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# General Counsel's Annual Report–2000

## Public Employment Relations Commission

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The Commission received one opinion from the Supreme Court. It was an affirmance. The Commission received six opinions from the Appellate Division. All were affirmances, save one. In addition, three appeals were dismissed or withdrawn, two motions for leave to appeal were dismissed, one stay was denied, and two agency orders were enforced.

### **Appeals From Commission Decisions**

### **Unfair Practice Cases**

The New Jersey Supreme Court affirmed *Middletown Tp. and Middletown PBA Local 124*, P.E.R.C. No. 98-77, 24 *NJPER* 28 (¶29016 1998), aff'd 334 *N.J. Super.* 512(App. Div. 1999), aff'd 166 *N.J.* 112 (2000). The Commission held that the employer was required to negotiate before changing its practice concerning salary guide

placement of newly hired but experienced police officers. The Appellate Division agreed with the agency's decision, quoting this language with approval:

The Township had an obligation to negotiate over starting salaries. It unilaterally established a policy of placing officers with police academy training and at least one year of municipal police department experience at step three of the salary guide. The PBA did not object to that practice. The only time that the PBA was aware of a deviation from that practice, it filed an unfair practice charge. Thus, the PBA cannot be said to have acquiesced to any deviations from the practice. Under these facts, we conclude that the Township had an obligation to negotiate with the PBA before setting Gonzalez' salary below step three.

We reiterate that the Township is not bound to maintain its practice. It is simply required to negotiate

before changing it.... If conditions have changed and the Township believes that the practice should be discontinued, it is free to take that position in negotiations.

The Appellate Division also accepted the Commission's distinction between breach-of-contract claims outside the agency's jurisdiction and unilateral change claims within its jurisdiction. The Supreme Court affirmed, substantially for the reasons expressed by the Appellate Division. Justice LaVecchia would have dismissed the petition for certification as improvidently granted.

In *Borough of Bogota and PBA Local 86*, P.E.R.C. No. 99-77, 25 *NJPER* 129 (¶30058 1999), aff'd 26 *NJPER* 169 (¶31066 App. Div. 2000), the Appellate Division held that, under the circumstances, the Borough had a prerogative to replace police officer dispatchers with civilians and to reassign the police officers to operational, investigative, supervisory, and crime prevention duties. No job losses were contemplated. Describing the Commission's decision as thorough and well-reasoned, the Court held that *City of Jersey City v. Jersey City POBA*, 154 *N.J.* 555 (1998), compelled the finding of a prerogative even though a desire to reduce overtime costs formed the incentive for the civilianization.

The Supreme Court denied certification. 165 *N.J.* 489 (2000).

School boards are prohibited from paying increments to teaching staff members during negotiations after a three-year contract expires. *Neptune Bd. of Ed. v. Neptune Ed. Ass'n*, 144 *N.J.* 16 (1996). In *East Hanover Bd. of Ed. and East Hanover Ed. Ass'n*, P.E.R.C. No. 99-71, 25 *NJPER* 119 (¶30052 1999), aff'd 26 *NJPER* 200 (¶31081 App. Div. 2000), the question was whether, after a three-year contract expired, a school board was required to pay increments to nonprofessional employees in the same negotiations unit as teachers. The Commission answered this question no, saying it was unwise, "as a matter of labor relations policy, to have separate rules for increment payments for different types of employees within a single, broad-based negotiations unit." The Court agreed and the Supreme Court denied certification. 165 *N.J.* 489 (2000).

*Neptune's* prohibition, however, does not apply to two-year contracts. In *Camden City Bd. of Ed. and Camden City Fed. of School Administrators*, I.R. No. 2000-5, 26 *NJPER* 80 (¶31031 1999), a Commission designee ordered the Board to pay increments during negotiations after a two-year contract

expired. The Appellate Division denied leave to appeal.

In *North Hudson Firefighters Ass'n and North Hudson Reg. Fire & Rescue*, I.R. No. 2000-7, 26 *NJPER* 108 (¶31044 2000), a Commission designee issued a temporary restraining order restraining the employer from altering pay dates during negotiations. The Appellate Division denied leave to appeal the TRO.

The Commission secured enforcement of unfair practice orders in two cases where Hearing Examiner decisions became final absent exceptions: *Nutley Tp. and PBA Local 133*, H.E. No. 99-18, 25 *NJPER* 199 (¶30092 1999), and *City of East Orange and East Orange Engineering Supervisory Personnel Ass'n*, H.E. No. 2000-5, 26 *NJPER*, 87 (¶31034 2000). A trial court will not consider the merits of an agency order in an enforcement action.

