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# Recent Judicial and Legislative Developments

## April 2009 through March 2010

### Public Employment Relations Commission

Ira W. Mintz  
General Counsel

Mary E. Hennessy-Shotter  
Deputy General Counsel

Don Horowitz  
Deputy General Counsel

Christine Lucrelli-Carneiro  
Deputy General Counsel

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This report contains information about all court actions involving Commission decisions since the April 2009 Annual Conference. It also summarizes 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.

<b>Appeals from Commission Decisions</b>
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The Appellate Division affirmed the Commission's decision in Borough of East Rutherford, P.E.R.C. No. 2009-15, 34 NJPER 289 (¶103 2008), *aff'd* 36 NJPER 33 (¶15 App. Div. 2010). In that decision, the Commission declined to restrain binding arbitration of a grievance filed by East

Rutherford P.B.A. Local 275. The grievance challenged increases in co-payments for NJPLUS and HMO office visits under the State Health Benefits Program and sought reimbursement of additional co-pay costs and a return to negotiated co-pay levels. The Commission held that the level of health benefits is generally negotiable and declined to restrain arbitration over the reimbursement issue, but permitted the Borough to refile its petition should the arbitrator find a contractual violation and a dispute arise over the negotiability of any remedy issued. The Court affirmed emphasizing that the Borough had a right to refile its petition post-award.

In an earlier case, the Appellate Division dismissed a similar appeal of a Commission decision as moot after an arbitration award issued, noting that the Commission had stated

that the Township could present its arguments to the Commission in the event that the arbitrator concluded that complying with the State Health Benefits Commission's mandate to increase co-payments for NJPLUS and HMO constituted a breach of the collective negotiations. Rockaway Tp., P.E.R.C. No. 2008-21, 33 NJPER 257 (¶96 2007), *dism.* as moot 35 NJPER 183 (¶69 App. Div. 2009). A trial court subsequently vacated the arbitration award.

The Appellate Division reversed and remanded the Commission's decision in Burlington Cty., P.E.R.C. No. 2009-10, 34 NJPER 247 (¶85 2008), *rev'd and rem'd* \_\_\_ N.J. Super. \_\_\_ (App. Div. 2010). In that decision, the Commission had held that under Warren Cty., P.E.R.C. No. 86-111, 12 NJPER 357 (¶46 1986), given their statutory power to arrest, weights and measures employees are police within the meaning of the Act. The Commission had affirmed the Director of Representation's decision to sever a group of weights and measures employees from an existing broad-based negotiations unit and to direct an representation election. The Court held that the Commission's per se rule that employees who have even a limited authority to arrest for regulatory violations reaches

persons the Legislature had not intended to include within the statutory definition of "policeman." The Court remanded the matter to the Commission to address the petition anew without reliance on the per se rule.

The Appellate Division affirmed the Commission's decision in Manalapan-Englishtown Regional Bd. of Ed., P.E.R.C. No. 2007-42, 33 NJPER 3 (¶3 2007), *aff'd* 35 NJPER 230 (¶82 App. Div. 2009). In that decision, the Commission denied the Board's request for a restraint of binding arbitration of a grievance filed by the Manalapan-Englishtown Education Association. The grievance contested the salary guide placement of a teaching staff member who returned to work following a disability leave. The Commission held that an employee's placement on a negotiated salary guide is normally mandatorily negotiable. In the same decision, the Court also affirmed a trial court decision confirming the arbitrator's award. The arbitrator had placed the returning teacher on the top step of the salary guide after finding an established policy of granting returning teachers salary guide credit for prior experience.

## Related Court Matters

In a case related to the Manalapan case described above, the New Jersey Supreme Court held that under N.J.S.A. 18A:66-40(a), a school district must return a formerly disabled teacher to the next available opening in the position that he or she held at the time of the disability retirement, so long as the teacher meets the standards set by the State Board of Education for that position, i.e., a valid teaching certificate and endorsements. Klumb v. Manalapan-Englishtown Bd. of Ed., 199 N.J. 14 (2009).

