Recent Judicial and Legislative Developments
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Public Employment Relations Commission

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This report contains complete information about all court actions involving Commission decisions since the April 2008 Annual Conference. It also contains synopses of other cases that bear on labor relations and public employment in New Jersey. The case summaries should not be relied on as a basis for taking action or advocating a position; instead please read any cases of interest.

Appeals from Commission Decisions

In the past year, the Appellate Division affirmed two Commission decisions and reversed one. It also denied leave to appeal in three cases. The Supreme Court denied certification in one case. Two appeals were withdrawn.

Unfair Practice Cases

In an unpublished decision, the Appellate Division affirmed the Commission's decision in Middletown Tp. and PBA Local 124, P.E.R.C. No. 2007-18, 32 NJPER 325 (¶135 2006), aff'd 34 NJPER __ (¶ __ App. Div. 2008). The PBA had filed an unfair practice charge alleging that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), by eliminating shape-up or travel time and by failing to implement the police chief's determination sustaining a PBA grievance challenging a change in that practice. The Commission ordered the Township to negotiate with the Association over the elimination of the practice; restore the practice of compensating patrol officers

for a reasonable period of shape-up or travel time, not to exceed one hour, when called for emergent or immediate overtime; make whole any officer who was denied a reasonable period of shape-up or overtime for emergent or immediate overtime; and post a notice of its violations. The Commission dismissed the allegation that the Township violated the Act by not complying with the police chief's grievance determination. The Appellate Division affirmed substantially for the reasons set forth in the Commission's decision.

In an unpublished decision, the Appellate Division reversed the Commission's decision in Toms River Tp. v. Teamsters Local 97, P.E.R.C. No. 2007-56, 33 NJPER 108 (¶37 2007), rev'd 34 NJPER 213 (¶72 2008), certif. den. __ N.J. __ (2009). The Township entered into a subcontract with a tree removal service to supplement the tree removal work of public works employees. The contract was for the removal of 124 trees within 120 days and prohibited Sunday work. Local 97 filed a grievance claiming that the Township had to first offer Saturday work to unit members as overtime. An arbitrator sustained the grievance.

Applying the lead case on subcontracting, Local 195, IFPTE v. State, 88 N.J. 393 (1982), the Court found no evidence to suggest that the purpose of the subcontract was to channel Saturday work to private employees and thus to avoid overtime expense. Local 195 had found subcontracting to be non-negotiable, but stated that the right was not unlimited, "[t]he State could not subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers."

The Court found the Saturday work to be an incidental feature of the subcontract and thus did not accept what it characterized as the Commission's "implicit conclusion that the Township entered into the private contract in bad faith to avoid excess labor costs." The Court applied Local 195 and finding no predominant purpose to avoid excess labor costs, found the grievance to be non-arbitrable.

The Court declined to address the employer's contractual argument, but then briefly stated that the union's interpretation of the contract clause prohibiting subcontractor workers from performing unit work would violate Local 195.

The Supreme Court denied the PBA's petition for certification.

Scope of Negotiations Cases

In an unpublished decision, the Appellate Division affirmed the Commission's decision in State of New Jersey (Dept. of Corrections), P.E.R.C. No. 2007-60, 33 NJPER 116 (¶41 2007), aff'd 34 NJPER 125 (¶54 App. Div. 2008), certif. den. __ N.J. __ (2008). In that decision, the Commission granted the request of the State for a restraint of binding arbitration of a grievance filed by P.B.A. Local 105. The grievance sought compensatory time off for essential employees who were required to work during the July 2006 State shutdown. The Commission restrained arbitration because Department of Personnel regulations limit the compensation for essential workers to regular pay. The Supreme Court denied the PBA's petition for certification.

Leave to Appeal

The Appellate Division denied the Harrison Board of Education's motion for leave to appeal the interim relief decision in I.R. 2009-6, 34 NJPER 276 (¶98 2008). The Commission designee had issued an order restraining the Board from extending the teacher workday. The Commission filed a letter brief opposing the Board's motion and arguing that no grave damage or injustice would occur if the Commission's proceedings were permitted to continue uninterrupted and if the parties were left to resolve their dispute over an increase in the teacher workday through their current round of contract negotiations.

The Appellate Division denied a motion for leave to appeal filed by the Borough of Paramus in an interest arbitration proceeding involving PBA Local 186. The arbitrator had ruled that the formal arbitration proceeding would be limited to the issues listed on the interest arbitration petition, which included wages, but not an employee contribution to medical benefits. The Chairman denied the Borough's application for special permission to appeal an interlocutory ruling of the arbitrator. The Chairman found that within the framework of the interest arbitration statute and regulations, the arbitrator carefully considered the Borough's arguments and did not abuse his discretion in rejecting those arguments. The Chairman noted that the net economic effect of a wage giveback as a contribution toward medical benefits is the same as a lower across-the-board wage increase and that the PBA had

no objection to the Borough's adjusting its wage proposal accordingly.

The Appellate Division denied the Trenton Board of Education's motion for leave to appeal the interim relief decision in I.R. No. 2009-12, 34 NJPER 418 (¶129 2008). The Commission Designee had granted a request to restrain the Board from ending full-time release time for the Association's President for balance of the 2008-2009 school year.