### **Scope-of-Negotiations Cases**

In *Jackson Tp. Bd. of Ed. and Jackson Tp. Ed. Ass'n*, P.E.R.C. No. 99-62, 25 *NJPER* 87 (¶30037 1999), the Commission held that a dispute over the non-renewal of a coaching contract was legally arbitrable under *N.J.S.A.* 34:13A-23 and that this statute had not been

repealed by *N.J.S.A.* 18A:27-4.1. The latter statute addresses only the respective roles of a school board and a superintendent in making personnel decisions, not any negotiability issues. The Appellate Division, in an opinion by Judge Kestin, agreed with the Commission's holding and reasoning and also rejected an argument that *N.J.S.A.* 34:13A-23 unconstitutionally delegated governmental powers to an arbitrator. 334 *N.J. Super.* 162 (App. Div. 2000), certif. den. 165 *N.J.* 676 (2000). At the end of its opinion, the Court expressed "serious reservations about the propriety or wisdom of PERC's appearance as a party in this appeal with a brief and oral argument addressing the merits of the dispute." *Id.* at 175. The Court conceded that this practice "has been fairly common for years." *Id.* at 176. *See, e.g., Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n*, 78 *N.J.* 25, 33-37 (1978) (affirming PERC's participation in appeals involving unfair practice and scope-of-negotiations disputes). It is also the common practice of other administrative agencies such as the State Board of Education and the Merit System Board. The Court nevertheless referred its question about the validity of that practice to the Supreme Court's Civil Practice

Committee. That Committee promptly concluded that “the long-standing practice of PERC’s participation in certain appeals is supported by court rules, statutes, and case law, and that no change to this practice is warranted.”

In *Randolph Tp. Bd. of Ed and Randolph Tp. Ed. Ass’n*, P.E.R.C. No. 99-45, 25 *NJPER* 14 (¶30005 1998), the Commission held that the 1990 amendments to the Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, made all increment withholdings from non-professional school board employees subject to binding arbitration under *N.J.S.A.* 34:13A-29. The Appellate Division, however, reversed and remanded the case to the Commission. 328 *N.J. Super.* 540 (App. Div. 2000). The Court’s opinion expands the Commission’s jurisdiction under *N.J.S.A.* 34:13A-27 to apply to non-professional employees as well as teaching staff members and requires the Commission to determine whether a support staff withholding was predominately evaluative or disciplinary. The parties later settled the case so the Commission did not issue a decision on remand.

The Appellate Division has affirmed *Demarest Bd. of Ed. and Demarest Ed. Ass’n*,

P.E.R.C. No. 99-36, 24 *NJPER* 514 (¶29239 1998), *aff’d* 26 *NJPER* 113 (¶31046 App. Div. 2000). The Commission and the Court declined to restrain arbitration over a music teacher’s increment withholding; they agreed that two of the three cited reasons were not based on teaching performance.

### **Representation Cases**

In *Ocean Cty. Sheriff and Ocean Cty. Sheriff’s Officers, FOP Lodge No. 135*, P.E.R.C. No. 99-70, 25 *NJPER* 117 (¶30051 1999), *aff’d* 26 *NJPER* 170 (¶31067 App. Div. 2000), the Appellate Division affirmed the Commission’s dismissal of two representation petitions seeking to sever sheriff’s officers and sheriff’s superior officers from negotiations units including corrections officers and corrections superior officers. The units had been represented by the majority representatives for decades and had functioned well. While the County was the sole employer of corrections officers and the County and the Sheriff were joint employers of sheriff’s officers, the Commission held that these multi-employer units should not be disrupted. The Court agreed and reiterated the deference paid the Commission in representation cases.

## Interest Arbitration

The Appellate Division denied the employer's motion for a stay pending appeal in *Teaneck Tp. and FMBA Local No. 42*, P.E.R.C. No. 2000-33, 25 *NJPER* 450 (¶30199 1999), app. pending App. Div. Dkt. No. A-001850-99T1. As a result, the employer has paid the awarded salary increases. This is the first case appealed to the courts since 1996, when the Commission was given jurisdiction to review interest arbitration awards.

## Other Litigation

Judge Sypek of the Mercer County Superior Court dismissed an FOP Complaint seeking the removal of Commissioner Madonna from the Commission because he is a State PBA official and allegedly would be biased against the FOP. The Court found no basis in law or fact for that claim.

## Commission Regulations

The Commission readopted (with some amendments) its representation and unfair practices regulations. *N.J.A.C.* 19:11 and 19:14. This year the Commission will readopt its regulations governing mediation,

factfinding, grievance arbitration, and interest arbitration and will consider amending those rules as well. *N.J.A.C.* 19:12 and 16.

## Other Court Cases

### Grievance Arbitration

#### 1. Decisions Confirming Awards

In *City of Egg Harbor City and New Jersey State PBA, Inc., Mainland Local #77*, P.E.R.C. No. 98-128, 24 *NJPER* 228 (¶29108 1998), the Commission declined to restrain arbitration of a grievance contesting the transfer of work from full-time officers within a negotiations unit to part-time officers outside the unit. The City did not appeal that ruling. The arbitrator then ruled against the City and the City sought to vacate the award on the ground that it was non-negotiable. Judge Gibson held that the failure to appeal the Commission decision precluded raising the negotiability claim in an action to vacate the award. The Appellate Division affirmed that ruling and added that the notice of appeal should have been served on the Commission. App. Div. Dkt. No. A-5176-98T2 (5/22/00).

In *PBA Local 240, Monmouth Cty. Correction Officers Ass'n v. Monmouth Cty.*

*Sheriff and Monmouth Cty. Freeholders Bd.*, App. Div. Dkt No. A-5826-98T1 (6/19/2000), the Court upheld an award finding the employer had violated a past practice concerning the imposition of fines in lieu of suspensions as a disciplinary penalty. Judges Petrella and Conley held that a past practices clause could be relied upon to sustain the grievance even though the policy alleged to have been changed was not spelled out in the agreement. The Court held that the arbitrator's findings were "reasonably debatable" and should be upheld. It noted that its holding was "without prejudice" to the employer's ability to petition the Commission for a negotiability determination.

