court held that the mid-year termination of a part-time secretary/teacher was not contractually arbitrable. A synopsis of each case follows.

In *Pascack*, the collective negotiations agreement provided that custodians would not be disciplined without just cause and that any dismissal would be considered a disciplinary action subject to the grievance procedure. However, individual employment contracts signed by each custodian allowed either party to terminate that contract upon 15 days' notice. The board determined that a custodian had made racially offensive remarks and terminated him with 15 days' notice and pay. The Association grieved the dismissal under the just cause provision and an arbitrator ruled that the custodian's conduct warranted a sixty-day suspension, but not termination. The board then moved to vacate the award, arguing that the arbitrator exceeded his authority because he did not enforce the termination provision of the individual employment contract. The Chancery Division judge and an Appellate Division panel agreed.

By a 6-0 vote, the Supreme Court reinstated the award. It found that the board had used the notice provision as a surrogate for a disciplinary proceeding. "Under the particular circumstances of this matter, where the parties have agreed that the non-tenured school employees may only be disciplined for just cause and have defined any dismissal as a disciplinary action subject to the grievance procedure at the employees' option, a mid-term contract termination imposed as punishment for behavior that would otherwise call for imposition of discipline falls within the collective agreement's definition of dismissal subject to the grievance procedures." *Id.* at 491. This holding did not imply that the board "could not have waited until the end of the annual term and opted to not renew [the custodian's] contract" or that "a contract termination on 15 days' notice for reasons unrelated to discipline would not be both permissible and outside of the scope of the grievance clause." *Id.* at 496, 499-500.

In *Northvale*, the collective negotiations agreement provided that

employees would not be discharged or disciplined without just cause and that any such action would be subject to the grievance procedure. However, individual employment contracts signed by each employee allowed either party to terminate that contract upon 60 days' notice. The board determined that a part-time secretary/teacher had "serious deficiencies in [her] performance as a teacher and secretary" and terminated her with 60 days' notice and pay. The Association grieved the dismissal under the just cause clause, but a trial court restrained arbitration. An Appellate Division panel affirmed this order, concluding that the board had properly invoked the notice provision in the individual employment contract and that invoking that right was neither a "discharge" nor a form of "discipline."

Justice Zazzali recused himself from the Supreme Court's review of the *Pascack* and *Northvale* cases. The remaining Justices were evenly divided in the *Northvale* case so the Appellate Division judgment was affirmed in a one-sentence order. Justice Hoens wrote a concurring opinion which Justices LaVecchia and Rivera-Soto joined. In the view of these justices, unless a provision in a collective agreement clearly vests an employee with a right to grieve and arbitrate a mid-year termination, the terms of the individual employment contract allowing a termination on notice are enforceable. Justice Long wrote a dissenting opinion in which Justices Albin and Wallace joined. In the view of these justices, the presumption of arbitrability codified in *N.J.S.A*. 34:13A-5.3 controlled given that the collective agreement could fairly be read to require arbitration.

In *New Jersey Transit Corp. v. New Jersey Transit Police Superior Officers Fraternal Order of Police Lodge #37*, App. Div. Dkt. No. A-4486-05T2 (7/25/07), a grievance contesting a police sergeant's suspension was held to be not contractually arbitrable. The parties' contract recognized two avenues for contesting a disciplinary action: (1) arbitrating a grievance under the just cause clause, and (2) going through an internal trial and obtaining Superior Court review of a conviction. Because the grievant had already unsuccessfully invoked the second avenue, the FOP was barred from arbitrating the just cause grievance.

2. Decisions Confirming Awards

New Jersey Turnpike Auth. v. Local 196, IFPTE, 190 *N.J.* 383 (2007), upheld an

award reinstating a toll collector who shot a paintball gun at a passing vehicle while he was driving home from work and was still in uniform. An Appellate Division panel held that public policy required termination for the misconduct, but the Supreme Court reasoned that the focus of a public policy analysis should be on the remedy ordered rather than the misconduct penalized. The arbitrator imposed a substantial penalty by denying back pay for an employee suspended for 11 months and also conditioned reinstatement on the employee's passing a psychological fitness test and undergoing monitoring. The Court also stressed the legislative policy favoring final and binding arbitration and concluded that an award should not be set aside for other policy reasons unless the remedy violated a clear mandate of public policy embodied in statute, regulation, or legal precedent.