Related Court Matters

The New Jersey Supreme Court granted certification in Manalapan-Englishtown Reg. School Dist. v. Klumb, Sup. Ct. Dkt. No. 63,009. The Appellate Division had affirmed the decision by the New Jersey State Board of Education to reinstate a teacher to her former position with back pay and emoluments after she recovered from a disability pension. The Supreme Court will review that decision. A related Commission decision found that the compensation to be paid to the teacher upon her return to teaching was negotiable and arbitrable. P.E.R.C. No. 2007-42, 33 NJPER 3 (¶3 2007), app. pending App. Div. Dkt. No. A-3515-06T1). That decision is currently on appeal before the Appellate Division. The Commission is involved only in the latter appeal, not the reinstatement case before the Supreme Court.

Other Court Matters

Judge Clarkson S. Fisher, Jr. of the Appellate Division denied the Township of Rockaway's application for emergent relief seeking a stay of a grievance arbitration hearing. The scope of negotiations decision declining to restrain binding arbitration is the subject of an appeal before the Appellate Division. Rockaway Tp., P.E.R.C. No. 2008-21, 33 NJPER 257 (¶96 2007), app. pending App. Div. Dkt. No. A-1628-07T2.

In Yanovak v. Hanover Tp. et al., Superior Court Judge Michael Paul Wright granted the Commission's motion to quash a subpoena issued to a former staff agent seeking his testimony in a civil suit filed by a police officer against his employer and police chief. The staff agent had tried to mediate a settlement of an unfair practice charge during an exploratory conference. The police chief had allegedly told the mediator that the plaintiff police officer would never be promoted. The plaintiff also subpoenaed his mediator notes. The Judge granted the motion based on a Commission rule that ensures the

confidentiality of unfair practice settlement discussions. N.J.A.C. 19:14-1.6(d). The parties then promptly settled the lawsuit.

Superior Court Judge Francis J. Orlando dismissed a complaint filed by the City of Camden against the Commission and denied the City's request for an injunction that would have stopped the Commission from processing an unfair practice charge filed by Camden Council No. 10. The charge alleges that the City violated the Act when it refused to negotiate over layoff procedures and provide information to the union about the layoffs. The City argued that its obligations under the Act are preempted by the Municipal Rehabilitation and Economic Recovery Act ("MRERA"). The Commission argued that it has exclusive unfair practice jurisdiction and that the City can raise MRERA as a defense in the unfair practice proceeding. The Judge stated that he did not believe that he had the authority to enjoin the Commission from proceeding. The City also argued that MRERA preempted its obligation to participate in an arbitration challenging the layoffs and that the Commission should be restrained from processing the request for an arbitrator. The Judge rejected that argument as well.

Legislation Affecting PERC's Authority

On March 5, 2009, Governor Corzine signed legislation designed to expedite disciplinary proceedings when law enforcement officers and firefighters are suspended without pay by limiting the number of days pay can be suspended. P.L. 2009, c. 16. The legislation also requires the Commission to establish a special panel of arbitrators to review police and firefighter terminations in non-Civil Service jurisdictions. The legislation applies to terminations for non-criminal conduct in which the underlying conduct occurs after June 1, 2009.

Other Court Cases

Discipline

In In re Deborah Payton, City of Jersey City, App. Div. Dkt. No. A-3571-06T2 (4/22/08), the Appellate Division reversed a decision of the Merit System Board ("MSB") that had rejected an ALJ's recommendation to terminate an employee. A municipal surveyor had collected $5 from a customer for a tax map. The daily deposits had already been

made so the next day, the surveyor gave the five $1 bills and a receipt to Payton, who worked in the Tax Assessor's Office. She put the bills and receipt in her back pocket on her way to the ladies' room. The next day, the Tax Assessor showed Payton a copy of the receipt. Payton said that she had forgotten about the money and asked permission to go home to get it. The Assessor said no and suspended Payton. Payton's union representative told her to hold onto the receipt and money until the departmental hearing. At the hearing, Payton returned the receipt and five different $1 bills. She was removed and appealed to the Merit System Board. The ALJ discredited Payton because the serial numbers on the bills returned did not match the serial numbers on the receipt and sustained the charge of conduct unbecoming a public employee. The MSB adopted the ALJ's findings of fact but concluded that those facts did not support the charge of conduct unbecoming a public employee or the severe sanction of removal. The MSB found that "the record [did] not establish that [Payton] intentionally took the $5." The MSB specifically expressed that it was "troubled that the appointing authority failed to allow the appellant to return the money the next day, especially in light of the fact that it had no policy as to what do with money received after the daily deposits had been made. The Appellate Division panel reversed holding that the ALJ's findings were entitled to deference. It remanded the matter to the MSB for redetermination of the propriety of the removal penalty in light of both neglect of duty and conduct unbecoming a public employee.

In Charles Leek v. New Jersey Department of Corrections, App. Div. Dkt. No. A-2350-06T3 (5/14/08), the Appellate Division affirmed an MSB finding of conduct unbecoming a public employee. The Court stated that the determination of what constitutes conduct unbecoming a public employee is primarily a question of law, and thus the Court's scope of review is de novo or one allowing the court to take a fresh look at the case. In In re Payton, City of Jersey City, reported above, the Appellate Division reversed a determination of the MSB that had rejected an ALJ's finding that an employee engaged in conduct unbecoming a public employee. The Court in that case stated that an ALJ's findings on the question of whether an employee engaged in unbecoming conduct were entitled to deference because a reviewing

court must give deference to the factual findings of a trier of fact.

In Teamsters Local Union No. 177 v. UPS, Inc., App. Div. Dkt. No. A-5814-06T1 (4/30/08), the Appellate Division precluded the use of expunged criminal records and the testimony of subpoenaed investigators in a disciplinary proceeding unless the grievant testified and presented a defense that disputed that he possessed marijuana on a UPS truck on the date of his arrest.

