General Counsel's Annual Report – 2002
Public Employment Relations Commission

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Mark Rosenbaum

Mark Rosenbaum, a beloved colleague at PERC for many years and a stellar member of our labor relations community, died in July. Mark was the consummate artist in deal-making - - he excelled in resolving disputes amicably, whether acting as a neutral or representing management or labor. And he was the life of every party. This report is dedicated to him.

Statistics

The Commission received seven decisions from the Appellate Division. Except for one partial reversal, all were affirmances. In addition, the Court denied two motions for leave to appeal interlocutory orders and one motion to stay a Commission proceeding. It granted one motion to stay a Commission order pending appeal while it partially granted and partially denied another such motion.

Appeals from Commission Decisions

Unfair Practice Cases

Lumberton Ed. Ass'n and Lumberton Tp. Bd. of Ed., 28 *NJPER* 427 (¶33156 App. Div. 2002), aff'g P.E.R.C. No. 2002-13, 27 *NJPER* 372 (¶32136 2001), required school boards to negotiate over allowing employees to stack FMLA leave and other leaves of absence. The FMLA grants employers discretion to require substitution of other leaves for FMLA leave, but that discretion can be exercised consistent with the duty to negotiate. The Court also reaffirmed the duty to negotiate mid-contract over proposed new policies.

In *Carroll v. ATU, Local 880 and New Jersey Transit*, 28 *NJPER* 300 (¶33111 App.

Div. 2002), aff'g PERC No. 2001-48, 27 *NJPER* 128 (¶32048 2001), a former NJT ticket taker, discharged for failure to deposit and account for company funds, filed an unfair practice charge against NJT and ATU, her majority representative. She asserted that after she was acquitted of criminal charges of theft and official misconduct, NJT was contractually obligated to reinstate her and ATU was required by the duty of fair representation to pursue a grievance seeking reinstatement. The Commission dismissed the Complaint and the Court affirmed, finding no merit to the contractual claim and no duty to press a meritless grievance.

In *Tinton Falls Bd. of Ed. and Tinton Falls Ed. Ass'n*, 28 *NJPER* 407 (¶33147 App. Div. 2002), aff'g P.E.R.C. 2001-78, 27 *NJPER* 293 (¶32107 2001), the Commission held that a school aide's termination was based on her absenteeism and refusal to acknowledge a contractual work obligation rather than on her filing a grievance. The Court affirmed, upholding the Commission's discretion to draw different inferences than a Hearing Examiner from the same facts.

In *Union Tp. and FMBA Local No. 46 and PBA Local 69*, I.R. No. 2002-7, 28 *NJPER* 86 (¶33031 2001), recon. den. P.E.R.C. No. 2002-55, 28 *NJPER* 198 (¶33070 2002), lv. to appeal den., the employer changed health insurance carriers, thereby substantially reducing the number of network providers and increasing the possibility that employees would have to pay upfront costs to out-of-network providers. The designee did not order the employer to rescind the change in carriers, but did order it to maintain a fund which employees could use to pay up-front costs and any additional costs that would have been covered under the previous plan. The League of Municipalities and the Conference of Mayors filed amicus curiae briefs in support of a motion for leave to appeal, but that motion was denied.

In *State of N.J. (Div. of State Police) and State Troopers Fraternal Ass'n*, P.E.R.C. Dkt. No. CO-02-273, emergent relief denied by App. Div. (4/19/02) and Sup. Ct. (4/23/02), a Commission designee denied the STFA's request for a temporary restraining order until an interim relief hearing was held. The proposed TRO would have required the State to allow STFA representation for all witnesses during investigatory interviews. The STFA appealed the denial of the TRO to the Appellate Division, but Judge Parrillo denied emergency relief. The STFA then sought

Supreme Court review, but Justice Long denied that request.

In *Morris Cty. and Morris Council No. 6*, P.E.R.C. No. 2003-22, 28 *NJPER* 421 (¶33154 2002), app. pending App. Div. Dkt. No. A-000837-02T1, the Commission ordered the County to provide the majority representative with the home addresses of County negotiations unit employees. The Court has stayed the Commission's order pending appeal.

In *Middlesex Cty. Sheriff and Eckel*, P.E.R.C. No. 2003-4, 28 *NJPER* 308 (¶33115 2002), app. pending, App. Div. Dkt. No. A-000057-02T2, the Commission ordered the Sheriff to rescind a reassignment, reduce a suspension, and post a notice as remedies for a violation of *N.J.S.A.* 34:13A-5.4a(1) and (3). The Appellate Division stayed the posting of the notice pending appeal, but otherwise denied a stay.

A motion for a stay of Commission proceedings was denied in *City of Somers Point and Mainland PBA #77 and Van Daley*, P.E.R.C. No. 2002-45, 28 *NJPER* 148 (¶33049 2002). The City had sought to have PERC's unfair practice proceedings discontinued given that factually-related claims were before a trial court in a CEPA case.

Scope-of-Negotiations Cases

In *Paterson State-Operated School District and Paterson Ed. Ass'n*, 28 *NJPER* 290 (¶33108 App. Div. 2002), aff'g P.E.R.C. No. 2001-42, 27 *NJPER* 99 (¶32038 2001), the Commission declined to restrain arbitration of a grievance asserting that a school security guard was entitled to work during adult school hours at overtime rates. The guard had done that work in addition to his day shift at the same school for 17 years before the employer gave that work to a security guard employed by a subcontractor. The Court affirmed on the basis of the Commission's decision applying the negotiability balancing test to the particular facts presented.