In In re Emergency Temporary Layoff Rule, App. Div. Dkt. No. A-3626-08T2, A-3627-08T2, A-3656-08T2, A-3657-08T2 (4/17/09), the Appellate Division ruled that given the economic crisis confronting the State and nation, the Civil Service Commission had met the imminent peril requirement to adopt an emergency regulation authorizing temporary layoffs. The Court found no basis to disturb the emergency regulation providing for temporary layoffs of an entire layoff unit for one or more work days over a defined period. However, as to “staggered layoffs,” the Court found that the unions challenging the regulations had made

a substantial showing that the emergency regulations may not adequately address statutory layoff rights and so the Court stayed enforcement of the emergency regulation as it relates to “staggered layoffs.” The issues concerning “staggered layoffs” were transferred to PERC for a scope of negotiations determination. The Court noted that related proceedings had already been commenced at PERC. A Commission Designee subsequently issued an interim relief decision in a case involving the State and three local employers. Maplewood Tp., I.R. No. 2009-26, 35 NJPER 184 (¶70 2009).

The Commission moved to intervene in an enforcement action brought by PBA Local 145 against the Borough of Fort Lee. The Borough had not implemented the terms of the interest arbitration award that was affirmed by the Commission in P.E.R.C. No. 2010-17, 35 NJPER 352 (¶188 2009), app. pending App. Div. Dkt. No. A-1212-09T1. The Borough then notified the Court that it was not aware that the Commission believed implementation was required in light of several outstanding language issues. The Borough then announced a schedule to implement most aspects of the award and the Commission withdrew its motion to intervene.

The Commission filed an action to enforce a Hearing Examiner's final Order in City of Newark, H.E. No. 2009-2, 34 NJPER 307 (¶113 2008). The City then complied with the Order and rescinded unilaterally adopted random drug testing procedures.

### **Appeal from PERC Appeal Board Decision**

The Appellate Division affirmed the decision of the PERC Appeal Board ordering that the representation fee assessed on a Teaneck Board of Education employee for the 2005 and 2006 calendar years be reduced from 85% to 70% of membership dues. Michael Jacobs and Teamsters Local 97, A.B.D. No. 2008-1, 34 NJPER 142 (¶60 2008), aff'd 35 NJPER 227 (¶81 App. Div. 2009). The difference amounted to \$300. The Court, citing federal decisions including the recent Locke v. Karass, \_\_\_ U.S. \_\_\_ (2009), agreed with the Appeal Board that once a representation fee is challenged, a majority representative bears the burden of showing how affiliated organizations that receive representation fees allocated those funds between chargeable and non-chargeable expenses.

### **Contractual Arbitrability**

In Freehold Reg. H.S. Bd. of Ed. v. New Jersey Education Ass'n, App. Div. Dkt. No. A-4130-06T1 (5/8/09), the Appellate Division affirmed a decision of the trial court that had restrained arbitration over the non-renewal of a school bus driver. Applying the presumption in favor of arbitration found in N.J.S.A. 34:13A-5.3, the Court found no provision in the collective negotiations agreement regarding the nonrenewal of non-tenured employees. The Court further found that a nonrenewal is not a disciplinary action subject to arbitration under N.J.S.A. 34:13A-29(a). Contrast Nini v. Mercer Cty. Community College, 406 N.J. Super. 547 (App. Div. 2009), certif. granted 200 N.J. 206 (2009) (if decision not to renew was based on plaintiff's age, then no difference under Law Against Discrimination between nonrenewal and termination).

In Berlin Borough Bd. of Ed. v. Berlin Teachers' Ass'n, App. Div. Dkt. No. A-4715-07T2 (5/13/09), the Appellate Division applied the presumption in favor of arbitration and vacated a trial court order restraining advisory arbitration of a grievance challenging

the denial of health benefits to certain part-time employees.

In New Jersey Transit Corp. v. PBA Local 304, App. Div. Dkt. No. A-3342-07T3 (6/23/09), the Appellate Division affirmed a trial court decision that had restrained arbitration over a grievance challenging a minor disciplinary determination after finding that the grievance procedure permits arbitration of disputes arising from the interpretation of the contract itself, not to individual disciplinary matters. The Commission had previously held that the grievance was legally arbitrable and that whether the parties had, in fact, agreed to arbitrate minor discipline was a question outside the Commission's limited scope of negotiations jurisdiction. New Jersey Transit, P.E.R.C. No. 2008-031, 33 NJPER 286 (¶108 2007).