In McElwee v. Borough of Fieldsboro, App. Div. Dkt. No. A-1230-06T3 (5/29/08), the Appellate Division held that the 45-day limit for bringing charges against police officers found in N.J.S.A. 40A:14-147 et seq. applies only to alleged violations of department rules and regulations and not to other misconduct.

In In re Flagg v. City of Newark, App. Div. Dkt. No. A-0788-05T5 (7/15/08), the Appellate Division held that an MSB regulation did not bar a disciplined employee who was entitled to back pay from changing his secondary job during the period of removal or suspension. The regulation allows earnings from a secondary job to mitigate a back pay obligation when the new or substituted secondary job has duties or hours incompatible with the public position. In this case, the employee had a series of secondary jobs during the back pay period, but none had duties or hours incompatible with his city job.

In Peck v. City of Hoboken, App. Div. Dkt. No. A-4590-06T3 (7/21/08), the Appellate Division affirmed a decision of the trial court granting permanent relief to a plaintiff on the return date of an order to show cause on preliminary restraints. The trial court dismissed disciplinary charges against a police officer after finding that the charges were brought in retaliation for speaking out against procedures that would promote preferential treatment for the police chief's son. There was no basis for the court to find any materially disputed facts warranting a plenary hearing.

In In re Herrick and Kostoplis, App. Div. Dkt. Nos. A-2590-06T1 and A-2734-06T1 (7/28/08), the Appellate Division affirmed decisions of the MSB dismissing the appeals of two police superior officers who alleged disciplinary demotions when they were returned to their former positions after two other officers returned to their positions from military leave. The return of an officer to his or her permanent title upon expiration of the title holder's return from a leave of

absence is not "major discipline." It is an action required by regulation.

In In re Norris, App. Div. Dkt. No. A-0030-07 (8/27/08), the Court reversed a decision of the MSB that had dismissed an appeal of a termination as untimely. The Court concluded that the MSB's decision was arbitrary and unreasonable, based on the factual record before it, because it did not "advance the welfare of the public and protect permanent employees in the classified service by preventing their removal except for cause after due notice and hearing." Norris filed his appeal 53 days after he received notice that he was going to be removed.

In In re Mark Moncho, App. Div. Dkt. No. A-0130-07T2 (10/16/08), the Appellate Division reversed a final decision of the Division of State Police that a sergeant violated none of the specifications underlying the disciplinary charges; but nonetheless, was guilty of the first disciplinary charge based solely upon the amount of overtime he had earned. At no time was the sergeant ever notified that the accrual of overtime, in and of itself, could subject him to disciplinary action. An employee cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority.

In Fricano v. Borough of Freehold, App. Div. Dkt. No. A-2280-07T3 (12/17/08), the Appellate Division affirmed a decision of the MSB finding that a probationary police officer had resigned in good standing. The officer was summoned to a meeting with the chief ten months after he was appointed. The chief told him his performance was unsatisfactory and that he would not receive permanent appointment. The officer was given the option of resigning. He resigned but later challenged his resignation, claiming that he had been denied a request for legal representation or to have a PBA representative present and that he resigned under duress and coercion. The Court did not address the alleged denial of representation.

In In re Gonzalez, __ N.J. Super. __ (App. Div. 2009), the Appellate Division held that the Media Policy of the Waterfront Commission of New York Harbor, a bi-state agency, was overbroad and facially unconstitutional and that, therefore, discipline imposed on the PBA president was illegal. The president had contacted a reporter to tell him of an allegedly unsafe and hazardous condition at the detective's workplace. In light of the Court's resolution of the constitutional issues, it did not need to address his argument

that his media contact constituted protected union activity.

In O'Rourke v. Lambertville, 405 N.J. Super. 8 (App. Div. 2008), the Appellate Division affirmed a Trial Court decision that had reversed the City Council's decision removing plaintiff from his position as a police officer. The Court held that when a law enforcement agency adopts rules pursuant to N.J.S.A. 40A:14-181 to implement the Attorney General's Guidelines, the agency has an obligation to comply with those rules. Because it failed to do so, and because the deficiencies tainted the disciplinary process, the City's decision to remove the officer from his position cannot stand.

In Rodgers v. Neptune Tp., App. Div. Dkt. No. A-3290-07T2 (3/18/09), the Township suspended a police officer without pay. A departmental hearing officer found termination to be warranted. The officer sought review in the Superior Court pursuant to N.J.S.A. 40A:14-150. The Judge reduced the penalty to a three-month suspension and the Appellate Division reversed, restoring the termination. The Court found that the officer's misconduct involved public safety and caused a present and future risk of harm to ordinary citizens, as the hearing officer had recognized. Thus, the trial court had acted arbitrarily.

In Ackermann v. Borough of Glen Rock, App. Div. Dkt. No. A-2947-07T2 (3/31/09), the Appellate Division affirmed a Trial Court order that had upheld the discipline of a police officer, but rejected the Borough's decision to demote him from detective sergeant to police officer. The Court found that the Trial Court had the power to modify a disciplinary penalty and properly applied the principles of progressive discipline. The Court also rejected the detective's cross-appeal, which had alleged, in part, that an increase in sanctions, from the initial recommendation of a three-day suspension, to a ten-day suspension, to a sixty-day suspension with demotion, violated the forty-five day rule of N.J.S.A. 40A:14-147. The Court stated that notice of the prospective penalty is not a vital element of a statement of charges.