Representation Cases

In *City of Newark and Association of Government Attorneys*, 346 *N.J. Super.* 460 (App. Div. 2002), aff'g P.E.R.C. No. 2000-100, 26 *NJPER* 289 (¶31116 2000), the Court affirmed an order certifying a negotiations unit of staff attorneys. It upheld the agency's

showing of interest rules and rejected claims that attorneys cannot organize because of the Rules of Professional Conduct and because they are confidential employees or managerial executives.

Contested Transfer Cases

N.J.S.A. 34:13A-25 prohibits transferring school board employees between work sites for disciplinary reasons. In *North Bergen Tp. Bd. of Ed. and North Bergen Fed. of Teachers, Local 1060*, 28 *NJPER* 406 (¶33146 App. Div. 2002), aff'g P.E.R.C. No. 2002-12, 27 *NJPER* 370 (¶32135 2001), the Board violated *N.J.S.A.* 34:13A-25 when it transferred a switchboard operator in its central office to a secretarial position at another work site for disciplinary reasons. The Court found ample record support for the Commission's factual findings and concluded that its decision and its order rescinding the transfer followed logically from its findings. This was the first contested transfer case to reach the Appellate Division.

Interest Arbitration

In *Teaneck Tp. and Teaneck FMBA Local No. 42*, 353 *N.J. Super.* 289 (App. Div. 2002), certif. granted 175 *N.J.* 76 (App. Div. 2002), aff'g in pt., rev'g and rem'g in pt., P.E.R.C. No. 2000-33, 25 *NJPER* 450 (¶ 30199 1999), the Court agreed with the Commission that the Director of Arbitration properly accepted the withdrawal of the first interest arbitrator appointed to the case. It also agreed that the record supported the second interest arbitrator's award of an EMT stipend and added that the Township was barred from contesting the negotiability of that issue since it did not file a scope-of-negotiations petition before arbitration. The Court also agreed with the Commission that the FMBA's proposal of a 24/72 work schedule for firefighters was mandatorily negotiable and that the record supported awarding that schedule on a trial basis. However, it disagreed with the Commission's modification of the award to delay implementation of the 24/72 schedule for firefighters until that schedule was also adopted for superior officers. The Court accepted the Commission's guidelines for analyzing the Township's supervision concerns, but held that the Commission should not have modified the award itself. Instead, the Court remanded the case to the Commission to "succinctly articulate its new

guideline regarding impairment of supervision and to remand to the same arbitrator for evaluation of proofs and factual findings in light of PERC's standard." *Id.* at 310.

The Supreme Court has granted certification to consider the negotiability of the FMBA's proposal for a 24/72 work schedule. The Court stayed further arbitration proceedings pending its review.

In *City of Clifton and Clifton FMBA Local 21*, P.E.R.C. No. 2002-56, 28 *NJPER* 201 (¶33071 2002), stay den., P.E.R.C. No. 2002-74, 28 *NJPER* 254 (¶33097 2002), stay den. and app. pending App. Div. Dkt. No. A-4573-01T2, the Commission affirmed an interest arbitration award of a 24/72 work schedule for firefighters on a trial basis. Both the Commission and the Appellate Division denied a motion to stay that award pending appeal.

The Employer-Employee Relations Act

Effective August 1, 2002, sections 5.5 and 5.6 of the Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq*. were amended to provide that a majority representative can obtain the right to collect representation fees from non-members even absent a negotiated agreement. If no agreement is reached, the majority representative can now petition the Commission to investigate whether a majority of negotiations unit employees are voluntary dues paying members and whether the representative maintains a demand-and-return system for objecting to fees not attributable to its representational duties. If these conditions are met, the Commission must order the employer to deduct fees from paychecks of non-member employees.

Commission Regulations

In 2002, the Commission adopted regulations clarifying that orders in interim relief cases are interlocutory, *N.J.A.C.* 19:14-9.1 and 9.5; authorizing the Chair to initiate an electronic filing program and to permit certain filings by fax and e-mail, *N.J.A.C.* 19:10-2.4; and specifying rulemaking procedures governing petitions, comments, and hearings, *N.J.A.C.* 19:10-6.1 *et seq.*

Other Court Cases

Grievance Arbitration

1. Decisions Confirming Awards

IFPTE, Local 196 v. New Jersey Highway Authority, App. Dkt. No. A-6679-00T5 (6/24/02), certif. den. 175 *N.J.* 77 (2002), upheld an award in management's favor. The parties disputed the meaning of this clause: "Retirees will carry into retirement the same coverage they had prior to retirement." Both sides agreed that "coverage" meant the amount and extent of the risk covered; but the union believed that the clause addressed "the economics of the insurance" while the employer argued that the clause addressed the "type or kind of plan." The arbitrator found the clause ambiguous, considered past practice, and interpreted the provision in a reasonably debatable way. The Court thus upheld the award.

New Jersey State Council v. New Jersey Transit Bus Operations, Inc., App. Div. Dkt. No. A-1035-01T2 (12/10/02), upheld an award denying a grievance in which the union claimed that an employee should have received disability benefits and vacation pay simultaneously instead of being taken off sick leave and put on vacation leave at the end of the year. Because the contract did not clearly require double payments, the arbitration panel properly relied upon an unequivocal past practice of denying such payments.