In *Pinelands Ed. Ass'n v. Pinelands Bd. of Ed.*, App. Div. Dkt. No. A-4222-98T1 (6/30/00), an Appellate Division panel upheld an award denying a grievance that had claimed that a school board violated its contract by asking new hires to sign waivers of health benefits for part-time employees working more than 20 hours a week. The arbitrator found that the employees knowingly waived the benefits and that the board would not have hired them to work more than 20 hours if they had insisted on health benefits. In the court proceedings, the Association argued that the

waivers violated *N.J.A.C. 17:9-1.8*, prohibiting financial enticements not to enroll in the State Health Benefits Program, but the Court held that this issue itself was waived because it was not presented to the arbitrator.

In *Borough of Kenilworth v. Kenilworth PBA Local 135*, App. Div. Dkt. No. A-244-99T2 (9/7/00), the Appellate Division confirmed an award in a PBA local's favor. The arbitrator applied a retention-of-benefits clause to a practice of allowing disabled officers on leave of absence to receive the holiday and vacation time they would have received if they had continued to work.

In *Western Monmouth Utilities Auth. v. Highway and Local Motor Freight Drivers, Dockmen and Helpers Local Union No. 701*, App. Div. Dkt. No. A-275-99T5 (11/30/00), Judges Stern and Rodriguez confirmed an award entitling the grievant to seniority retroactive to the date she began working at the employer's facility as an employee of a temporary personnel agency, rather than the date on which she was formally hired.

The same panel also confirmed an award ordering an employer to pay four years of back overtime pay, based on a finding that there was a continuing violation of the overtime clause and thus the 30-day deadline

for filing grievances did not limit the remedy. *Trenton Bd. of Ed. v. Trenton Business & Technical Employees Ass'n*, App. Div. Dkt. No. A-1634-99T3 (12/01/00). The Court held that issues of timeliness in the grievance process are to be determined by the arbitrator.

In *Hudson Cty. v. PBA Local 109A*, App. Div. Dkt. No. A-1352-98T3 (1/18/00), the Court confirmed an award requiring that employees serving as union representatives be paid when attending Executive Board meetings and other union meetings. The arbitrator interpreted the past practices clause to require payment.

In *Bergen Pines Cty. Hosp./Bergen Cty. v. JNESO, Dist. Council 1, IUOE, AFL-CIO*, App. Div. Dkt. No. A-4465-98T5 (2/16/00), the Court confirmed an award paying employees for accrued sick leave and vacation pay. Effective March 15, 1998, the County transferred operation of Bergen Pines County Hospital to a private sector company; it then declined to credit employees for accrued vacation and sick leave time for the first two weeks of March because they did not work the entire month. The arbitrator, the trial court, and the Appellate Division all rejected that position.

## **2. Decisions Vacating Awards**

In *State of New Jersey (Dept. of Corrections) v. Local 195, IFPTE*, App. Div. Dkt. No. A-6309-98T1 (6/19/00), an Appellate Division panel vacated an award requiring that overtime compensation be paid to employees improperly bypassed under the contract procedures for allocating overtime opportunities. The contract empowered the arbitrator to “prescribe an appropriate back pay remedy when he finds a violation of this contract provided such remedy is permitted by law and is consistent with the terms of this contract”; but it also denied the arbitrator the power to “add to, subtract from, or modify the provisions of this Contract or laws of the State, or any policy of the State.” The Court held that the common law rule of “no work-no pay” governed the case. The Supreme Court has granted certification, 165 *N.J.* 604 (2000), and CWA has filed an amicus curiae brief.

In *Jersey City Police Superior Officers Ass'n v. City of Jersey City*, App. Div. Dkt. No. A-2161-99T2 (12/13/00), an Appellate Division panel vacated an award. The Court held that the arbitrator improperly based his decision on negotiability considerations within PERC’s exclusive jurisdiction. The Commission subsequently ruled that the grievance (contesting the use of lieutenants to

fill in for absent sergeants) was non-negotiable. *Jersey City Police Superior Officers Ass'n and City of Jersey City*, P.E.R.C. No. 2001-32, 27 *NJPER* 30 (¶32016 2000), mot. for recon. pending.

In *Padovano v. Borough of E. Newark*, 329 *N.J. Super.* 204 (App. Div. 2000), the Appellate Division vacated an award reinstating a police captain and awarding him back pay because disciplinary hearings were not conducted in a timely fashion. The Court held that the police captain did not have standing to demand arbitration under the parties' contract. That right belonged exclusively to the majority representative, the PBA, and therefore the award had to be vacated. The Court rejected an argument that the PBA had assigned the right to arbitrate the grievance to the individual employee. Noting that the PBA had disclaimed any responsibility for the employee's legal fees, the Court reasoned that permitting such an assignment would increase the number of arbitrations and subvert the Borough's contractual rights. The Court also held that the hearing officer who heard the disciplinary charges had the power to reconsider his initial recommendation that Padovano be dismissed and to recommend instead a 120-day suspension. The Borough,

however, could not reject that recommendation. Finally, while the Borough never adopted an ordinance authorizing the hearing officer's appointment, the PBA was estopped from seeking to void his initial recommendation since it had earlier argued that the hearing officer had the power to reconsider that recommendation.