Arbitration

In Somerset Cty. Sheriff's Officers FOP Lodge #39 v. Somerset Cty. and Somerset Cty. Sheriff, App. Div. Dkt. No. A-5789-06T3 (4/29/08), the Appellate Division reversed the decision of a trial court

that had denied the FOP's application for interest on an interest arbitration award plus counsel fees for the cost of the FOP's action to enforce the award. The Court reaffirmed that absent a stay, the County was required to implement the award within 14 days of the Commission decision affirming the arbitration award. It stated that not only didn't the County pay, but it played a cat-and-mouse game with the stay application. "The record plainly demonstrates that the County had no intention of paying the award until it was forced to do so." The Court also stated that once the Commission rendered its decision, the onus was on the County to implement the award; it should not have been the FOP's burden to move for enforcement. The Court ruled that it was a mistaken exercise of discretion for the trial court to deny the application for counsel fees and that interest should have been awarded.

In Wein v. Morris, 194 N.J. 364 (2008), in a non-labor context, the New Jersey Supreme Court ruled that when a trial court orders parties to arbitration, the court's order is a final judgment for appeal purposes.

In Borough of Glassboro v. FOP Lodge No. 108, 197 N.J. 1 (2008), the Supreme Court affirmed in part and reversed in part a decision of the Appellate Divison that had confirmed an arbitration award that had concluded that a police sergeant was improperly deprived of a promotion and that he should be promoted with full back pay. The Supreme Court agreed with the arbitrator's conclusion that the record showed no reasoning by the Borough for elevating another sergeant over the grievant at Phase III of a three-phase promotion process. The Court stated that this case stands for the unremarkable proposition that, should a grievant make the type of showing made here, and should the municipality not provide even the simplest explanation on the record for some kind of rational reason for its decision, the decision cannot stand. However, the Court also held that if the record was inadequate regarding how the other sergeant passed the grievant during Phase III, it was equally deficient in respect of the grievant's leadership skills and how, upon testing, he lost his lead. Thus, it was beyond the arbitrator's power to fashion a remedy that promoted the grievant, and the affirmance of that award must be reversed. The matter was remanded to the Borough to conduct a new Phase III proceeding, unless the parties can amicably resolve the case among themselves.

In Dumont Custodial Maintenance Ass'n v. Dumont Bd. of Ed., Dkt. No. C-532-08 (2/5/09), the Trial Court held that because the contract did not specify discharge as a penalty for an employee's first serious disciplinary offense, the arbitrator's improperly sustained the discharge of a custodian for stealing a student's iPod. The court reduced the penalty to a 15-day suspension.

In a 5 to 4 decision in 14 Penn Plaza v. Pyett, __ U.S. __ (2009) (4/1/09), the United States Supreme Court held that a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law. The dissenting opinions stated that the majority opinion was a departure from Supreme Court precedent with respect to arbitration clauses in collective bargaining agreements.

Promotions

In Hawthorne PBA Local 200 v. Borough of Hawthorne, 400 N.J. Super. 51 (App. Div. 2008) (4/29/08), the Appellate Division held that under a mayor-council form of government, the governing body may, by ordinance, delegate to the mayor the authority to make police appointments and promotions. The Court rejected the PBA's argument that police officers may only be appointed and promoted by governing body ordinance.

In In re Kenneth R. Martinez, 403 N.J. Super. 58 (App. Div. 2008), the Appellate Division reversed the portion of an MSB decision that had accepted a portion of a settlement agreement that had promised an employee a promotion if he scored first on a promotional exam. The Court stated that it had serious doubts that the Legislature wished to allow municipalities to dispense with the Rule of Three and reach agreements with applicants guaranteeing them a position if they scored high enough on an exam. Such individualized guarantees run contrary to the objectives of the Civil Service system.

Pensions

In Manzella v. Township of Rochelle Park, App. Div. Dkt. No. A-4534-06T1 (5/7/08), the Appellate Division upheld a PERS decision that disqualified a former public employee from eligibility for deferred retirement because he had been removed for cause from his positions as Tax Collector, Finance Officer and Town Administrator. Manzella was terminated after pleading guilty

to theft by deception after he submitted a fraudulent financial voucher to the Township for attending a seminar that he did not attend. A deferred retirement allowance is available to those who have become vested after completing ten years of eligible service but who leave office before reaching retirement age. Under N.J.S.A. 43:15A-38, a deferred retirement is disallowed if the employee is removed for cause on a charge of misconduct. It does not require conviction of an indictable offense nor does it require any form of conviction.

In Hemsey v. PFRS, 196 N.J. 85 (2009), the Supreme Court held that a retired police officer did not satisfy the statutory requirements for mandatory re-enrollment in PFRS because there was insufficient credible evidence to conclude that he exercised administrative or supervisory duties over police officers or firefighters in his current position as Director of Communications for the City of Trenton.

Discrimination & Retaliation

In John Cicchetti v. Morris Cty. Sheriff's Office, 194 N.J. 563 (2008), the New Jersey Supreme Court answered two novel questions relating to workplace discrimination claims. The Court unanimously held that a law enforcement employee's failure to disclose an expunged conviction does not prohibit the employee from pursuing a workplace discrimination complaint, but evidence of the conviction can be used to limit or potentially eliminate economic damages. The Court also held that individual supervisory defendants did not bear any personal liability because the statutory basis for personal liability by an individual is limited to acts that constitute aiding or abetting, and the record revealed no act by either of the individual supervisory defendants sufficient to meet that statutory test.