Green v. City of Long Branch, App. Div. Dkt. No. A-3400-00T1 (2/19/02), confirmed an award requiring the employer to pay $86,000 to one former employee and $100,000 to another given a provision mandating payment for accumulated sick time on retirement. Holding that the arbitrator's interpretation was reasonably debatable, the Court rejected an argument that the arbitrator did not properly consider public policy and fiscal concerns.

2. Decisions Vacating Awards

In *Harrington Park PBA, Local 233 v. Borough of Harrington Park,* App. Div. Dkt. No. A-2564-00T2 (5/02/02), the arbitrator found that the employer improperly denied terminal leave benefits to a police officer who had served 29 years but who resigned after being arrested on charges alleging sexual contact with minors. The Court vacated the award. It stated: "absent contractual or

statutory provisions to the contrary, terminal leave is not available to an individual who submits an unconditional resignation because the program contemplates continuance of the employer-employee relationship during the period of the leave, even though the employee may not actually be working during that time. *Roem v. Borough of Dumont*, 176 *N.J. Super*. 397 (App. Div. 1980)."

3. Contractual Arbitrability Cases

In *Mount Laurel Tp. Bd. of Ed. v. Mount Laurel Ed. Ass'n*, App. Div. Dkt. No. A-971-01T5 (10/17/02), the arbitrator found that an untenured janitor's non-renewal was motivated by disciplinary reasons and that the board lacked just cause to take that disciplinary action. A trial court vacated the award, relying on *Marlboro Tp. Bd. of Ed. v. Marlboro Tp. Ed. Ass'n*, 299 *N.J. Super*. 283 (App. Div.), certif. den. 151 *N.J.* 71 (1997), and finding that the dispute was not contractually arbitrable regardless of the reasons for that non-renewal. Holding that the arbitrator's interpretation of the just cause clause was reasonably debatable, the Appellate Division panel upheld the award. It noted that the just cause clause did not exclude disciplinary-motivated non-renewals and it distinguished *Marlboro* on the grounds that discipline was not a motivating factor there.

In *Camden Bd. of Ed. v. Alexander*, 352 *N.J. Super*. 442 (App. Div. 2002), certif. granted 175 *N.J.* 77 (2002), the collective negotiations agreement had a broad arbitration clause covering all contractual disputes and a just cause clause, but no clauses addressing tenure, non-renewal of employment contracts, or arbitration of non-renewals. Several custodians received letters threatening disciplinary actions, including non-renewal. The Court concluded that the custodians could arbitrate their non-renewals under a just cause clause if they could prove that their contracts were not renewed for disciplinary reasons. If they could do so, the arbitrator could then determine if there was just cause for a non-renewal. The Court distinguished *Marlboro* because there was evidence in this case that the non-renewals may have been disciplinary.

In *Pascack Valley Reg. H.S. Dist. Bd. of Ed. v. Pascack Valley Reg. Support Staff Ass'n.*, App. Div. Dkt. No. A-1313-01T5 (11/14/02), the Court restrained arbitration of a grievance contesting a custodian's dismissal and the non-renewal of her contract. In April 2000, the custodian received a notice of

unsatisfactory service for not following her supervisor's directions. In May 2000, she was notified that her contract would not be renewed and that she should stop working immediately, although she would be paid until the end of the year. She grieved the notice of unsatisfactory service and claimed that the notice resulted in her wrongful discharge. The Board denied the grievance and the Association sought arbitration. Relying on *Marlboro*, the Court restrained arbitration and observed that the rights of a disciplined employee should rise no higher that those of a similarly situated faultless employee who had no right to a renewed contract.

The United States Supreme Court has reaffirmed the traditional labor relations principle that questions of procedural arbitrability, including timeliness, are for an arbitrator to resolve absent an agreement to the contrary. *Howsam v. Dean Witter Reynolds, Inc.*, __ *U.S.* ___ , 123 *S.Ct.* 588 (2002). A rule of the National Association of Securities Dealers stated that no dispute "shall be eligible for submission to arbitration... where six (6) years have elapsed from the occurrence or event giving rise to the dispute." The applicability of this time limit was a matter for the arbitrator rather than a court. Other questions of procedural arbitrability include notice, waiver, estoppel and conditions precedent to an obligation to arbitrate.

4. Arbitration of Statutory Claims

In *Martindale v. Sandvik, Inc.*, 173 *N.J.* 76 (2002), the New Jersey Supreme Court held, by a 4-3 vote, that an agreement in a job application to arbitrate statutory claims related to one's termination could be binding on an employee. Relying on the national policy and New Jersey policy favoring arbitration, the majority opinion rejected an argument that the consent form was a contract of adhesion. The dissenting opinion would have held that a job application consent form is unenforceable as a matter of public policy given the disparity in bargaining power between an employer and an applicant.

5. Effect of Arbitration on Other Causes of Action

Shtab v. Sands Casino Hotel, App. Div. Dkt. No. A-3889-99T5 (5/30/02), held that an arbitration award finding just cause to break an employee's seniority was not entitled to preclusive effect in the employee's lawsuit

claiming a Family Leave Act violation. The employee was not a party to the arbitration, which was controlled by the union and the employer; the issue was somewhat different; and the award was not confirmed. The Court also ruled that the Division on Civil Rights violated the employee's rights by considering information submitted by the employer without giving the employee copies of that information or an opportunity to respond.