Middletown Tp. PBA Local 124 v. Middletown Tp., 189 *N.J.* 648 (2007), upheld an award requiring the Township to pay health benefits for its retired police officers who had 25 years of government service credits. The Court rejected the Township's argument that under *N.J.S.A*. 40A:10-23, retirees who did not have 25 years of actual service with the Township could not receive health benefits unless an ordinance or resolution specified a shorter period of service. An amendment to *N.J.S.A*. 40A:10-23 instead expanded the class of qualified retirees to any employees with a combination of credits and service totaling 25 years unless an ordinance or resolution required a certain number of years of service with the employer. The Court also rejected an argument that the collective agreement must be interpreted to require 25 years of actual service with the employer since *N.J.S.A*. 40A:10-23 mandated that length of service at the time the agreement was first negotiated. The agreements were re-negotiated after *N.J.S.A*. 40A:10-23 was amended and the arbitrator's interpretation of the agreement was reasonably debatable in light of the Township's longstanding practice of providing health benefits to all retirees, both before and after *N.J.S.A*. 40A:10-23 was amended.

In *Borough of Glassboro v. FOP Lodge No. 108*, 395 *N.J. Super*. 644 (App. Div. 2007), an award ordered the employer to promote a police officer who was arbitrarily denied a promotion to lieutenant. The grievant scored higher than the promoted officer in the first two phases of the promotion

process, but fell behind in the rankings after the final phase, a subjective oral examination. The arbitrator found that the promotion denial was arbitrary because the employer had not explained how the last phase had caused the grievant to fall behind. The Court upheld this conclusion and rejected arguments that the award would contravene the public interest by making objective tests the only permissible standard; subjective tests may still be used so long as an employer articulates the basis upon which it scores such tests.

Saddle Brook PBA Local 102 v. Saddle Brook Tp., App. Div. Dkt. No. A-1347-05T1 (3/21/07), confirmed an award in the employer's favor. The arbitrator found that the employer did not violate the contract when it assigned police officers to work undercover on a special overnight shift and did not pay them overtime. No mistake of law infected the arbitrator's conclusion that the chief's managerial authority included creating a special, temporary detail to work on a non-continuous shift to apprehend vandals.

In *City of Newark v. Newark Firefighter's Union*, App. Div. Dkt. No. A-0475-06T3 (11/01/07), an arbitrator ordered the City to grant a Fire Prevention Specialist a provisional promotion to the position of Supervising Fire Prevention Specialist. The City moved to vacate the award. Two months later, it filled the supervising position permanently and removed the grievant from the promotional list. The grievant appealed that removal to the NJDOP. A Chancery Division judge initially confirmed the award ordering a provisional appointment, but on reconsideration modified the order to require the City to grant the grievant a permanent promotion. The Appellate Division ruled that the dispute over the provisional promotion was moot once the NJDOP created a promotional list and that the trial court had no authority to grant a permanent promotion. The dispute involved a challenge to appointment and removal from the Civil Service promotional list and NJDOP was the proper venue for resolving that dispute initially.

IBEW Local Union 629 v. Flynn's Electric, LLC, App. Div. Dkt. No. A-4199-05T2 (4/19/07), confirmed an award issued by a Labor-Management Committee. The award required companies to pay the unions fringe benefits for work performed pursuant to a collective bargaining agreement between the

union and a New Jersey chapter of the National Electrical Contractors Association. The defendants lost their opportunity to present defenses when they walked out of the Committee meeting rather than request a postponement because of late notice.

3. Decisions Vacating Awards

In *New Brunswick Ed. Ass'n v. New Brunswick Bd. of Ed.*, App. Div. Dkt. No. A-6586-05T1 (5/8/07), an arbitrator found that the board violated a just cause clause by transferring a teacher from a project liaison position to an ESL position in the high school for disciplinary reasons and ordered the board to return her to her project liaison position. The board did so, but on the same day transferred her again to an ESL position in the middle school given an alleged shortage of ESL teachers. The trial court enforced the award and directed the board to return the teacher to her project liaison position. But the Appellate Division panel ruled that a hearing was needed on the reasons for the second transfer and the transfer should not be set aside if those reasons were not disciplinary. The case was remanded to the trial court to determine whether it or an arbitrator should conduct the hearing. The Court cited *N.J.S.A*. 34:13A-25, providing that transfers of school board employees "shall not be mandatorily negotiable except an employer shall not transfer employees for disciplinary reasons." But the Court did not cite *N.J.S.A*. 34:13A-27, providing that the Commission shall determine whether a transfer was for disciplinary reasons.