### **3. Other Arbitration-Related Decisions**

In *Haddonfield Bd. of Ed. v. Haddonfield Ed. Ass'n*, App. Div. Dkt. No. A-2557-98T2 (4/25/00), and *Jackson Tp. Bd. of Ed. v. Jackson Ed. Ass'n*, App. Div. Dkt. No. A-417-99T1 (9/29/00), certif. den. \_\_\_ *N.J.* \_\_\_ (2001), the Appellate Division declined to hold that non-reappointment grievances were not contractually arbitrable. In *Haddonfield*, the contract expressly empowered the arbitrator to decide contractual arbitrability questions and the Court ruled that an arbitrator could determine whether a custodian's non-renewal was for disciplinary reasons. The Court stated that "public employers have a right to exclude from arbitration the non-renewal of non-tenured employees," but held that the dispute did not involve a simple non-renewal since the Association had asserted that the non-renewal

followed a suspension and should be considered disciplinary. In *Jackson*, the parties' contract contained a just cause clause and the Court allowed the arbitrator to determine whether that clause implicitly covered coaching nonreappointments.

Two Appellate Division cases addressed claims that employees were bound to arbitrate statutory discrimination claims. In *Quigley v. KPMG Peat Marwick LLP*, 330 N.J. Super. 252 (App. Div. 2000), the panel held that a senior manager was not coerced into signing an agreement to arbitrate LAD claims and that such agreements are enforceable despite the public policy against discrimination. However, the Court also held that the plaintiff did not knowingly and voluntarily waive his right to a jury trial on his claim that his discharge violated the LAD since no such statutory right existed when he signed the agreement and since the arbitration clause was too ambiguous to waive his statutory remedies. The clause did not mention termination, discrimination, or statutory rights and thus violated the principle that "a clause depriving a citizen of access to the courts should clearly state its purpose." But in *Garfinkel v. Morristown Obstetrics & Gynecology Associates*, 333 N.J. Super. 291

(App. Div. 2000), the Court found that a physician had knowingly entered into an employment contract compelling arbitration and clearly waiving statutory remedies for a gender discrimination claim arising from his termination.

In *South River Ed. Ass'n v. South River Bd. of Ed.*, App. Div. Dkt. Nos. A-4288-98T3 and A-4350-98T3 (10/11/00), an arbitrator issued an award finding:

1. The Board violated Articles VI, VII and XIII of the Collective Bargaining Agreement by unilaterally increasing student contact time for elementary school teachers without negotiating compensation.
2. The Board and the Association shall negotiate retroactive and prospective compensation for elementary school teachers, excluding fifth grade teachers, who were assigned additional student contact time.

The award was confirmed, but on appeal the Association argued that the case should be remanded to the arbitrator to fix the amount of compensation for employees who worked extra time. The Board responded that the order to negotiate was clear and complete and that any remaining dispute could be the subject

of another grievance and PERC-panel arbitration. The Court concluded that the matter should be remanded to the arbitrator for a supplemental opinion clarifying the remedy; it noted that referring the matter to PERC was not proper since no management prerogatives, public policy issues or legal arbitrability issues were at stake. The opinion does not explain why an order to negotiate was not a proper remedy.

In *Trentacost v. City of Passaic*, 327 N.J. Super. 320 (App. Div. 2000), the Court rejected a claim that the Commission had sole jurisdiction over lawsuits asserting that the City's collective negotiations agreement required it to pay three retired firefighters for unused holidays and augmented pension benefits based on that pay. The Court ruled that holiday pay is a mandatorily negotiable employment condition so there was no negotiability issue within the Commission's jurisdiction. The Court next ruled that the retirees' claims should have been presented through the grievance procedure. It rejected the City's contention that the contractual deadlines necessarily precluded resort to the grievance procedure, concluding that an arbitrator should resolve procedural arbitrability issues concerning timeliness. It

remanded the case for the trial court to resolve the contractual issues if neither party demanded arbitration within 30 days.

The New Jersey Supreme Court has granted certification in *Troy v. Rutgers*, App. Div. Dkt. No. A-3817-98T (2/14/00), certif. granted 165 N.J. 602 (2000), to consider this question:

Could the plaintiffs, tenured professors, litigate their individual breach of contract claims or were they required to pursue their grievances through arbitration as provided in their union's collective bargaining agreement?

The Appellate Division dismissed a complaint claiming that Rutgers violated the contract rights of individual professors when it reduced them from calendar year employees to academic year employees. It held that the professors had not established such individual contract rights and that the real dispute was whether their duties were sufficient to meet calendar year requirements under the collective negotiations agreement, a claim that was contractually required to be pursued through advisory arbitration.