In *Vickery v. Edison Tp.*, App. Div. Dkt. No. A-5763-00T1 (6/6/02), the Court held that an employee who had resigned could not pursue a contract claim in Superior Court for accumulated sick leave, vacation time and other benefits under the collective negotiations agreement. The Court held that the collective negotiations agreement authorized individual employees to arbitrate a grievance and that he was still an "employee" under the contract for that purpose. The Court stated that limiting the right to file grievances to current employees would improperly prevent terminated individuals from asserting claims of wrongful termination or loss of benefits through contractual dispute resolution procedures.

In *Barker v. Brinegar,* 346 *N.J. Super*. 558 (App. Div. 2002), the Court declined to hold that an arbitration award was entitled to collateral estoppel effect in a personal injury suit against an insurer for unpaid medical bills. A similar result was reached in *Pace v. Kuchinsky,* 347 *N.J. Super*. 202 (App. Div. 2002).

6. Miscellaneous Arbitration Cases

In *Elliott-Marine v. Campanella,* 351 *N.J. Super*. 135 (App. Div. 2002), the parties removed a wrongful-death action from the trial list and agreed to arbitrate the dispute instead. The plaintiff won and then moved to confirm the award, seeking prejudgment interest. The Court held that the plaintiff could not seek prejudgment interest because that claim had not been arbitrated. It stated:

> This is particularly true in view of the purpose of, and public policy behind, arbitration - - to promote and encourage a voluntary, alternative method of resolving disputes in a given legal controversy in a single forum, in an efficient, expeditious, relatively inexpensive, and less formal manner that relieves our overburdened judicial resources. Id. at 143.

In *EEOC v. Waffle House,* 534 *U.S.* 279 (2002), the Court held that the EEOC was

not barred from seeking backpay, reinstatement, and damages for a grill operator who had signed an arbitration agreement. The EEOC was not a party to that agreement and could pursue its suit to protect the public interest.

Strikes

In *Magnolia Bd. of Ed. and Magnolia School Ed. Ass'n*, App. Div. Dkt. No. A-3117-00T1 (2/20/02), an Appellate Division panel vacated a $60,000 fine imposed against the MSEA for a four-day strike, but affirmed an attorney's fee award of $987 to the Board.

The trial court had imposed a fine against the MSEA of $5,000 for each day teachers and custodians were on strike, but did not properly consider the MSEA's ability to pay such fines as required by *R.* 1:10-3. The MSEA showed that it had a negative net worth and expected a net loss for the next year and that the NJEA had not agreed to pay any fines imposed against the MSEA. The trial court, however, had held that the affront to the judicial system outweighed the effect of the fines on the MSEA.

The Appellate Division reversed the $60,000 in fines against the MSEA, reasoning that the object of a civil proceeding under R. 1:10-3 is not to inflict punishment, but to compel compliance. The fines were improperly imposed retroactively to cover the first three days of the strike; did not take into account the MSEA's ability to pay; and were improperly based on the concept that any sanction that did not work cannot be characterized as excessive. The Court, however, upheld the award of attorney's fees for a hearing which was strike-related and which was necessitated by the MSEA's not having its witnesses present at an earlier hearing.

Bi-State Agencies

The New Jersey Supreme Court and the Third Circuit Court of Appeals are at odds as to whether the public sector labor laws of New Jersey and Pennsylvania apply to bi-state agencies. In *International Union of Operating Engineers, Local 68 v. Delaware River & Bay Auth.*, 147 *N.J.* 433 (1997), *cert.* den. 522 *U.S.* 861, the Supreme Court held that a bi-state compact had been modified by the "complementary and parallel" collective negotiations schemes adopted by both states so the DRBA was subject to New Jersey labor laws. But in *International Union of Operating Engineers, Local 542 v. Delaware*

River Joint Toll Bridge Commission, 290 *F.*3d 577 (3d Cir. 2002), the Third Circuit Court of Appeals rejected that approach. It held that the Bridge Commission need not comply with New Jersey collective bargaining laws because the New Jersey and Pennsylvania legislatures had not expressed a clear intent to impose their labor laws upon it.

In an earlier decision, *Delaware River Port Auth. v. FOP Penn-Jersey, Lodge 30*, 290 *F.*3d. 567 170 *LRRM* 2019 (3d Cir. 2002), the Third Circuit Court of Appeals gave preclusive effect to an Appellate Division decision requiring the Delaware River Port Authority to negotiate with its police officers. *FOP Penn-Jersey, Lodge 30 v. DRPA*, 323 *N.J. Super.* 444 (App. Div. 1999).

In *Ballinger v. Delaware River Port Auth.*, 172 *N.J.* 586 (2002), the Supreme Court applied the "complementary and parallel" legislation test and held that DRPA was subject to a common law claim for wrongful discharge in violation of a clear mandate of public policy, but was not subject to the New Jersey CEPA law because that law varied substantially from the Pennsylvania whistleblower law. The Court relied on the holding of the Third Circuit Court of Appeals in *DRPA v. FOP Penn-Jersey.*

The Port Authority Employment Relations Panel issues decisions determining the labor relations rights and obligations of the Port Authority of New York and New Jersey and its employees. Pursuant to the Port Authority's Labor Relations Instruction, the Commission's counsel staff represents the Panel when its decisions are challenged in New Jersey courts. Three such decisions were upheld last year, all by Judge Harris of the Bergen County Superior Court. *In re Port Authority Police Detectives' Endowment Association and Port Authority of New York and New Jersey*, Docket No. BER-L-010054-01; *In re Port Authority and Union of Automotive Technicians*, Dkt. No. BER-L-3279-02, appeal pending, and *In re Port Authority Police Detectives' Endowment Association and Port Authority of New York and New Jersey*, Docket No. BER-L-3412-02, appeal pending.

