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M E M O R A N D U M

TO: Commissioners

FROM: Counsel Staff

SUBJECT: Report on Developments in the Counsel's Office Since December 15, 2011

Commission Cases

Town of West New York and Communications Workers of America, I.R. No. 2012-11, leave to appeal denied, App. Div. Docket No. AM-184-11T2 (12/23/2011).

A Commission designee denied CWA's application for interim relief. CWA sought an order requiring the payment of a deferred six percent salary increase for civilian employees represented by CWA on the day after the parties most recent collective negotiations agreement expired. The appellate court denies, without comment, CWA's application to have the court review the interim relief decision before a final disposition of the case before the Commission has been made.

Cases related to Commission Cases

In Fort Lee PBA Local No. 245 v. Borough of Fort Lee, 2012 N.J. Super. Unpub. LEXIS 42, the Appellate Division affirms the conclusion of Bergen County Superior Court Judge Robert P. Contillo that an interest arbitration award is not the equivalent of a successor collective negotiations agreement. In Fort Lee PBA Local No. 245 v. Borough of Fort Lee, 2010 N.J. Super. Unpub. LEXIS 3144 (Superior Ct. Ch. Div.), Judge Contillo held that the employer had properly implemented P.L. 2010, Ch. 2, effective May 21, 2010. That law requires that employees begin contributing at least 1.5 % of their salaries toward the cost of health insurance. But, where a collective negotiations agreement is in place on the effective date, that statute provides that the contributions will not commence until that agreement expires.

An interest arbitration award setting the terms and conditions of employment for a contract that extended beyond May 21, 2010 had been confirmed by the Commission in Fort Lee and PBA Local No. 245, P.E.R.C. No. 2009-64, 35 NJPER 149 (¶55 2009), and P.E.R.C. No. 2010-17, 35 NJPER 352 (¶118 2009). On April 15, 2011, the award was then confirmed by the Appellate Division, In re Borough of Fort Lee, 2011 N.J. Super. Unpub. LEXIS 931. A footnote in that decision declined to address the Borough's argument that the 1.5 % law applied to the agreement established by the award noting "[T]he Court has decided against retroactive application of legislation." That decision was rendered after Judge Contillo's ruling and before this month's appellate court decision.

CWA et. al. v. N.J. Civil Service Commission, 2012 N.J. Super. Unpub. LEXIS 119, is a continuation of litigation that commenced in early 2009 in response to the adoption of rules promulgated by the CSC involving temporary emergency "layoffs" and "furloughs" both on a staggered basis and in cases where there were complete shutdowns on specific dates. CWA and several other unions representing state, county and municipal employees challenged the regulations. The Appellate Division of the Superior Court held that the CSC had followed mandated procedures in adopting the rules but questioned whether the substance of the rules were within CSC's authority. In the Matter of Emergency Temporary Layoff Rule, 2009 N.J. Super. Unpub. LEXIS 1549, 186 L.R.R.M. 2466. In that decision the Court held that the unions could not challenge the complete shutdowns but directed PERC to determine whether other layoffs and furloughs were negotiable in the context of several unfair practice charges that had been filed by the unions against both civil service and non-civil service employers. After a Commission Designee issued a decision denying interim relief in some cases and granting it in others [Township of Maplewood et. al., I.R. No. 2009-26, 35 NJPER 184 (¶70 2009)] the State and the Unions representing its employees reached some agreements including the creation of additional paid leave days for a "paid Leave Bank" (PLBs) to offset the mandated unpaid furlough days. The CSC then adopted regulations treating the PLBs in the same manner as vacation leave, including carryover limits on vacation leave. In this appeal the Unions challenged the CSC rule treating PLBs the same way as vacation leave. The Court concludes that the CSC did not provide sufficient reasoning or legal analysis to support its conclusion that PLBs should be treated the same way as vacation days and remands the case to the CSC.

Salem Community Coll. v. Salem Community Coll. Support Staff Ass'n. and Brown, 2011 N.J. Super. Unpub. LEXIS ____ (App. Div Dkt. No. A-1812-10 12/21/2011)

Two months after disciplining a non-tenured employee, the College sent him a letter advising that he would be "terminated" at the end of the academic year. The Association sought to arbitrate the termination under a just cause for discipline clause and the College filed a scope of negotiations petition with the Commission to block the arbitration. However, the College did not assert that arbitration of a disciplinary termination was not negotiable. It's primary argument was that it had not contractually agreed to arbitrate a non-renewal of such an employee. That issue is not within the Commission's scope of negotiations jurisdiction. The scope petition was administratively dismissed after the College and the Association agreed that the contractual

arbitrability dispute could be raised by the College in Superior Court. Relying on the 2006 amendment to N.J.S.A. 34:13A-5.3 that created a presumption in favor of arbitrability, the Superior Court granted the Association's motion for summary judgment and ruled that arbitration could proceed. In this decision the Appellate Division affirms the lower court. Its opinion extensively discusses contractual arbitrability of public sector grievances.

Other Cases

Race discrimination in public employee hiring caused by impact of residency requirement

NAACP v. N. Hudson Reg'l Fire & Rescue, 2011 U.S. App. LEXIS 24562 , ___ F. 3d ____ (3rd Cir).

In the latest chapter of this lengthy litigation challenging the legality of a residency requirement for firefighter candidates imposed by North Hudson Regional Fire and Rescue (North Hudson), the United States Court of Appeals for the Third Circuit affirms an injunction barring North Hudson from enforcing the residency requirement. The United States District Court for the District of New Jersey held the residency requirement invalid because it has a disparate impact on African-American applicants. North Hudson and six Hispanic firefighter applicants appealed the District Court's judgment. North Hudson is made up of five municipalities, each of which had an existing residency requirement for firefighter candidates. However, once hired, firefighters do not have to remain residents of any North Hudson communities.