In *Eastern Associated Coal Corp. v. United Mine Workers of America*, Dist. 17, \_\_\_ U.S. \_\_\_, 121 S.Ct. 462, 165 LRRM 2865

(2000), the United States Supreme Court held that public policy did not require vacating an award reinstating a truck driver who had twice tested positive for marijuana. The arbitrator found no just cause for terminating the driver, but did direct that the employee be suspended for 90 days, reimburse the parties for arbitration costs, participate in a substance abuse program, undergo random drug testing, and sign an undated letter of resignation to take effect if he tested positive within the next five years. The Court upheld this award, noting the “background labor law policy that favors determination of disciplinary questions through arbitration” and finding that the award did not violate any law, regulation, or explicit, well-defined and dominant public policy. A concurring opinion by Justice Scalia, joined by Justice Thomas, would confine the public policy basis for vacating an award to a violation of “positive law” – that is, a statute or regulation.

### **Strikes & Penalties**

In *Middletown Tp. Bd. of Ed. v. Middletown Tp. Ed. Ass’n*, App. Div. Dkt. No. A-3524-98T3 (5/16/00), strike-related damages were denied to a school board because the claimed damages did not exceed

the savings in teachers’ salaries. The Court held the Board could receive counsel fees from the Association, but not from the NJEA or an NJEA representative.

### **Representation**

An Appellate Division panel has rebuffed a labor union’s attempt to represent Seton Hall faculty. *Seton Hall Univ. Faculty Ass’n/NJEA v. Seton Hall Univ.*, App. Div. Dkt. No. A-5271-98T3 (6/8/00), certif. den. 165 *N.J.* 676 (2000). In 1982, the NLRB dismissed a petition seeking to represent the faculty because they were managerial employees under *NLRB v. Yeshiva Univ.*, 444 *U.S.* 672 (1980). An NJEA affiliate then filed this lawsuit, asserting that Article I, ¶19 of the New Jersey Constitution entitled the faculty to organize. The Court held, however, that the NLRB decision preempts the exercise of State jurisdiction; to allow bargaining under the Constitution would violate the national labor policy preserving the distinction between labor and management.

### **Union Conventions**

Judge D'Italia of the Hudson County Superior Court has ruled that a statute

granting FMBA members paid leave to attend the FMBA convention is "special legislation" violating the New Jersey Constitution. *New Jersey State FMBA v. North Hudson Reg. Fire and Rescue*, L-651099 (2/4/00), app. pending App. Div. Dkt. No. A-3827-99T1. Similar statutes also grant paid leaves to IAFF, PBA and FOP members to attend conventions. Despite this litigation, the Legislature recently amended *N.J.S.A. 11A:6-10*, the statute allowing police officers to attend a variety of union conventions. The amendment extends the statute's coverage to superior officer organizations and the International Association of Women Police.

**Collective Negotiations  
Agreements**

The State Board of Education has held that a school board member is not prohibited from voting on a collective negotiations agreement solely because the member or the member's spouse belongs to (or is represented by) a different local affiliate of the same statewide association with whom the agreement is made. *In re Frank Pannucci*, SB#16-97 (3/11/00). The State Board's ruling overturns the ruling of the School Ethics Commission that a school board member in

Brick Township could not vote on a contract between his school board and an NJEA affiliate because he taught in East Orange where he was represented by another NJEA affiliate.

In Advisory Opinion A02-00 (3/28/00), the School Ethics Commission held that *Panucci* did not apply to a school board member's participation in negotiations. The Commission ruled that a member could not serve on the board's negotiations committee in a district where the majority representative is an NJEA affiliate when the member's spouse is a teacher in another district represented by another NJEA affiliate. The Commission found that the spouse had an indirect financial involvement with the NJEA that might reasonably be expected to impair the member's objectivity.

**Union Buttons**

In *Green Tp. Ed. Ass'n v. Rowe*, 328 *N.J. Super.* 525 (App. Div. 2000), Judge Baime authored a decision holding that the school board could constitutionally prohibit teachers from wearing buttons stating "NJEA SETTLE NOW" in the presence of students on school property. But the Court also held that the policy was overbroad because other

parts could be read to prohibit employees from using their lunch breaks or free periods to discuss political issues even though no students were present; or to prevent teachers from speaking at Board meetings on school property; or to prohibit teachers from passing out leaflets off school property during non-working hours.

### **Disciplinary Issues**

*Golden v. Union Cty. Prosecutor's Office*, 163 N.J. 420 (2000), holds that Prosecutors cannot bind themselves in an employment manual to give an assistant prosecutor a pre-termination hearing. Such a right would contravene a statute stating that assistant prosecutors serve "at the pleasure of the prosecutors." N.J.S.A. 2A:158-15. The Court, however, distinguishes *OER v. CWA*, 154 N.J. 98 (1998), permitting employees serving at their employer's pleasure to negotiate collectively over disciplinary review procedures.

*In re Hall*, 335 N.J. Super. 45 (App. Div. 2000), involved a police officer's dismissal for offering money to impound lot employees to steal stereo equipment from an owner's car; the officer wore his uniform pants and displayed his service revolver in an

attempt to intimidate the employees to sell the equipment to him. Invoking progressive discipline concepts, the Merit System Board reduced the penalty to a 15-day suspension, but the Court upheld the dismissal.

In *Grasing v. Borough of Palisades Park*, App. Div. Dkt. No. A-2431-98T1 (5/16/00), the Court reversed a permanent injunction that had invalidated disciplinary action because the employer had violated the Open Public Meetings Act. The decision discusses the different standards for granting preliminary injunctions and permanent injunctions.

