STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PO Box 429
TRENTON, NEW JERSEY 08625-0429

www.state.nj.us/perc

ADMINISTRATION/LEGAL
(609) 292-9830
CONCILIATION/ARBITRATION
(609 292-9898
UNFAIR PRACTICE/REPRESENTATION
(609) 292-6780

For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

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

April 21, 2011

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 March 31, 2011

Commission Cases

I/M/O Borough of Ft. Lee and PBA Local No. 245, N.J. Super. Unpub. LEXIS 931 (4/15/11) (attached) affirms two Commission decisions reviewing an initial and supplemental award of an interest arbitrator, P.E.R.C. No. 2009-64, 35 NJPER 149 (¶55 2009), remanding the matter to the interest arbitrator; and P.E.R.C. No. 2010-17, 35 NJPER 352 (¶118 2009), affirming the arbitrator's ultimate award. The Court rejects the Borough's contention that the award is void because the arbitrator erroneously concluded the holiday pay fold-in was creditable for pension purposes. The opinion observes that the arbitrator did not assume or conclude that the holiday pay fold-in was creditable for pension purposes. He recognized that only the Division of Pensions can make that determination. Until such a determination is made, the holiday pay fold-in will only be creditable for all purposes as presently allowed by law. The Court also held that the arbitrator sufficiently considered and gave due weight to the N.J.S.A. 34:13A-16g factors he judged relevant, satisfactorily explained why certain factors were not relevant, and provided an adequate analysis of the evidence on each relevant factor. His reasoned analysis, as supplemented by his decision on remand, was supported by substantial credible evidence.

Bergen Community College filed a summary action in the Superior Court, Law Division, Mercer County seeking to quash a subpoena issued by a Hearing Examiner in a pending unfair practice case. Bergen Community College and Public Employment Relations Commission and Bergen Community College Support Staff Association, Docket No. MER-L-597-11. The parties

filed briefs and presented oral argument on April 11 to Superior Court Judge Thomas W. Sumners, Jr. On April 14, the Court issued an oral decision. While recognizing that the subpoena could have been contested before the Hearing Examiner in accordance with the Commission's rules of procedure, Judge Sumners held that the Superior Court had jurisdiction concerning whether subpoenaed materials in an administrative hearing were confidential. He directed that the College turn over the disputed materials to him within 15 days and he would make a determination.

Other Cases

In re Anthony Stallworth, Camden County Municipal Utilities Authority ___ N.J. ___, 2011 N.J. LEXIS ___ (4/12/2011). After a pump station operator returned at least a half-hour late from a break, the Authority terminated the employee who had a substantial prior disciplinary history. The employee appealed and an Administrative Law Judge upheld the termination. However, the Civil Service Commission reduced the penalty to a four month suspension. The Supreme Court holds that the Civil Service Commission did not adequately consider the public employee's entire record of misconduct and disregarded its obligation to state with particularity its reasons for rejecting the Administrative Law Judge's findings and conclusion. The Court remands the case to the CSC to reconsider its decision and to provide a more complete explanation for its determination. The opinion also discusses situations when progressive discipline is appropriate and instances when it may not apply.

Nutley Policemen's Benevolent Association Local #33, et al. v Township of Nutley, et al. __ N.J. Super. __ 2011 N.J. Super. LEXIS 54 (4/1/2011). In this published decision, the Appellate Division affirms the grant of summary judgment dismissing the claims of the PBA and some individual police officers alleging violations of the federal Fair Labor Standards Act. The Township had a policy that allowed an officer, entitled to overtime pay, to elect compensatory time in lieu of the premium compensation. Approval to use compensatory time on a specific shift was linked to the minimum staffing level on the officer's shift. Evidence of two denials of requests for use of compensatory time were included in the record. The court interpreted 29 U.S.C.S. § 207 and relevant federal regulations and held that the employer did not violate the FLSA when it denied permission to use compensatory time on the date requested but permitted use within the "reasonable period" defined in the collective negotiations agreement. The Township, in order to deny a specific request, did not need to show that its operations would be "unduly disrupted."

Hyland v. Township of Lebanon, __ N.J. Super. __ 2011 N.J. Super. LEXIS 55 (App. Div. 4/7/2011) rejects the Township's argument that the claims of its tax collector should have been filed with the Public Employment Relations Commission, and affirms a judgment that the Township improperly reduced her compensation. The collective negotiations agreement between the Township and the CWA does not provide paid sick, personal and vacation leave to employees working less that 20 hours per week. The Township passed a resolution depriving the tax collector, who worked 19 hours per week. She filed suit asserting the Township's action violated N.J.S.A. 40A:9-165 barring any reduction in compensation for a tax collector (and certain other independent officials) during the term of their appointments. The Court wrote that the tax collector was not a member of CWA and

was apparently not part of the negotiations unit. Although the Township asserted in this litigation that she was covered by its agreement with the CWA the Court notes that in the five years since the Township appointed the plaintiff as tax collector it never sought a ruling from the Commission concerning her status. The Court observes:

> Even if we were to agree with the Township that the person holding the position of tax collector is included in the Local 1040 bargaining unit, the fact remains that, mistake or otherwise, the Township agreed to pay plaintiff for forty percent of the vacation days, sick leave and personal time to which other municipal employees are entitled. Having done so, the Township was required to comply with N.J.S.A. 40A:9-165. The statute precluded the Township from eliminating the compensation for vacation, sick and personal days that the Township had agreed to pay plaintiff.

Vogt, et al., v. City of Jersey City, 2011 N.J. Super. Unpub. LEXIS 811 (App. Div. 4/4/11) is another case involving Jersey City employees whose salaries are protected by a specific statute. The plaintiffs are health officials who are in the classified civil service and are also included in one of two collective negotiations units depending on whether their positions are supervisory or non-supervisory. As determined by a 1996 published Appellate Division ruling, they are also covered by N.J.S.A. 26:3-25.1, providing:

> [E]very person holding a license . . . who is employed in a position for which this license is required by any board of health, municipality or group of municipalities shall receive the maximum salary in the person's range, within five years from the date of appointment to the position if the majority of the person's job performance evaluations are satisfactory.

In contrast to Hyland v Lebanon, the Appellate Division, affirming the lower court, rules that an action to compel compliance with N.J.S.A. 26:3-25.1 could not be brought in court because the plaintiffs had available remedies through contractual grievance procedures and/or the Civil Service Commission that had to be exhausted before seeking the aid of the Superior Court.

Hester v. Parker and Winslow Township Board of Education , 2011 N.J. Super. Unpub. LEXIS ___ (App. Div. 4/14/11). The Appellate Division overturns the dismissal of the plaintiff's whistle-blowing claims. Hester had been terminated from his job as the District's Director of Facilities/Operations. The court holds that the various complaints filed by Hester including a civil complaint alleging various causes of action founded on assertions that he was a victim of reverse discrimination, could be considered whistle-blowing.