In *Essex Cty. Prosecutor's Office v. PBA Local 325,* App. Div. Dkt. No. A-3504-05T3 (4/5/07), the Court concluded that the arbitrator ignored contractual provisions limiting vacation time and carry-over and improperly relied on a past practice of allowing more generous benefits. The Court noted that the maintenance of benefits clause did not apply to benefits specified in the agreement. The Court also held that *N.J.S.A.* 34:13A-21 did not prohibit a change consistent with a contractual provision, even though the change occurred during interest arbitration.

In *Lourdes Medical Center of Burlington v. JNESO*, 2007 *U.S.Dist. LEXIS* 25458 (D. N.J. 2007), a federal district court vacated an award holding that the employer violated the layoff clause of the collective bargaining agreement when it reduced its

employees' work hours. The contract's zipper clause and its definition of layoff made it clear the layoff clause did not apply to work hour reductions. The Court also rejected claims that the arbitrator (appointed by the New Jersey State Board of Mediation) was biased because of pressure State officials had allegedly brought against the company to accede to union demands.

4. Miscellaneous

Out-of-state attorneys may now participate in arbitrations and mediations in New Jersey, provided they comply with RPC 5.5. Opinion 43 (supplementing Opinion 8), 187 N.J.L.J. 123 (1/8/07). Out-of-state attorneys must register with the Supreme Court Clerk, authorize the Clerk to accept service of process, and obey the rules on registrations and fees.

In *Pavon v. UPS, Inc.*, App. Div. Dkt. No. A-6329-04T2 (2/22/07), a truck driver was discharged for insubordination when he refused to follow a company policy that deemed visual inspections of trailer-coupling devices to be adequate and instead insisted that safety required uncoupling the trailers for a closer inspection. An arbitrator sustained the discharge and a federal district court refused to vacate it. The truck driver then filed a CEPA claim in Superior Court. An Appellate Division panel held in part that the arbitration award did not preclude the CEPA claim. It reasoned that the contractual issue before the arbitrator – had the union proved that an "imminent peril" justified the insistence on uncoupling the trailers? - - differed from the statutory issue before the court – did the plaintiff have a reasonable belief that the company's inspection policy violated a federal safety regulation? While the arbitrator had focused on the union's claim, a judge would focus on the litigants and the public interest, and the public policy behind CEPA was important enough to prevent contract-based claims from precluding subsequent resolution of statutory claims.

Parties in a private business affair can waive Appellate Division review of an arbitration award dividing their joint property. *Van Duren v. Rzasa-Ormes*, 2007 *N.J. Super. LEXIS* 199 (App. Div. 2007). But an agreement to waive trial court review violates public policy because it eliminates all judicial scrutiny and results in rubberstamping awards.

Other Court Cases

Grievance Procedures

Altieri v. Rutgers, App. Div. Dkt. No. A-0771-05T5 (1/19/07), dismissed a lawsuit asserting that the employer violated a just cause clause when it discharged a police officer. The Court found dispositive a provision in the just cause clause stating that "[i]n the case of any disciplinary action, the sole right and remedy under this Agreement shall be to file a grievance through and in accordance with the grievance procedure."

In *CWA v. State of New Jersey*, App. Div. Dkt. No. A-5583-04T1 (2/14/07), the Court dismissed a lawsuit based on CWA's assertion that the State violated an agreement stating that the parties mutually desired to limit the number of "represented employees" who would become unemployed as a result of the closings of Marlboro Psychiatric Hospital and the North Princeton Developmental Center. The Court held that the grievance procedure provided the exclusive remedy for the alleged violations.

In *DeNiscia v. IAFF*, App. Div. Dkt. No. A-5367-05T2 (4/20/07), two suspended IAFF officers were required to exhaust their internal union remedies before going to court to overturn their suspensions. The suspensions were imposed for supporting a rival organization - - the FMBA. The Court found no reason to think internal union appeals would be futile.