*Yajcaji v. Albert C. Wagner Youth Correctional Facility*, App. Div. Dkt. No. A-5509-97T3 (1/18/00), reversed an MSB determination upholding a five-day suspension of a lieutenant corrections officer. The evidence did not suffice to show that the lieutenant knew or should have known that he was required to remain at Center Control during an emergency or that he was required to apprise the on-call administrator when he became aware of the problem.

*Prince v. Goslin*, App. Div. Dkt. No. A-378-98T3 (2/9/00), upheld a police officer's termination based on charges that he obstructed the administration of justice by

advising a citizen to falsify an accident report. The Township Committee could properly designate itself to hear disciplinary charges arising before that designation, but could not adopt and apply disciplinary regulations retroactively. The Court also ruled that the 45-day time limit under *N.J.S.A. 40A:14-147* for filing disciplinary charges applies only to charges based on violations of department rules or regulations. Since the charges alleged a criminal violation, obstruction of justice, the 45-day period did not apply.

*Madara v. Borough of Surf City*, App. Div. Dkt. No. A-7471-97T2 (2/16/00), upheld a police officer's six-month suspension for unbecoming conduct and using his position to obtain favorable treatment from a radiologist's office. The Court rejected an argument that the officer should have been dismissed; he had served for nine years with many commendations and only one minor reprimand. The Court distinguished *Comse v. Borough of E. Newark Tp. Comm.*, 304 *N.J. Super.* 191 (App. Div. 1997), certif. den. 156 *N.J.* 381 (1998), holding that dismissal is required given a breach of discipline so serious that it supports a suspension greater than six months. In this case, the trial judge did not impose a penalty in excess of six months.

## Police Departments

*Reuter v. Borough of Fort Lee*, 328 *N.J. Super.* 547 (App. Div. 2000), certif. granted 164 *N.J.* 561 (2000), invalidated a resolution creating a deputy chief position. *N.J.S.A. 40A:14-118* requires that the organizational structure of a police department and the number of positions be established by ordinance.

*Harrison v. Roxbury Tp.*, App. Div. Dkt. No. A-0247-99T3 (11/22/00), found that the Township Manager was the appropriate authority under *N.J.S.A. 40A:14-118* for adopting a police duty manual and that a Council resolution approving the manual was surplusage. The manual's rules were not required to be adopted by ordinance and disciplinary action pursuant to the manual was valid.

In *Marjarum v. Hamilton Tp.*, 166 *N.J. Super.* 85 (App. Div. 2000), a police officer was properly suspended for rudeness to the public even though the Township's disciplinary rules had not been validly adopted by an appropriate authority—the mayor, manager, or public safety director—under *N.J.S.A. 40A:14-118*. A validly promulgated rule is not a precondition to expecting public courtesy.

## CEPA Issues

In *Schechter v. New Jersey Dept. of Law & Public Safety*, 327 N.J. 428 (2000), summary judgment was granted against a CEPA plaintiff. No cause of action existed because the decision of the Division of Gaming Enforcement to assign lower priority to cases excluding certain persons from casinos did not violate any law or clear mandate of public policy.

*DeLisa v. Bergen Cty.*, 165 N.J. 140 (2000), held that CEPA's protection against retaliation extended to employees who communicate information either to employers or to public bodies concerning a co-employee's criminal conduct.

*Roach v. TRW, Inc.*, 164 N.J. 598 (2000), sustained a jury verdict in favor of an employee who was terminated for complaining to the employer about coemployee activities that he reasonably believed were criminal or fraudulent. While the jury also found that the activities reported by the employee were not incompatible with a clear mandate of public policy, CEPA violations do not require a specific showing that the complained-about activities implicate the public interest.

*Fleming v. Correctional Healthcare Solutions, Inc.*, 164 N.J. 90 (2000), held that CEPA prohibited an employer from firing an employee for "insubordination." The employer directed that complaints be submitted to a lower-level supervisor, but that supervisor had already ignored the same complaints. The Court cited a Bruce Springsteen song, *Reason to Believe*.

A career civil service employee who filed a CEPA claim was not precluded from appealing a disciplinary action to the MSB simply because he alleged that he was disciplined for the same retaliatory reasons alleged in the CEPA action. *Scouler v. City of Camden*, 332 N.J. Super. 69 (App. Div. 2000). The "cause of action" at an MSB hearing is not the employee's claim that the employer has taken retaliatory action, but the employer's claim that the employee was guilty of misconduct.

In *Smith-Bozarth v. The Coalition Against Rape and Abuse, Inc.*, 329 N.J. Super. 238 (App. Div. 2000), Judge Skillman's panel rejected a CEPA claim that a nonprofit organization employee was discharged because she refused to turn over confidential files to the executive director. No clear mandate of

public policy restricted the director's access to the files.

*Sutley v. Atlantic City Police Dept.*, App. Div. Dkt. No. A-6287-96T2 (6/29/00), held that CEPA permits a trial court to award prejudgment interest and punitive damages, but not per quod damages.