Joint Employers

In *Prunetti v. Mercer Cty. Freeholders Bd.*, 350 *N.J. Super.* 72, 136-138 (Law Div. 2001), Judge Feinberg of the Mercer County

Superior Court considered the validity of an administrative code adopted by the Freeholders pursuant to *N.J.S.A.* 40:41A-125. That code designated the Sheriff as the employer of all employees of the Sheriff's Office and the representative of the County for collective bargaining. The County Executive asserted that this provision conflicted with his authority to negotiate contracts for the County. The Court held that the code had to be modified to include both the Sheriff and the County as collective negotiations agents. The Court relied on *Bergen Cty. Sheriff and PBA Local 134*, P.E.R.C. No. 84-98, 10 *NJPER* 168 (¶15083 1984), holding that the County and the Sheriff are joint employers for purposes of collective bargaining. It also held that the joint-employer approach did not infringe upon the County Executive's power under *N.J.S.A.* 40:41A-36 to negotiate contracts for the County; it merely distinguished collective negotiations agreements from other contracts and brought all necessary parties to the bargaining table.

Compensation

In *Prunetti*, the Court also invalidated another code section which called for the Freeholders to set salaries for employees besides the top-level employees specified in *N.J.S.A.* 40:41A-100d; to the extent the code went beyond the statute, it trespassed upon the County Executive's power to set salaries for other employees. *Id.* at 134-136.

Stanziale v. Monmouth Cty. Bd. of Health, 350 *N.J. Super.* 414 (App. Div. 2002), held that *N.J.S.A.* 26:3-25.1 applies to the Monmouth County Board of Health. This statute mandates that certain employees of any "board of health" receive the maximum salary in their salary ranges after five years of service. The Court held that Monmouth County's autonomous health board was different from Middlesex County's subordinate health department and was therefore covered by the salary statute.

In *Maltese v. North Brunswick Tp.*, 353 *N.J. Super.* 226 (App. Div. 2002), the Court held that a mayor had the power to appoint a Director of Public Safety, but only the Town Council could establish his compensation and benefits. The Court remanded the case for the trial court to consider whether the Council was equitably estopped or whether it had otherwise indicated an intention to ratify the mayor's agreement with the Director. That agreement called for

the Director to receive the benefits provided by the superior officers' collective negotiations agreement, including payment upon retirement for unused vacation and sick leave.

In *German v. Monmouth Cty.,* App. Div. Dkt. No. A-5307-00T2 (7/5/02), the Court denied a retroactive salary increase to a sheriff's officer who resigned after the effective date of a successor contract, but before the contract was executed. The Court distinguished *State Troopers Fraternal Ass'n v. State*, 149 *N.J.* 38 (1997), granting retroactive increases, on the ground that the parties' past practice in this case was that employees who retired before contract execution did not receive retroactive payments.

Rawitz v. Essex Cty., 347 *N.J. Super*. 590 (App. Div. 2002), certif. den. 172 *N.J.* 357 (2002), held that an assistant county counsel was not entitled to be paid under *N.J.S.A.* 40A:9-6 at a section chief's salary rate even though he did many of the duties of a section chief who had been terminated. The assistant county counsel did not meet the statutory requirement of having "held" the "office or position" on a de facto basis; neither he nor anyone else had held him out to be a section chief or an acting section chief.

In *Pukowsky v. Egg Harbor Tp. Bd. of Ed.*, App. Div. Dkt. No. A-0789-01T2 (11/22/02), a payroll supervisor retired and sought payment for unused sick leave days. She had worked in the central office and was not in a negotiations unit, but the Board apparently had a policy of paying central office employees the same benefits as employees covered by the best negotiated contract. That policy would have entitled the supervisor to compensation for unused sick days at a 60% rate (about $28,000); but after she announced her retirement, the Board capped reimbursement at $5,000. The Court upheld the employee's implied contract claim and rejected contentions that the Board could not be bound by an implied contract or the "ad hoc decisions" of prior boards.

Pensions

In *Brown v. State of New Jersey (Dept. of Treasury),* 356 *N.J. Super*. 71 (App. Div. 2002), the Court held constitutional an amendment to *N.J.S.A.* 43:16A-7, a provision of the Police and Firemen's Retirement System laws. The amendment enhanced retirement benefits for PFRS members who retired on accidental disability on or after

April 1, 1991. Plaintiffs were pre-1991 retirees who challenged their exclusion from this benefit as special legislation and a violation of equal protection, but the Court found that the Legislature acted rationally to increase benefits for some retirees while protecting the fiscal integrity of the system.