In Engquist v. Oregon Department of Agriculture, __ U.S. __ (2008), the United States Supreme Court rejected the argument that an individual employee who is not the victim of group-based discrimination can nonetheless suffer a denial of equal protection within the meaning of the Amendment. An Oregon public employee filed suit against her agency, her supervisor, and a co-worker – asserting claims under the Equal Protection Clause, among other things. She alleged that she had been discriminated against based on her race, sex, and national origin, and she also brought a so-called "class-of-one" claim,

alleging that she was fired not because she was a member of an identified class (unlike her race, sex, and national origin claims), but simply for arbitrary, vindictive, and malicious reasons. In a prior case involving a zoning dispute, the Supreme Court had accepted the theory that an individual can comprise a "class of one" for equal protection purposes and can sue a government agency for mistreatment that has no objectively rational explanation. The "class-of-one theory of equal protection" was "simply a poor fit in the public employment context," Chief Justice Roberts said, writing for the majority. He explained that the government needed "broad discretion" to make "subjective and individualized" decisions concerning its work force. In a dissenting opinion, Justice John Paul Stevens objected that the majority "carves a novel exception out of state employees' constitutional rights." There is a "clear distinction between an exercise of discretion and an arbitrary decision," he said. The Equal Protection Clause protects people against "unequal and irrational treatment at the hands of the state," Justice Stevens continued. He said that "even if some surgery were truly necessary to prevent governments from being forced to defend a multitude of equal protection 'class of one' claims, the court should use a scalpel rather than a meat-axe."

In CBOCS West, Inc. v. Humphries, __ U.S. __ (2008), the United States Supreme Court affirmed that Section §1981 of the Civil Rights Act of 1866 encompasses retaliation claims, such as when an individual (black or white) suffers retaliation because he or she tried to help a different individual suffering direct racial discrimination.

In Gomez-Perez v. Potter, __ U.S. __ (2008), the United States Supreme Court held that the ADEA prohibits retaliation against a federal employee who complains of age discrimination. In so concluding, the Court followed the reasoning of two prior decisions holding that retaliation is covered by similar language in other anti-discrimination statutes.

In Meacham v. KAPL, Inc., __ U.S. __ (2008), the United States Supreme Court placed the burden on employers in age discrimination cases to prove a layoff or other action that hurts older workers more than others was based not on age but on some other "reasonable factor." The 7-to-1 decision overturned a ruling by the federal appeals court in New York that had said that employees had the burden of disproving an employer's defense of reasonableness.

In Roa v. LAFE, 402 N.J. Super. 529 (App. Div. 2008), certif. granted 197 N.J. 477, the Appellate Division held that the anti-retaliation provisions of the Law Against Discrimination ("LAD") create a distinct cause of action that need not be related to the workplace. The LAD contains both "substantive" provisions and an anti-retaliation provision. While the former prohibits discriminatory conduct based upon a person's status as a member of a protected class, the latter makes it unlawful for any person to take reprisals against any person because that person has opposed any practices or acts forbidden under [the LAD] . . . or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [the LAD]. The "practices or acts forbidden" under the LAD include many things unrelated to one's employment.

In Mineer v. McGettigan, Atlantic Cty., Atlantic Cty. Sheriff's Dept., App. Div. Dkt. No. A-6560-05T3 (7/16/08), among other things, the Appellate Division held that a sheriff's officer had an interest in refraining from engaging in political activities on behalf of the sheriff that is protected by Article I, paragraph 6 of the New Jersey Constitution and that he could not be subject to retaliation, such as the denial of a promotion or other significant adverse employment actions for exercising that constitutional right.

In Charapova v. Edison Bd. of Ed., App. Div. Dkt. No. A-0259-07T2 (7/21/08), the Appellate Division affirmed a State Board of Education decision that a discrimination claim was untimely because it was filed more than 90 days after a non-tenured teacher received a RIF notice. The Acting Commission of Education had ruled that the petition was timely because it was filed within 90 days of the petitioner's becoming aware that similarly situated staff members were being recalled. Note that effective July 7, 2008, appeals of Commissioner of Education decisions go directly to the Appellate Division. P.L. 2008, c. 36.

In Parker et al v. City of Trenton, App. Div. Dkt. No. A-3647-06T2 (7/31/08), plaintiffs are or were employed by Trenton Water Works. In April 2000, they filed a complaint in which they alleged that their efforts to obtain promotions were frustrated and blocked by defendants due to their race, and that defendants created and perpetuated a

hostile work environment. In an amended complaint, plaintiffs alleged that defendants engaged in retaliatory acts after plaintiffs commenced their court action. Plaintiffs appealed two orders granting summary judgment in favor of defendants and dismissing the entirety of their complaint. The Appellate Division reversed. In determining whether harassment constitutes an adverse employment action, the trial court must consider the nature of the harassment, the closeness of the working relationship, whether the employee resorted to internal grievance procedures, the responsiveness of the employer to the employee's complaints, and all other relevant circumstances. Here, plaintiffs submitted sufficient evidence to raise genuine issues of fact as to whether the actions taken after the filing of the complaint were different in nature or quantity and whether the conduct was severe or pervasive and altered the conditions of their employment.