Salary Increases

A trial court properly denied a Prosecutor's application for salary increases for employees covered by collective negotiations agreements. *In re Application of Taylor*, 393 *N.J. Super*. 213 (App. Div. 2007), aff'g 393 *N.J. Super*. 425 (Law Div. 2006). Judge Todd determined that the Prosecutor could not reopen the contracts to give a one-time increase in salaries to negotiations unit employees so as to meet the statewide salary averages of other Prosecutor's Offices; he rejected the Prosecutor's argument that the Board of Freeholders usurped the Prosecutor's authority to negotiate salaries and did not negotiate in good faith.

Leaves

In *FOP, New Jersey Lodge #91 v. State,* App. Div. Dkt. No. A-6612-05T5 (3/30/07), the Department of Corrections denied officers paid leave to attend the FOP convention. The FOP filed a Complaint

asserting that the denials violated the employees' statutory right to attend the convention. However, the denials constituted a final administrative action so only the Appellate Division had jurisdiction to review them.

In *Hedges v. Manchester Reg. H.S. Dist. Bd. of Ed.*, Dkt. No. PAS-L-4797-05 (8/31/07), a school board refused to allow a tenured teacher taking a child-rearing leave to return to work until the next school year. The teacher asserted that not allowing her to return in April, when the leave ended, violated both the LAD and the collective negotiations agreement. Judge Riva of the Superior Court in Passaic County granted summary judgment to the Board on the LAD claim because males as well as females could take child-rearing leaves, subject to the same limits and conditions. But the Court denied summary judgment to both parties on the contract question because it found the clause to be ambiguous and past practice to be relevant.

Labor Protests (Rats!)

State v. DeAngelo, 396 *N.J. Super.* 123 (App. Div. 2007), upheld a union organizer's conviction for violating a Lawrence Township ordinance. The ordinance prohibited the display of inflated signs to attract the attention of pedestrians and motorists. The organizer violated the ordinance when he hoisted a 10-foot tall inflatable rat in front of Gold's Gym to publicize the union's dispute with Gold's. The Court rejected arguments that the ordinance was preempted by the National Labor Relations Act; violated the organizer's constitutional right of free speech; was void for vagueness; and was selectively enforced. Judge Sabatino dissented from the majority's conclusion that the ordinance did not violate the right to free speech.

Duty of Fair Representation

In *Veggian v. Camden Bd. of Ed. and Camden Ed. Ass'n*, 2007 *U.S. Dist. LEXIS* 73449 (D. N.J. 2007), a teacher filed a civil action against a board and its superintendent and other officials and her majority representative and its president. She alleged that the defendants conspired to remove her from her school after she reported a grade-altering scheme to her supervisors. Judge Hillman of the federal district court denied motions to dismiss the claims alleging that the Association and its president violated her

constitutional rights and breached the duty of fair representation. While the Association is generally not subject to the constitutional standards applicable to governmental entities, the Court found sufficient evidence (if believed) to warrant a finding of a conspiracy between administrators and Association representatives so that all the defendants could be considered to have been acting under color of State law. The Court also found sufficient evidence (if believed) to warrant a finding that the Association had not acted in good faith, with honesty of purpose, and without unfair discrimination against the teacher. The Court declined to limit the duty of fair representation to contract negotiations, administration, and enforcement.

LAD

To prevail on a retaliation claim, a plaintiff must prove that the initial complaint of discrimination was filed reasonably and in good faith. *Carmona v. Resorts Int. Hotel, Inc*., 189 *N.J.* 354 (2007). The Court read that requirement into the LAD, reasoning that the Legislature could not have intended that the LAD "provide a safe harbor to one who files a baseless, meretricious complaint" and that the LAD "cannot protect one who preemptively files a complaint solely in anticipation of an adverse employment action by the employer." *Id*. at 373.

Raspa v. Office of the Sheriff of Gloucester Cty., 191 *N.J.* 323 (2007), dismissed a LAD lawsuit in which a corrections officer contended that the Sheriff violated the duty to reasonably accommodate his Graves' disease when it terminated his light duty assignment and sought involuntary disability retirement benefits for the officer. The officer did not possess the bona fide occupational qualifications for his position since his eye condition precluded contact with inmates and the employer could limit light duty assignments to those employees who had temporary disabilities.