In *Inganamort v. Police and Firemen's Retirement System*, App. Div. Dkt. No. A-2542-00T5 (2/19/02), a PFRS decision excluded from pension calculations the extra compensation (8% of base salary) called for by a collective agreement and paid to police officers for assuming positions as "training officers" after 24 years of service. The PFRS concluded that the duties required by that position were illusory and the payments constituted individual salary adjustments granted primarily in anticipation of retirement. An Appellate Division panel affirmed, relying on *Wilson v. PFRS Bd. of Trustees*, 322 *N.J. Super*. 477 (App. Div. 1998).

Leaves of Absence

In *Ragsdale v. Wolverine World Wide, Inc.*, ___ *U.S.* ___ , 122 *S.Ct.* 1155 (2002), the United States Supreme Court invalidated a Department of Labor regulation implementing the Family Medical Leave Act. The regulation prohibited an employer from counting a leave of absence against the FMLA entitlement to 12 weeks of leave unless it timely notified an employee it would do so. The Court reasoned that this regulation effectively required an employer to grant more than the 12 weeks of leave mandated by the FMLA as a minimum benefit.

Sicknick v. Cranbury Bd. of Ed., App. Div. Dkt. No. A-4926-00T1 (5/07/02), held that *N.J.S.A.* 38A:4-4 (a) entitled a school board employee to a paid leave of absence while deployed in a federal military action in Saudi Arabia. The Court held that the statute applied to this federal duty since the Governor had approved the deployment order. The statute has since been amended to expressly apply to federal duty as well as State service.

The Legislature has amended *N.J.S.A.* 11A:6-10, a statute determining which police officers and firefighters are entitled to paid leaves of absence to attend union conventions. The statutory right to attend conventions is now limited to duly authorized representatives of an employee organization affiliated with the New Jersey Policemen's Benevolent Association, the Fraternal Order of Police, the Firemen's Mutual Benevolent Association, or

the Professional Fire Fighters Association of New Jersey. The amendment also limited the number of employees entitled to take leaves and the number of days (seven) for such leaves. This amendment was apparently enacted in response to *New Jersey State FMBA v. North Hudson Reg. Fire & Rescue*, 340 *N.J. Super*. 577 (App. Div. 2001), certif. den. 170 *N.J.* 88 (2001), which had declared that *N.J.S.A.* 11A:6-10 was unconstitutional because it constituted special legislation and delegated too much power to unions to determine how many employees would take leaves.

Project Labor Agreements

The Governor has signed a bill calling for project labor agreements on public works projects that will cost $5,000,000 or more. *P.L.* 2002, *c.* 44.

Firefighter Appointments

In re Dreyer, 356 *N.J. Super*. 159 (App. Div. 2002), held that in Civil Service communities, volunteer firefighters who apply for paid firefighting positions do not have an absolute preference over non-volunteers. In this case, the volunteer firefighter's credits for his years of volunteer service were insufficient to give him preference over non-volunteers who scored higher on the Civil Service examination.

Special Police Officers

A shore community may hire special police officers for the summer, even if it has recently laid off regular police officers. *In re Special Police Officers, Borough of Keansburg*, 354 *N.J. Super.* 269 (App. Div. 2002). Absent a showing that the layoffs were made in bad faith, such hirings do not violate *N.J.S.A.* 40A:14-146.16b which prohibits using special officers "to replace or substitute for full-time, regular police officers or in any way diminish the number of full-time officers employed by the local unit." The Court reasoned that the municipality's decision to reduce its regular, year-round force for economic reasons is separate from the need for enhanced law enforcement services during the summer .

Tenure

In *Merlino v. Borough of Midland Park, 172 N.J.* 1 (2002), the Supreme Court held that a construction official did not become tenured under *N.J.S.A.* 52:27D-126(b) when he was appointed to a second four-year

term because there was a ten-day break in service between the two terms. The Borough and the official had negotiated a deal calling for a second appointment without tenure.

Viviani v. Borough of Bogota, 170 *N.J.* 452 (2002), held that the Exempt Firemen's Tenure Act permits an employer to abolish positions for reasons of economy so long as its declared objective is not a pretext for terminating or demoting an employee. The Court reversed a lower court decision that had blocked an employer from abolishing positions absent a "time of widespread economic depression or mandatory retrenchment."

Statutory Term of Office

Coyle v. Warren Cty. Freeholder Bd., 170 *N.J.* 260 (2002), held that the Rule of Professional Conduct requiring an attorney to withdraw from representation when discharged does not apply to a County counsel who has a statutory term of office and statutory protection against termination without good cause. The Court's analysis is consistent with *City of Newark v. Association of Government Attorneys*, described on pp. 3-4 of this report.

Suspensions

In *Herzog v. Fairfield Tp.*, 349 *N.J. Super.* 602 (App. Div. 2002), an Appellate Division panel held that "suspensions without pay are precluded for [police] officers charged solely with violations of departmental rules or regulations, except where conduct equivalent to the most serious of crimes involving moral turpitude or dishonesty is supportably alleged." A police officer was entitled to be paid during his suspension because the charge against him - - reading a confidential internal affairs document and disseminating it to a newspaper - - was not of the prescribed gravity.

Forfeiture

In *Flagg v. Essex Cty. Prosecutor*, 171 *N.J.* 561 (2002), the Supreme Court addressed the standard for reviewing a county prosecutor's decision not to apply for a waiver of the forfeiture provision of *N.J.S.A.* 2C:51-2 when an employee has been convicted of a disorderly or petty disorderly persons offense. The prosecutor must review each case and not abuse his or her discretion in denying a request. Under the facts presented, the Court concluded that the refusal to seek a waiver

abused that discretion.