In Spinks v. Clinton Tp., 402 N.J. Super. 465 (App. Div. 2008), the Appellate Division affirmed a trial court decision granting summary judgment and dismissing complaints of retaliation in violation of plaintiffs' civil rights pursuant to 42 U.S.C. §1983 and unlawful termination based on age in violation of the New Jersey LAD. The Court found that it was the prosecutor, not the defendant police chief, that directed an investigation and decided to charge plaintiffs with falsifying documents. It also found that complaints about the administration of the police department and management of its personnel affected plaintiffs and their bargaining unit and were not matters of public concern qualifying as "protected activity" under §1983. The Court stated that plaintiffs and other PBA members had filed an unfair practice charge challenging new promotional procedures. As to the age discrimination claim, the Court ruled that an employer must be free to investigate complaints of employee misconduct without fear of LAD liability and that the investigation initiated by the Township and police chief was not an adverse action. The Court also ruled that the adverse action, plaintiffs' resignations as a condition of their plea agreements, were the prosecutor's responsibility.

In Norenius, et al. v. Multaler, Inc., App. Div. Dkt. No. A-4481-06T (9/11/08), among other things, the Court held that the LAD is the exclusive remedy for acts of discrimination declared illegal under the LAD.

Accordingly, the Court dismissed common law claims of sexual harassment, hostile work environment, and retaliation.

In Cutler v. Dorn, 196 N.J. 419 (2008), the New Jersey Supreme Court unanimously ruled that consistent with New Jersey's strong policy against any form of discrimination in the workplace, the threshold for demonstrating a religion-based, discriminatory hostile work environment cannot be any higher or more stringent than the threshold that applies to sexually or racially hostile workplace environment claims. The case involved a series of anti-semitic comments made to a Jewish police officer in the Haddonfield police department. The Court found that the comments were not only degrading, but conveyed ongoing hostility toward Jewish people. Collectively, the statements could be viewed, objectively, as humiliating to a person of Jewish ancestry and faith. The Appellate Division called it "teasing," but the Supreme Court found that the moniker undervalues the invidiousness of the stereotypic references and demeaning comments.

In Kwiatkowski v. Merrill Lynch, App. Div. Dkt. No. A-2270-06T1 (8/13/08), the Appellate Division ruled that calling an employee a "stupid fag" just once is ground for a prima facie case of hostile workplace discrimination based on sexual orientation. In addition, the Court ruled that plaintiff's suit could go forward even though the claim of bias was directed at a lower-level supervisor and not at the manager who eventually fired him. The Court invoked the federal doctrine known as the "cat's paw" which applies in situations where a supervisor who lacks decision-making power uses a decision-maker as a dupe to trigger a negative action against an employee.

In Cerdeira v. Martindale-Hubbell, Inc., 402 N.J. Super. 486 (App. Div. 2008), the Appellate Division reversed a decision granting summary judgment and permitted further litigation on the claim that the employer was liable for co-worker harassment based upon the negligent failure to have in place effective and well-publicized sexual harassment policies.

In Tartaglia v. UBS PaineWebber Inc., 197 N.J. 81 (2008), the New Jersey Supreme Court reiterated that under Pierce v. Ortho Pharm. Corp., 84 N.J. 58 (1980), an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. In this case, it held

that nothing in Pierce requires an actual or even threatened external complaint as an element of the cause of action.

In Vitale v. Atlantic Cty. Special Services School Dist., App. Div. Dkt. No. A-1675-07T3 (1/12/09), the Appellate Division held that a Veterans' Tenure Act claim was not subsumed within an LAD claim that a teacher had lost at trial. The claims are separate and either one or both could be litigated by the teacher.

In Crawford v. Nashville, __ U.S. __ (2009), the United State Supreme Court held that under Title VII of the Civil Rights Act of 1964, protections against retaliation against employees who report workplace race or gender discrimination extend to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation.

Duty of Fair Representation

In Grasso v. FOP Glassboro Lodge No. 108, App. Div. Dkt. No. A-2517-07 (9/4/08), the Appellate Division held that the FOP had no duty to represent a retired employee in a dispute with the Borough of Glassboro regarding reimbursement of Medicare insurance costs. The Court held that a union's duty of fair representation does not extend to retirees.

Privacy

In State v. M.A., App. Div. Dkt. No. A-4922-06 (8/29/08), the Appellate Division ruled that an employee has no reasonable expectation of privacy in personal files stored on a company-owned computer and that the employer's consent made a police search lawful. Even if M.A. had a subjective expectation of privacy because he used a confidential password, that expectation was unreasonable because of the criminal use to which it was put. Also, M.A. effectively abandoned the computers when he made no attempt to get them when he was fired. The Court distinguished a case that had found that the State Constitution protects an individual's privacy interest in subscriber information kept by his Internet service provider.

Conscientious Employee Protection Act ("CEPA")

In Maslow v. Latorre et al, App. Div. Dkt. No. A-3489-07T1 (11/17/08), the Appellate Division held that alleged retaliation for filing an individual grievance under a collective negotiations agreement is

not grounds for CEPA claim. See N.J.S.A. 34:19-1 to -8. Because the trial court dismissed the plaintiff's complaint, it did not address the defendant's argument that plaintiff's claim was within PERC's exclusive jurisdiction.

In Eddy v. State of New Jersey and New Jersey State Police, App. Div. Dkt. No. A-3129-07T1 (12/8/08), the Appellate Division affirmed the dismissal of a CEPA claim made by a State Police sergeant who had asserted on several occasions that efforts to reduce overtime were endangering the safety of the public and the Troopers. Among the statutes cited by Eddy to establish that his claim was a matter of public interest is a portion of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-14. The decision applies precedent holding that CEPA was not intended to address "internal disputes at the workplace."