Discipline/Removal of public employees

In re Rhoda Livingston, Department of Corrections, 2012 N.J. Super. Unpub. LEXIS 4

In re Christopher Marucci, Town of West Orange Police Department, 2012 N.J. Super. Unpub. LEXIS 5

In these two cases, the Appellate Division upholds decisions of the Civil Service Commission terminating law enforcement officers for disciplinary reasons. In each case the Administrative Law Judge held that the public employer had just cause to discipline the employees, but recommended six month suspensions rather than terminations. Both appellate panels held that the CSC was justified in increasing the penalty to dismissal, which each employer had sought.

In the Matter of Jamie McCarron, Township of Middletown, 2011 N.J. Super. Unpub. LEXIS 3029

A police officer was terminated for disciplinary reasons four days before his disability retirement date. The Civil Service Commission upheld the disciplinary termination and the officer appealed, challenging the agency's conclusions, but also alleging that the disciplinary case was

mooted by his retirement. The Superior Court Appellate Division holds that because the physical and psychological conditions on which his retirement was based, could abate, the dispute was not moot. The appeals court affirms the CSC's determination to uphold the officer's termination.

John Philippakos v. Borough of Mountainside, 2012 N.J. Super. Unpub. LEXIS 103

A non-civil service police officer was terminated for having used his flashlight to strike a fleeing teenager during a foot chase. Pursuant to N.J.S.A. 40A:14-150, the officer appealed to the Superior Court, Law Division which upheld the officer's termination. The Appellate Division of Superior Court affirms that ruling. In this case, the events forming the basis for the discipline occurred in 2007, the internal hearing officer's report was issued in September 2009; the officer was terminated in January 2010, the decision of the trial judge upholding the termination was issued in September 2010; oral argument in the appellate court was held on April 4, 2011 and the decision on appeal was issued January 16, 2012.

Note: Had the facts constituting the offense occurred after June 1, 2009 the officer could have sought binding arbitration under N.J.S.A. 40A:14-209 and N.J.S.A. 40A:14-210, to review his termination instead of going to court. That law is intended, in part, to expedite proceedings to review terminations of non-civil service police officers and fire fighters where the terminations do not involve criminal conduct. The law allows covered police officers or fire fighters to seek arbitration, administered by the Commission, by filing an appeal within 20 days of the notice of termination. Arbitration is to be completed within 90 days after an arbitrator is appointed.

Defense for Public Employees Against Job-related Civil Actions

In the Matters of Daniel Rodriguez and Douglas Tubby, ___ N.J. Super. ____ , 2011 N.J. Super. LEXIS 219 (App. Div.)

The Appellate Division reverses the Attorney General's decision not to provide legal representation to two State corrections officers who were defendants in a civil lawsuit brought by an inmate alleging that they had assaulted him. The Court notes that the written justification for denying representation did not acknowledge that disciplinary charges against the officers had been dismissed and that the dismissal had been affirmed on appeal. The Court rejects the Attorney General's argument that the officers' appeals were untimely, holding that the time to appeal the determination of an administrative agency begins when a party is served with the administrative determination, as opposed to the date that decision was issued.

Waters, et al. v. Board of Education of the Township of Toms River, 2011 N.J. Super. Unpub. LEXIS 3083

A teacher, administrators and the Board were named as defendants in a civil lawsuit brought by a student. The teacher requested that the Board provide representation for him as authorized by N.J.S.A. 18A:16-6. The Board refused and the teacher secured representation through an

insurance company retained by the New Jersey Education Association. The teacher was dismissed from the lawsuit without any finding of liability and the teacher and the insurance company sought reimbursement from the Board for their costs in defending the suit. After the Board refused, an appeal was filed with the Department of Education. An Administrative Law Judge and the Commissioner of Education held that the Board was liable for the costs of the defense. The Appellate Division of the Superior Court affirms, rejecting the Board's argument that the teacher and the insurance company could not recover because they had not followed the procedure of the state's tort claims act. The Court notes that N.J.S.A. 18A:16-6 was adopted before the Tort Claims Act and was not superseded by it.

Harassment/retaliation

Alessandra Viola v. County of Bergen, et al., 2011 N.J. Super. Unpub. LEXIS 3024

The plaintiff, a Hackensack police officer, filed a "whistle-blower" lawsuit against the City and the Chief of Police alleging sexual harassment and disciplinary retaliation because she allegedly refused to "fix" a PBA election. The police chief was later dismissed after being indicted on unrelated criminal charges. Subsequently, Bergen County and the Bergen County Prosecutor's Office were appointed to oversee police department operations. A Superior Court Judge allowed plaintiff to amend her complaint to add the County and Prosecutor as defendants. Leave to appeal was granted and the Appellate Division of Superior Court dismisses the County and Prosecutor as defendants because the events that form the basis of her CEPA claim occurred before the County and Prosecutor were given oversight of the Hackensack police department.

Class size regulations

Elizabeth Education Association, et al. v. Board of Education of the City of Elizabeth, 2011 N.J. Super. Unpub. LEXIS 3065

The Association and two Elizabeth residents, one with a child attending the district's schools, filed an appeal with the Department of Education asserting that the District was exceeding the Department's class size regulations applicable to "high poverty school districts." The Commissioner of Education adopted an Administrative Law Judge's recommendation that upheld the claims of the Association and the parents. On appeal, the Board asserts that: the Association and the parents lacked standing to challenge the regulations; the regulations are an unconstitutional, unfunded mandate; and the Commissioner and the judiciary lacked jurisdiction as such issues were within the jurisdiction of the Council on Local Mandates. The Appellate Division of the Superior Court rejects the Board's arguments and upholds the decision and order of the Commissioner of Education.