<p style="text-align: center;"><b>Pensions and Retiree Health Benefits</b></p>
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In *NJEA v. Bd. of Trustees, Public Employees Retirement System*, 327 N.J. Super. 405 (App. Div. 2000), certif den. 165 N.J. 135 (2000), Judges Muir, Wallace, and Lesemann upheld a PERS regulation requiring a deceased employee's beneficiaries to elect either a retirement allowance or a full insurance benefit. In *NJEA v. Bd. of Trustees, Public Employees Retirement System*, 327 N.J. Super. 326 (App. Div. 2000), the same panel invalidated regulations requiring all retired persons receiving a disability pension to undergo a medical examination if the PERS Board or the TPAF Board has good cause to believe the retiree is no longer disabled. The regulations contravened statutes limiting such examinations to the first five years after retirement.

Our Supreme Court has estopped a public employer from discontinuing health benefits for a retired police officer and his dependents. *Middletown Tp. PBA Local No. 124 v. Middletown Tp.*, 162 N.J. 361 (2000). The officer did not have the 25 years of actual service required for coverage when he retired, but he justifiably relied on the parties' collective negotiations agreement and the assurances of Township representatives that health coverage would be continued and he received benefits for ten years. The Supreme Court approved *Wood v. Borough of Wildwood Crest*, 319 N.J. Super. 650 (App. Div. 1999), and noted that a subsequent amendment to N.J.S.A. 40A:10-23 now authorizes municipal employers to grant benefits to retiring employees in the plaintiff's position.

The PFRS Board of Trustees has adopted new regulations defining "base pay" and "creditable compensation" for pension purposes. N.J.A.C. 17:4-4.1. Longevity, holiday, and education benefits paid only at career end cannot be included in base pay. Commission case law has established that interest arbitrators cannot decide what is included in base pay for pension purposes, but

has distinguished the negotiability of base pay issues for other purposes.

### **Compensation and Vested Rights**

*Caponegro v. State-Operated School Dist. of the City of Newark*, 330 N.J. Super. 148 (App. Div. 2000), addressed the rights of administrators terminated when the State took over Newark's schools. Under the takeover statute, any contracts for these administrators were extinguished on the date the State-operated district was created. The employees therefore could not seek compensation for the rest of that school year. They could, however, seek payment of deferred compensation – *e.g.* accumulated vacation days and sick leave days. Taking away such compensation would be an unconstitutional deprivation of vested rights.

In *Serico v. Department of Labor*, App. Div. Dkt. No. A-2245-98T2 (1/25/00), the Court denied a salary appeal by the executive secretary of the DOL's Board of Review. He sought a 4% increase based on an outstanding rating and a salary guide regulation. But the Court concluded that the regulation granted discretion to department heads to apportion the total fund available for

management salary increases among individual employees.

### **Terms of Office**

In *DiPaolo v. Passaic Cty. Freeholder Bd.*, 162 N.J. 572 (2000), *aff'g* 322 N.J. Super. 487 (App. Div. 1999), an outgoing board of freeholders acted *ultra vires* when it appointed an adjuster to a five-year term. Since no statute fixed a term of office or authorized the old governing body to enter a five-year contract, the new governing body could remove the employee at its pleasure.

### **Privatization**

The Appellate Division has dismissed a Complaint filed by CWA and former employees of the State's Division of Motor Vehicles. *CWA v. Whitman*, 335 N.J. Super. 283 (App. Div. 2000). The Complaint had alleged that private sector agencies that took over DMV functions did not hire former State employees because of their political affiliation or non-affiliation. These allegations were not actionable because the operators of the privatized agencies were not parties and because the abolition of the employees' positions was a necessary consequence of the

privatization plan rather than an attempt to make room for party loyalists.

*Hudson v. North Brunswick Tp.*, App. Div. Dkt. No. A-5977-97T1 (2/8/00), held that a decision to privatize services and lay off employees was made in good faith and not in retaliation for a grievance and unfair practice charge seeking overtime compensation. The MSB upheld the layoffs given a cost-saving motive and no proof that the privatization was pretextual. The union did not file a charge contesting the layoffs.

### **Elimination of Positions**

In *Langford v. City of Atlantic City*, 235 F.3d 845 (3d Cir. 2000), the Court allowed plaintiffs to pursue a civil rights claim asserting that the City eliminated their positions from its budget in retaliation for the plaintiffs' political opposition. The Court held that passage of a budget could be considered an official policy, custom or practice triggering potential liability against the City.

### **Public Records**

Tenure charges against a superintendent are "public records" under the Right-to-Know law and have to be disclosed

to the press upon request. *Williams v. Atlantic City Bd. of Ed.*, 329 N.J. Super. 308 (App. Div. 2000), certif. den. 165 N.J. 488 (2000). The Court rejected arguments that the charges were not public because the Board considered whether to bring the charges in private session and because Executive Order 11 makes disciplinary information in personnel files non-public.

### **Age Discrimination**

The federal Age Discrimination in Employment Act cannot constitutionally authorize suits by state employees against their employers. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

### **Employee Status**

Licensed real estate salespersons are employees, not independent contractors, for purposes of collecting premiums under the Workers' Compensation Act. *Re/Max of New Jersey Inc. v. Wausau Ins. Cos.*, 162 N.J. 282 (2000). The Court adopted Judge Gibson's application of the "control" and "relative nature of the work" tests and added its own public policy analysis.