In *State v. Williams*, 355 *N.J. Super*. 579 (App. Div. 2002), a police officer was convicted of fourth degree aggravated assault for pointing a gun in the direction of another person under circumstances manifesting extreme indifference to human life. Reversing the lower court, an Appellate Division panel held that the conviction resulted in the forfeiture of the officer's employment under *N.J.S.A.* 2C:51-2a(2) because the misconduct involved or touched upon the officer's public office. The lower court had stressed that the conduct occurred when the officer was off duty and on sick leave, "miles away from Bayonne" and "in his own vehicle with his wife and child"; but the Appellate Division stressed that Williams had identified himself as a police officer and had displayed and pointed his service revolver.

In re Tenure Hearing of Vitacco, 347 *N.J. Super*. 337 (App. Div. 2002), held that a superintendent forfeited his job as of the date of his conviction for filing false federal income tax returns and other charges. Given this automatic forfeiture, the Commissioner of Education properly denied the superintendent a tenure hearing.

Back Pay and Damages

In *Taylor v. International Maytex Tank Terminal*, 355 *N.J. Super*. 482 (App. Div. 2002), a LAD plaintiff claimed that a racially hostile work environment had caused him to leave his employment and suffer emotional distress. He sought damages for his economic losses and his emotional distress as well as punitive damages. After he left his employment, the employer discovered that he and his supervisor had agreed to lie about their involvement in an overflow of a toxic gasoline additive from a storage tank. Applying the after-acquired evidence doctrine, the Court concluded that the plaintiff would have been fired the day the employer learned of the cover-up so it barred the plaintiff from seeking reinstatement or recovery of economic losses after that date. The Court, however, permitted the plaintiff to seek non-economic and punitive damages because these remedies do not have a direct nexus to a plaintiff's status as an employee and may be necessary to deter forms of discrimination outlawed by statutes.

_____*In re Falkowski*, App. Div. Dkt. No. A-1206-00T3 (2/13/02), upheld a back pay award issued by the Merit System Board in favor of an improperly dismissed police officer. The employer was not entitled to have

the amount of back pay reduced by the money earned by the officer as a security guard since he had been working as a guard before he lost his job as a police officer. *See N.J.A.C.* 4A:2-2.10(d)(3).

Counsel Fees

McCurrie v. Town of Kearny, 174 *N.J.* 523 (2002), held that the Town could pay the counsel fees spent by a former municipal clerk and township administrator in defending the legality of the severance package he negotiated with the Town. The Town was not required by *N.J.S.A.* 40A:9-134.1 to pay the counsel fees because the severance package did not directly relate to the performance of his duties. Nevertheless, the Town had common law authority and a moral obligation to pay legal expenses incurred as a result of the employee's acting in good faith in the course of official duties in a matter in which the municipality had an interest. Those conditions were met since the Town and the former administrator agreed that the public interest and the efficiency of the clerk and administration offices would be best served by his surrendering his terms of office and letting a new political majority replace him.

Discrimination Claims

In *Communications Workers of America v. New Jersey Dept. of Personnel*, 282 *F.*3d 313 (3d Cir. 2002), the Court enforced an agreement between CWA as a national union and DOP settling an EEOC charge that DOP's PAR program had a disparate impact upon African-American and Hispanic employees. A CWA local that had not filed an EEOC charge itself could not contest the settlement agreement and the national union was estopped from challenging the existence of the agreement.

In *Constantino v. Borough of Berlin*, 348 *N.J. Super*. 327 (App. Div. 2002), certif. den. 174 *N.J.* 91 (2002), the Court dismissed a lawsuit claiming that the employer discriminatorily refused to hire a police officer over the age of 35. *N.J.S.A.* 40A:14-127 prohibits hiring police officers over the age of 35. At the time the plaintiff applied for a position, however, the federal law against age discrimination overrode this state law. Subsequently, Congress revitalized a provision that had permitted states to use age as a criterion in hiring police officers and firefighters. This subsequent permission retroactively covered plaintiff's situation.

CEPA Claims

In *Donofry v. Autotote Systems, Inc.*, 350 *N.J. Super.* 276 (App. Div. 2002), the employer violated CEPA when it discharged an employee who had informed senior management that unlicensed technicians were working at a facility, thus triggering a report to the Casino Control Commission that threatened the employer's casino license. The Court's opinion elaborated upon the burdens of proof under CEPA in pretext and mixed motive cases. The plaintiff in this pretext case had to prove by a preponderance of the evidence that "protected whistleblowing activity was a determinative or substantial, motivating factor in defendant's decision to terminate him and that it made a difference. Plaintiff need not prove that his whistleblowing activity was the only factor in the decision to fire him." *Id.* at 296.

In *Hancock v. Borough of Oaklyn*, 347 *N.J. Super.* 350 (App. Div. 2002), certif. granted 174 *N.J.* 191 (2002), the Court dismissed CEPA claims filed by two police officers. The Court found no cognizable acts of retaliation; neither officer was discharged or demoted and the allegations of retaliation had no impact on their pay or rank.