In Brown v. New Brunswick Bd. of Ed., App. Div. Dkt. No. A-2501-07T2 (3/20/09), the Appellate Division held that filing a grievance is the commencement of an adjudicatory process that does not satisfy the definition of a whistle-blowing activity under CEPA.

In Cipriano v. City of Trenton, App. Div. Dkt. No. A-2220-07T3 (3/9/09), the Appellate Division affirmed the dismissal of a CEPA claim against the City and its then civilian police director. The Trial Court had held that the plaintiff, a police lieutenant who had been the Trenton PBA President, had to exhaust the available appeal procedures to contest discipline that he alleged was retaliatory. The Appeals court held that CEPA contains no exhaustion requirement, but that the plaintiff did not allege facts that would violate CEPA. The case mentions that the PBA had filed several unfair practice charges challenging the police director's efforts to re-structure the police department.

Open Public Records Act ("OPRA")

In Asbury Park Press v. Monmouth Cty., __ N.J. Super. __ (App. Div. 2009), the Court held that OPRA, N.J.S.A. 47:1A-1 to -13, required disclosure of the County's agreement with an employee to settle her sexual harassment and discrimination lawsuit.

In North Jersey Media Group, Inc. v. Bergen Cty. Prosecutor's Office, __ N.J. Super. __ (App. Div. 2009), the Appellate Division upheld a trial court decision that

OPRA did not permit the Bergen County Record to inspect records of Prosecutor's Office employees who sought approval for outside employment. Disclosure of the requested information was found to result in a substantial risk to the employees and their families.

In Education Law Center v. New Jersey Department of Education, __ N.J. __ (2009) (3/26/09), the Supreme Court held that a government record, which contains factual components, is subject to the deliberative process privilege when it was used in the decision-making process and its disclosure would reveal the nature of the deliberations that occurred during that process.

Bigley Applications

In In re Taylor, 196 N.J. 162 (2008), the New Jersey Supreme Court addressed the standard to be applied in evaluating a prosecutor's application under N.J.S.A. 2A:158-7 to increase appropriations for staff and facilities beyond the amounts appropriated by the county, called a Bigley application. The Court held that the statute authorizes the Assignment Judge to approve expenses of the Prosecutor that exceed the funds appropriated by the County only when the expenses are "reasonably necessary." The Prosecutor had sought to increase certain salaries beyond the levels in the collective negotiations agreements. The Trial Court had expressly found that the "Prosecutor has not established that an increase in salary levels is somehow 'essential,' or that his office will not be able to fulfill some specific function entrusted to it without an increase in salaries." Also, the Trial Court expressly found that an additional increase for assistant prosecutors beyond the amount previously agreed to in negotiations was not "essential." The Trial Court interpreted those findings to mean that the salary increases, although appropriate, were not "reasonably necessary" for the Prosecutor to fulfill his statutory responsibilities. In light of those findings, the Supreme Court held that it was error to approve the Prosecutor's request to increase the salaries for those positions.

Port Authority of New York and New Jersey

The PBA has filed a petition for certiorari with the United States Supreme Court in In re Port Authority of New York and New Jersey, 194 N.J. 314 (2008). In that case, the New Jersey Supreme Court reversed a

decision of the Port Authority Employment Relations Panel that had found an improper practice when the Authority leased its international terminal at JFK to a private entity and work that had been performed by Port Authority police officers was given to security personnel employed by the private entity. The Panel was represented by the Commission's then-General Counsel Bob Anderson. The PBA argues that the New Jersey Supreme Court improperly applied New Jersey law to this dispute involving a bi-state agency.

Miscellaneous Court Cases

In Hietanen v. Ramapo Indian Hills Bd. of Ed., App. Div. Dkt. No. A-2491-06T2 (5/12/08), the Appellate Division upheld a denial of counsel fees under the "frivolous litigation" statute, N.J.S.A. 2A:15-59.1. The brother of a high school student wrote to the school district asking that an advisor be removed from an extracurricular position. The Board did so at a public meeting during which the person with the complaint spoke out against the teacher during the public portion of the meeting. The teacher sued the Board and the person making the complaint for defamation and other civil wrongs. A Trial Court granted summary judgment for the person making the complaint but denied an application for counsel fees made under the "frivolous litigation" statute. The Appellate Division affirmed stating that its determination required the weighing of several countervailing policies, such as the principle that citizens should be free to address their public concerns in a public forum without fear of being sued and the principle that citizens should have "ready access to all branches of government, including the judiciary."

In CWA v. Rousseau, App. Div. Dkt. No. A-6126-04 (8/22/08), the Appellate Division held that Department of Treasury (Division of Investment) regulations authorizing and governing the engagement of external investment managers are invalid. Regulations authorizing investments in private equity funds and hedge funds are valid subject to the standard of care set forth in N.J.S.A. 52:18A-89b.

In City of Ocean City v. Somerville, 403 N.J. Super. 345 (App. Div. 2008), the Court held that an ordinance that imposes a "cost of living" cap on budgeted municipal expenditures in a Faulkner Act community may not be adopted by the "initiative" process.

In Wilson v. Brown, 404 N.J. Super. 557 (App. Div. 2009), certif. den. __ N.J. __ (2009), the Appellate Division overturned a Trial Court order requiring the Governor to turn over e-mails between him and CWA Local 1034 President Carla Katz, some of which occurred while the State was negotiating with the CWA. The Court held that the emails are protected by executive privilege. The Court noted that due to its disposition of the applicability of executive privilege, it did not need to address the argument that the documents fell within the "information generated . . . in connection with collective negotiations" exclusion from the Open Public Records Act. The Supreme Court denied certification.