Larsen v. Branchburg Tp., App. Div. Dkt. No. A-0190-05T2 (1/22/07), dismissed a patrol officer's claim that she suffered gender discrimination and disparate treatment when the police chief refused to make an exception to the department's "no-light-duty" policy while she was pregnant. The LAD does not protect a normal pregnancy and the employer was not required to grant pregnant employees a benefit not available to other employees.

In *Klawitter and DeBonis v. City of Trenton*, 395 *N.J. Super*. 302 (App. Div.

2007), the Court held that the City discriminated against a female, Caucasian detective by appointing an African-American candidate to Detective Sergeant. Both candidates scored the same on the promotional exam. In finding reverse discrimination, the Court stated that race can be considered in an employment decision only pursuant to and in accordance with an established affirmative action plan.

Terminations

Termination was the appropriate penalty for a police officer repeatedly found to have been sleeping on duty. *In re Carter*, 191 *N.J.* 474 (2007). The MSB was not required to apply progressive discipline concepts because the officer's infractions were serious enough to support the penalty even without prior discipline.

In *In re Herrmann*, 192 *N.J.* 19 (2007), the Division of Youth and Family Services discharged a Family Services Specialist Trainee who held a lit cigarette lighter in front of a child's face and near oxygen tanks during a child abuse investigation. The Supreme Court rejected the Appellate Division's reliance on progressive discipline principles and upheld the discharge.

The MSB properly determined that a six-month suspension rather than termination was the appropriate penalty for a deputy municipal court administrator who pled guilty to reckless driving and disturbing the peace. *Thurber v. City of Burlington*, 191 *N.J.* 487 (2007). The MSB reasonably considered the employee's long service and unblemished record.

_____*In re Richard Holland (Rowan Univ.)*, App. Div. Dkt. No. A-0338-05T2 (9/7/07), overturned an MSB decision upholding a groundskeeper's termination for conduct unbecoming a public employee. A charge of "unbecoming conduct" cannot be based on pre-hiring conduct.

Other Disciplinary Issues

Internal disciplinary charges against a trooper were timely initiated under *N.J.S.A.* 53:1-33 in *Trooper Ronald Roberts, Jr. v. State of New Jersey (Division of State Police)*, 191 *N.J.* 516 (2007). That statute mandates that charges be brought within 45 days of the date the person filing the complaint obtains sufficient information to file the complaint, but further provides that when there is a

concurrent criminal investigation, the time for filing a complaint begins to run the day after the disposition of the criminal investigation. In this case, a criminal investigation resulted in a decision not to prosecute, but an internal investigation was promptly commenced and then completed with the filing of an investigative report recommending that charges be filed. The Superintendent's receipt of that report started the 45-day period.

In *State of New Jersey Division of State Police v. Sergeant Robert Sobolusky, Badge No. 4003*, App. Div. Dkt. No. A-4987-05T3 (7/3/07), the Court upheld a 30-day suspension of a trooper who wore a "Lords of Discipline" T-shirt to a national police picnic. The suspension did not violate the trooper's right of free speech; the "Lords of Discipline" had an unquestioned reputation as a racist and sexist association and wearing the shirt to this quasi-official gathering amounted to an act of contempt for the efforts of the Division of State Police to repudiate racial profiling.

In *Smith v. East Greenwich Tp.*, 2007 *U.S. Dist. LEXIS* 80191 (D. N.J. 2007), the Court dismissed a police officer's claim that her 90-day suspension violated her constitutional rights, the LAD, and CEPA. With respect to the constitutional issue, the Court found that the officer had no property right to public employment so it was unnecessary to consider whether the suspension was arbitrary. The only relevant issue was whether the employer had provided procedural due process and the undisputed evidence showed that it had.

Indemnification

Rockaway Tp. v. State of New Jersey, Office of the Attorney General, App. Div. Dkt. No. A-6220-05T5 (5/22/07), held that the State was not required to represent five police officers and the municipalities that employ them in connection with federal litigation arising from their work on a county task force and alleging false arrest, malicious prosecution, sexual harassment, and Title VII violations. Under *N.J.S.A*. 40A:14-155, a municipality remains responsible for defending and indemnifying its police officers for work performed while assigned to a county prosecutor's task force.