Gerard v. Camden Cty. Health Services Center, 348 *N.J. Super.* 516 (App. Div. 2002), certif. den. 174 *N.J.* 40 (2002), reversed a grant of summary judgment against a CEPA plaintiff. Plaintiff, an assistant director of nurses at a health center, refused a superior's request to serve disciplinary charges upon a nurse. The trial court found that the charges did not actually violate a law, regulation or public policy; but the appellate court disapproved that standard and retreated from previous cases which had required a CEPA plaintiff to establish that an employer had violated a law or regulation or clear mandate of public policy or engaged in fraudulent or criminal conduct. Instead, a plaintiff can show that he or she had an objectively reasonable belief that the conduct complained of was fraudulent or criminal. The assistant director introduced sufficient evidence that she could have reasonably believed that the charges were fraudulent and violative of the proper quality of patient care under *N.J.S.A.* 34:19-3c(1).

In *Dzwonar v. McDevitt*, 348 *N.J. Super.* 164 (App. Div. 2002), certif. granted 172 *N.J.* 180 (2002), the Court held that the federal Labor-Management Reporting and Disclosure Act preempted CEPA claims by

union employees whose sole allegations involved LMRDA violations rather than crimes.

Mosley v. Femina Fashions, Inc., 356 *N.J. Super*. 118 (App. Div. 2002), dismissed a CEPA claim because the plaintiff did not prove that she suffered an adverse employment action. After complaining that she had worked overtime without compensation, the plaintiff decided she could not continue to work under those conditions. The employer tried to have her resume work, but she never returned to work to discover if the employer would correct the asserted wrongful conduct.

In *Grainger v. State of New Jersey*, App. Div. Dkt. No. A-1257-01T1 (11/14/02), the Court dismissed a CEPA claim filed by a temporary employee in the human resources office of the Ocean County court vicinage. After her temporary employment ended, the plaintiff unsuccessfully sought to obtain several clerk positions. She claimed that she did not succeed because she had upheld employee claims to FMLA benefits after they had initially been denied. The Court, however, found no basis for a CEPA claim, reasoning in part that "failure to obtain prospective employment does not appear to constitute adverse action under CEPA" and that CEPA did not protect her disagreement with respect to the FMLA benefits.

Immunity

In *Brown v. City of Bordentown*, 348 *N.J. Super*. 143 (App. Div. 2002), an African-American police sergeant claimed that the City and the police commissioner discriminatorily hired a white man rather than the sergeant as police chief. The City and the Commissioner were immune from this suit to the extent he was acting in a legislative capacity, as when he voted on the appointment. But neither the City nor he was immune to the extent he was acting in an executive or administrative capacity, as when he allegedly influenced a discriminatory hiring behind the scene.

Statutes of Limitation

A six-year statute of limitations applies to claims for underpayment of wages required by the Prevailing Wage Act. *Troise v. Extel Communications, Inc.*, 174 *N.J.* 375 (2002). The Court's per curiam opinion affirms substantially for the reasons expressed in Judge Skillman's opinion at 345 *N.J. Super.* 231 (App. Div. 2001).

In an opinion concerning the continuing violation doctrine, the United States Supreme Court has held that Title VII precludes recovery for discrete acts of racial discrimination or retaliation occurring outside the statutory time period for filing a charge. The continuing violation doctrine, however, permits recovery for the entire scope of a hostile work environment claim, including behavior occurring outside the time period, so long as an act contributing to the hostile work environment took place within the limitations period. *National Railroad Passenger Corp. v. Morgan*, __ *U.S.* __, 88 *FEP Cases* 1601 (2002).

Caggiano v. Fontoura, 354 *N.J. Super*. 111 (App. Div. 2002), held that a hostile work environment claim under LAD will not be time-barred so long as the acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the statutory time period - - in the case of the LAD, a two year statute of limitations. The Court followed *Morgan*.

Soon after *Caggiano,* the New Jersey Supreme Court also adopted *Morgan's* analysis and holding. *Shepherd v. Hunterdon Developmental Center,* 174 *N.J.* 1 (2002). A cause of action in a hostile work environment case accrues on the date of the last act in a series of allegedly hostile acts.

Mancini v. Teaneck Tp., 349 *N.J. Super.* 527, 556-560 (App. Div. 2002), found a continuing violation in a sexual harassment case brought by a female police officer against her department. The Court thus permitted the plaintiff to recover on incidents of harassment outside the statutory limitations period.

Retaliatory Lawsuits

In *BE&K Construction Co. v. NLRB,* __ *U.S.* ___, 122 *S.Ct.* 2390 (2002), the United States Supreme Court held that an employer did not violate the LMRA by filing a reasonably based, but ultimately unsuccessful lawsuit against a union. Given the constitutional right to petition courts for the redress of grievances, the employer's retaliatory motive for filing the lawsuit was not a basis for finding a violation.

Public Records

The New Jersey Legislature has expanded access to public records by amending the Right to Know Law, *N.J.S.A.* 47:1A-1. The amended statute, however, excludes from the definition of government

record "information generated by or on behalf of public employers or public employees in connection with . . . any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position." The Governor has issued two Executive Orders implementing the new law, E.O. 21 and E.O. 26. Regulations have been proposed continuing to protect the confidentiality of records related to mediation and settlement efforts and to employee petitions and ballots in representation cases.

Loigman v. Middletown Tp., App. Div. Dkt. No. A-4503-00T2 (4/10/02), held that the compensatory time cards of police officers are public records subject to disclosure. The Court rejected an argument that the cards are personnel records exempt from disclosure. Any confidential police or personal information can be redacted.