In Lourdes Medical Center of Burlington Cty. v. Board of Review, 197 N.J. 329 (2009), the Supreme Court held that striking nurses qualified for unemployment benefits because a loss of revenue attributable to the strike that did not result in a substantial curtailment of work at the Lourdes Medical Center was not the equivalent of a “stoppage of work” within the intendment of the Unemployment Compensation Law.

In State v. Wayne DeAngelo, 197 N.J. 478 (2009) (2/5/09), the New Jersey Supreme Court unanimously held that a Lawrence Township sign ordinance that prohibited all but a few exempted signs violated the First Amendment right to free speech and was overbroad. The case involved a large inflatable rat displayed by a union as part of a labor protest.

In Tracey D. Parks v. Board of Review, 405 N.J. Super. 252 (App. Div. 2009), the Appellate Division ruled that absences from work due to family emergencies did not constitute "misconduct" for purposes of a six-week disqualification from receiving unemployment benefits.

In Horsnall v. Washington Tp., 405 N.J. Super. 304 (App. Div. 2009), the Appellate Division held that the creation of a Division of Fire to replace a previously existing Fire District did not eliminate a Fire District fireman's statutory tenure protections under N.J.S.A. 40A:14-19 and N.J.S.A. 40A:14-25.

In State of New Jersey Department of Environmental Protection v. Mazza, __ N.J. Super. __ (App. Div. 2009), the Appellate Division reviewed the purpose and mechanics of enforcement of administrative agency decisions. Although Rule 4:67-6(c)(3) prohibits a trial court from considering the

validity of an agency order in an enforcement action, an agency seeking enforcement of one of its orders must show that the defendant has failed to comply with the order and that the court's assistance is necessary to secure compliance.

In a case of first impression that could have far-reaching implications, a bankruptcy judge in California recently determined that municipalities that file petitions under Chapter 9 of the Bankruptcy Code (reorganization for municipalities) can reject existing collective bargaining agreements with public employee unions. In re City of Vallejo, Case No. 08-26813-A-9 (E.D. Cal. Mar. 13, 2009). Facing a $9 million budget shortfall, the City of Vallejo filed a petition for bankruptcy protection under Chapter 9 in May 2008, which allowed the City to attempt to re-negotiate contracts with employees, vendors and others. When efforts to re-negotiate the collective bargaining agreements with the unions representing firefighters (International Association of Firefighters, Local 1186) and electrical workers (International Brotherhood of Electrical Workers, Local 2376) failed, the City moved before the bankruptcy court to void the contracts with those unions. The court stated that as established by the Supreme Court in N.L.R.B. v. Bildisco & Bildisco, 456 U.S. 513, 521-22, 526 (1984), a debtor may use section 365 of the bankruptcy code to reject an unexpired collective bargaining agreement if the debtor shows that: (1) the collective bargaining agreement burdens the estate; (2) after careful scrutiny, the equities balance in favor of contract rejection; and (3) "reasonable efforts to negotiate a voluntary modification have been made, and are not likely to produce a prompt and satisfactory solution." The debtor has the burden of establishing that these factors have been satisfied. Id. Despite having concluded that the City may potentially reject the remaining CBAs, the court deferred determining whether the City had satisfied the Bildisco standard for their rejection for two reasons, including the fact that negotiations between the City, IAFF and IBEW were ongoing. The court wished to give the parties every reasonable opportunity to settle the motion.

Other Legislation

P.L. 2008, c. 17. extends the State's existing Temporary Disability Insurance program to provide insurance benefits to all New Jersey workers when they take time off

to care for newborn and newly adopted children, or sick family members.

P.L. 2008, c. 89 prohibits pension system credit purchased for out-of-State service from being creditable towards post-retirement health care benefits.

The law also provides that the State, or an independent State authority, commission, board or instrumentality, may allow any employee who is eligible for other health care coverage that is not under the SHBP to waive the SHBP coverage. In consideration of filing a waiver, the State or other employer may pay the employee annually an amount established at its sole discretion and not in excess of 50% of the amount saved because of the employee's waiver of coverage.

The law raises the retirement age for a benefit without any reduction, from age 60 to age 62, for new members of TPAF and PERS.

The law raises to $7500 the eligibility criteria for becoming a member of TPAF and PERS. The eligibility criteria were a minimum annual compensation of $500 for TPAF and $1,500 for PERS. The $7,500 minimum will be adjusted annually by the Director of the Division of Pensions and Benefits, by regulation, in accordance with changes in the Consumer Price Index but by no more than 4 percent.

The law provides that an adjunct faculty member or part-time instructor at a public institution of higher education in the State whose employment agreement begins after the effective date will be eligible for membership in the Alternate Benefit Program (ABP), instead of PERS.

The law puts into statute the current eligibility criteria for SHBP coverage, now contained in regulation, for an employee of an employer other than the State, who must work the number of hours per week as prescribed by the governing body of the participating employer, which number of hours worked will be considered full-time, determined by resolution and not less than 20.

Finally, the law lowers, from 13 to 12, the number of paid holidays for all State government public employees. Lincoln's Birthday will no longer be considered a public holiday for the purposes of conducting State government business. This provision will not impair any collective bargaining agreement in effect on the effective date and will take effect in the calendar year after the collective bargaining agreements or contracts covering a majority of the Executive Branch employees

expire. Those contracts expire on June 30, 2011.