Re-employment Lists

In *Klawitter and Debonis v. City of Trenton*, 395 *N.J. Super*. 302 (App. Div.

2007), a police sergeant revoked his retirement within 30 days after his retirement date. The trial court held that he was entitled to immediate reinstatement, but the appellate panel reversed. Because the City had filled the position, the officer was entitled only to be placed on a re-employment list. Such placement conformed to MSB statutes and rules and did not conflict with any pension laws or regulations.

Seniority Credit

The MSB rightly denied an employee seniority credit for the 14 weeks he spent as a corrections officer recruit trainee. *In re John Hogan, Correction Sergeant (PS56131), Dept. of Corrections*, App. Div. Dkt. No. A-4475-04T5 (5/4/07). The employee relied upon an arbitration award determining that the DOC violated its collective negotiations agreement when it denied such seniority credit, but the MSB held that its regulations prohibited granting credit for time spent in a temporary appointment. The Court agreed.

Workers' Compensation

Kibler v. Roxbury Tp., 392 *N.J. Super*. 45 (App. Div. 2007), held that the workers' compensation law provided the exclusive remedy for a teacher who was injured during a fight between two students. The Court rejected plaintiff's argument that the "intentional wrong" exception applied since one of the students had such a bad disciplinary record that he should have been expelled before he hurt someone.

Police Training Act

A police officer hired under the alternate route authorized by the Police Training Act may be fired without cause during a probationary period. *Azzara v. Waterford Tp.*, 392 *N.J. Super*. 322 (App. Div. 2007). In effect, the officer begins a working test period on the date of a regular appointment, thus allowing the department to evaluate the officer's job performance before the officer receives permanent status.

Unemployment Compensation

In *Lourdes Medical Center of Burlington Cty. v. Board of Review*, 394 *N.J. Super*. 446 (App. Div. 2007), the Court considered whether nurses were entitled to receive unemployment compensation while on strike. *N.J.S.A*. 43:21-5(d) disqualifies striking workers from receiving benefits if "it

is found that the unemployment is due to a stoppage of work which exists because of a labor dispute...." A DOL regulation defines a "stoppage of work" as a "substantial curtailment of work which is due to a labor dispute" and "substantial curtailment" is defined as occurring "if not more than 80 percent of the normal production of goods or services is met." The Court upheld the validity of the regulation and its 80% rule, but remanded to the DOL's Board of Review to reconsider its determination that the hiring of replacement nurses meant that the hospital's work was not curtailed.

In re Adoption of N.J.A.C. 12:17-9.6, 395 *N.J. Super*. 394 (App. Div. 2007), invalidated a regulation granting benefits to participants in "a written voluntary layoff and/or early retirement incentive policy or program . . . so that another employee may continue to work." The regulation contravened the policies underlying the Unemployment Compensation Act.

Employee/Independent Contractor Cases

In *Stomel v. Camden*, 192 *N.J.* 137 (2007), a former Mayor of Camden, Milton Milan, removed Elliot Stomel from his position as public defender after Stomel testified against Milan in a corruption trial that ended in a mistrial. Stomel then filed a CEPA action against the City, Milan, and the City Council and later added a civil rights claim under 42 *U.S.C.A*. §1983. The trial court dismissed the CEPA claim on the ground that Stomel was an independent contractor rather than an "employee" and it dismissed the section 1983 claim against the City on the ground that it was not vicariously liable for Milan's actions since he was not the final policy-maker with regards to the public defender position. Stomel won a jury verdict of $316,465 in damages on his civil rights claim against Milan.

The Supreme Court concluded that Stomel was an "employee" under CEPA and that Milan had final policy-making authority to remove him as the public defender. The Court remanded for trial on the CEPA claim and the section 1983 claim against the City and found that a reasonable fact-finder could determine that Stomel was "terminated" or "removed" from office rather than simply not being reappointed after his annual contract expired.

In *D'Annunzio v. Prudential Ins. Co.*, 192 *N.J.* 10 (2007), Prudential invoked a 60-

day termination provision in its contract with a chiropractic medical director in its Personal Injury Protection department. The doctor sued Prudential, asserting that he was fired because he had complained about the company's lack of regulatory and contractual compliance. The trial court granted summary judgment, finding that the doctor was an independent contractor and relying on a provision in the parties' contract so designating the doctor. But the Supreme Court reinstated the plaintiff's CEPA claim. It held that he presented sufficient evidence of the employer's control and direction over his day-to-day activities to preclude summary judgment for Prudential.