In *Cahill v. City of New Brunswick*, 99 F.Supp.2d 464 (D.N.J. 2000), a federal district

court found that police officers working “extra-duty jobs” were City employees rather than independent contractors for FLSA purposes. The officers were assigned and supervised by the department; were armed and uniformed; were paid by the department (from funds paid by outside vendors); and were considered to have “on-call” status.

### **Bi-State Agencies**

*Ruggiero v. Delaware River Port Auth.*, App. Div. Dkt. No. A-2690-98T3 (5/2/00), held that the Delaware River Port Authority was immune from a former employee’s common law claim that he had been discharged for union activities. The plaintiff was a union official and a toll taker who, along with other toll takers, shut down his booth on the Benjamin Franklin Bridge to protest asbestos in the workplace. While other toll takers were suspended for three days, Ruggiero was fired. The Appellate Division concluded that Pennsylvania, unlike New Jersey, did not recognize a common-law cause of action for employees covered by a collective negotiations agreement and alleging that they were wrongfully discharged for union activity and protesting unsafe working conditions.

Absent such a cause of action in both states, the plaintiff could not sue a bi-state agency.

### **Overtime**

Public employers may require employees to schedule compensatory time off to reduce the amount of accrued compensatory time under the FLSA. *Christensen v. Harris Cty.*, 529 U.S. 576 (2000). The Court rejected the Labor Department’s ruling that such use required an agreement with the employees.

### **Forfeiture of Public Employment**

The Supreme Court affirmed *Cedeno v. Montclair State Univ.*, 319 N.J. Super. 148 (App. Div. 1999), aff’d 163 N.J. 473 (2000), substantially for the reasons stated in Judge Skillman’s Appellate Division opinion. As a rule, a public employee statutorily disqualified by a criminal conviction from obtaining public employment cannot maintain an action asserting that a discharge violated CEPA or LAD. Unlike *Cedeno*, however, a case may present aggravated circumstances where the need to vindicate CEPA or LAD policies will justify an action seeking compensation for tangible physical or emotional harm suffered during employment.

In *State v. Ercolano*, 335 N.J. Super. 236 (App. Div. 2000), the Court upheld a forfeiture order. A teacher was convicted of simple assault based on his picking a student up and pushing him against a wall. The trial court did not order forfeiture, but that failure did not preclude the board from seeking a mandatory order of forfeiture based on N.J.S.A. 2C:51-2(g). A hearing was unnecessary because the teacher's conviction for assault upon a student during the school day involved or touched upon his employment.

### **Continuing Violations**

In *Bollinger v. Bell Atlantic*, 330 N.J. Super. 300 (App. Div. 2000), certif. den. 165 N.J. 491 (2000), the LAD's statute of limitations barred a claim brought by an employee removed from full-time status and placed on disability nine years earlier. The "continuing violation" theory did not make this action timely.

### **Indemnification and Counsel Fees**

*Johnstone v. Town of Kearny*, 332 N.J. Super. 606 (App. Div. 2000), certif. den. 165 N.J. 605 (2000), held that N.J.S.A. 40A:14-155 did not entitle a police officer to reimbursement for attorneys' fees. At a trial

covering several counts of alleged violations of the federal civil rights law, the officer was acquitted of some counts but convicted on others. The officer could not recover unless he prevailed on all counts. The Court, however, distinguished civil service disciplinary proceedings.

*Loigman v. Monmouth Cty. Freeholder Bd.*, 329 N.J. Super. 561 (App. Div. 2000), held that N.J.S.A. 59:10-4 authorized the freeholders to indemnify the Monmouth County Prosecutor against an award of punitive damages arising out of the performance of his duties. An award of punitive damages does not necessarily mean that the employee's acts constituted "actual fraud, actual malice, willful misconduct or an intentional wrong" under that statute. The decision to indemnify an employee is a legislative policy determination unreviewable by a court.

In *Marjarum v. Hamilton Tp.*, *supra*, the Court held that a dismissal and expungement order did not entitle a police officer to recover full counsel fees under N.J.S.A. 40A:14-155. The officer had contested a six-day suspension, but the legality of the suspension became moot on appeal since the officer had retired; the suspension

would not affect the officer's pension; and the employer agreed to expunge all references to the suspension from the officer's personnel file. An expungement is not the equivalent of an acquittal of criminal charges and is not a dismissal or favorable disposition of the charges under *N.J.S.A. 40A:14-155*.

the member in the last 12 months of creditable service before retirement. Further, if that member was forced to retire at age 65, he or she can receive an additional 3% of final compensation for every additional year of creditable service between 20 and 25 years.

<b>Statutes</b>
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*N.J.S.A. 18A:16-1.3* requires a school board to notify the State Board of Examiners when a non-tenured, certificated employee is dismissed. Under a new amendment, however, the notice requirement does not apply when an employee's contract is not renewed. Further, if a mid-year dismissal is contested in arbitration or in an administrative or court proceeding, the school board shall not report the dismissal unless an arbitrator, agency, or court finds just cause for dismissal due to misconduct in office. The amendment does not grant tenure.

The Legislature has enhanced PFRS retirement and survivor benefits. *N.J.S.A. 43:16A-1*. A member age 55 or older with 20 or more years of service can retire with a benefit equaling 50% of final compensation in lieu of the regular retirement allowance. Final compensation means the compensation paid