In *Hoag v. Brown*, 2007 *N.J. Super. LEXIS* 348 (App. Div. 2007), the Court found sufficient evidence that a social worker employed by Correctional Medical Services Inc. and assigned to work at a correctional facility could be considered a State employee for purposes of bringing a hostile work environment claim against the State under the LAD. The Court stressed that the DOC exercised control over her work and that her work was fully integrated into DOC's business and was part of the State's constitutionally-mandated health-care system for prisoners.

Policymaker Status

In *Galli v. New Jersey Meadowlands Commission*, 490 *F.*3d 265 (3d Cir. 2007), a former director of the Environmental Education for New Jersey Meadowlands Commission established a prima facie case that she was not a policymaker and thus could bring a First Amendment claim that she had been discharged for political reasons. While the former director had been a high-level supervisor, she provided evidence that she had only a low-level budgetary role and could not independently make personnel decisions, implement policies, or enter contracts.

Ordinances

An ordinance establishing a new organizational table for the Trenton police department and a salary range for the chief of administrative services had to be submitted to the voters for approval given a properly filed referendum petition. *In re Referendum Petition to Repeal Ordinance 04-75*. 192 *N.J.* 446 (2007). "Administrative" ordinances are not different from "legislative" ordinances; the plain language of the referendum statute,

N.J.S.A. 40:69A-185, applies to all ordinances.

Fire Districts/Fire Division

In *Horsnall v. Washington Tp. (Mercer Cty.)*, Dkt. No. MER-L-418-07 (2007), the Township violated *N.J.S.A*. 40A:14-19 and 25 when it terminated a Fire Captain after it dissolved its Fire District and created a Fire Division. Neither the fire department nor the plaintiff's position was abolished and the only difference resulting from the dissolution of the Fire District and the creation of the Fire Division was that the chief would now report to the mayor rather than the fire commissioners. Because the Township was removing, rather than hiring an employee, it had to provide notice and charges, establish good cause for removal, and terminate employees in inverse order of seniority. The Court also ruled that the Fiscal Control Law did not supersede these protections.

Statutes of Limitations

In *Ledbetter v. Goodyear Tire & Rubber Co., Inc*., 2007 *U.S. LEXIS* 6295 (2007), the United States Supreme Court held that an employee's Title VII lawsuit alleging sex discrimination in pay was untimely. No acts of intentionally discriminatory conduct occurred within the six-month statute of limitations and the employee could not rely alone on earlier acts of discrimination in claiming that her present paychecks were discriminatory.

Remedial Issues

Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 390 *N.J. Super*. 557 (App. Div. 2007), held that a jury could not increase a punitive damage award in a sexual harassment suit to deter others besides the defendant from engaging in the proscribed conduct. An increased award for that purpose differs from the concept of general deterrence inherent in any punitive damages award. A dissenting opinion would have upheld the punitive damages award.

In *Todaro v. Union Cty*., 392 *N.J. Super*. 448 (2007), a plaintiff was denied appointment to the position of Superintendent of Weights and Measures because of political discrimination. The Court held that she was entitled to instatement in that position or front pay. Instatement should be granted in discrimination cases absent special circumstances. The Court rejected the trial

court's remedy of allowing the politically-preferred appointee to remain as the superintendent until another opening arose.

Statutory Changes Affecting Health Benefits

Section 42 of P.L. 2007, c. 62 amends *N.J.S.A.* 52:14-17.38 and provides that a binding collective negotiations agreement may determine the obligations under the State Health Benefits Program of a non-State employer to pay the premium or periodic charges for SHBP coverage for active employees. The State has been able to negotiate premium sharing since 1997 and local governments have been able to negotiate premium sharing for retirees since 1999.

Sections 44 and 45 allow school boards and local government units to establish "cafeteria plans" pursuant to Section 125 of the Internal Revenue Code. These plans may provide for a reduction in an employee's salary, through payroll deductions or otherwise, in exchange for payment by the employer of medical or dental expenses not covered by a health benefits plan, and dependent care expenses as provided in section 129 of the Internal Revenue Code.