In a 4-3 decision in Mount Holly Tp. Bd. of Ed. v. Mt. Holly Tp. Ed. Ass'n, \_\_\_ N.J. \_\_\_ (2009) (6/24/09), Chief Justice Rabner reaffirmed that, in general, collective negotiations agreements ("CNAs") supersede individual contracts. To the extent provisions in an individual employment contract conflict or are inconsistent with terms in a CNA, and diminish or interfere with rights provided by

the CNA, the language in the individual contract must yield to the CNA. A custodian's employment contract conflicted with the CNA and diminished its specific terms by depriving him of the right to arbitrate a mid-contract termination; therefore, on remand, the custodian is entitled to a hearing before an arbitrator to address the grievance challenging his termination. The individual contract provided for termination by either party on 14 days' notice. The CNA prohibited discharges without just cause. The Court stated that in reaching a contrary result, the Appellate Division had placed too much emphasis on the language used in the CNA in Pascack Valley Reg. H.S. Bd. of Ed. v. Pascack Valley Reg. Support Staff Ass'n, 192 N.J. 489 (2007). The CNA in that case had stated that any dismissal shall be considered a disciplinary action and shall be subject to the grievance procedure. The Court stated that CNAs need not parrot the language used in the CNA in Pascack Valley. The Court noted that a 3-3 Supreme Court decision in Northvale Bd. of Ed. v. Northvale Ed. Ass'n, 192 N.J. 501 (2007), which also involved a termination on notice and a just cause clause, is not precedential and that the unpublished Appellate Division decision in that case is likewise not

precedential. Finally, the Court stated that requiring arbitration in this case is consistent with the Legislature's amendment to N.J.S.A. 34:13A-5.3 which extends a presumption in favor of arbitration to public employees. Justice Rivera-Soto, joined by Justices LaVecchia and Hoens, dissented.

In Medford Tp. Bd. of Ed. v. Medford Ed. Ass'n, \_\_\_ N.J. \_\_\_ (2009), the New Jersey Supreme Court ordered that a petition for certification be granted, and the matter summarily remanded to the Appellate Division for reconsideration in light of Mt. Holly. The Trial Court and Appellate Division had granted the Board's request for a restraint of arbitration, finding that a custodian was properly terminated in accordance with the 14-day notice provision in his individual employment contract. The Association had sought arbitration under the just cause provision in the collective negotiations agreement.

In Montclair Township v. CWA, App. Div. Dkt. No. A-0028-08T3 (10/19/09), the Appellate Division reversed the trial court's grant of a restraint of arbitration and held that the issue of whether the grievance procedure that required just cause for discipline applied to probationary employees is an issue for the

arbitrator, not a court. The Appellate Division relied on Amalgamated Transit Union, Local 880 v. New Jersey Transit Bus Operations, Inc., 200 N.J. 105 (2009).

In Lenape Reg. H.S. Dist. Bd. of Ed. v. Lenape Dist. Support Staff Ass'n, App. Div. Dkt. No. A-3240-08T3 (2/16/10), the Appellate Division affirmed a trial court order staying arbitration of a grievance challenging the non-renewal of a non-tenured custodian on the ground that the "termination" violated the dismissal procedure set forth in the collective negotiations agreement. Citing the presumption favoring arbitration of grievances found in N.J.S.A. 34:13A-5.3, the Court found that the employee was neither terminated, discharged nor dismissed and that its review of the contract discerned no terms governing the non-renewal of a non-tenured employee's contract.

<b>Grievance Arbitration</b>
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<b>Confirming Awards</b>
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In Hudson Cty. v. District 1199J, App. Div. Dkt. No. A-2726-08T2 (1/15/10), the Appellate Division reversed a trial court decision that had vacated a grievance arbitration award. The grievant was a

provisional employee who had worked for more than six months. The contract provided that after a provisional employee had worked for six months, he or she could invoke the grievance procedure. The grievant took, but did not pass, an examination for the position. The County then laid him off. The arbitrator found that nothing in Civil Service regulations required that the grievant be laid off. The Appellate Division agreed. The Court found no regulation or statute that mandated the grievant's termination prior to the 12-month provisional period given the facts present and the arbitrator's reasonably debatable interpretation of his status. The award was also the subject of a post-award scope of negotiations decision. P.E.R.C. No. 2009-38, 35 NJPER 6 (¶4 2009). The Commission held that the grievance award was not preempted by Civil Service statutes or regulations and was within the scope of negotiations.

In City of Clifton v. Clifton PBA Local #36, App. Div. Dkt. No. A-4806-07T3 (5/4/09), the Appellate Division reversed the decision of a trial court that had vacated an arbitration award on the ground that the arbitrator had exceeded his authority under the contract when he said that he had waived the 20-day time limit to file a grievance. The

union argued that the grievance was timely under the continuing violation doctrine. The Court remanded to the case to the arbitrator for clarification of the basis for his decision.

In New Jersey Transit Corp. v. PBA Local 304, App. Div. Dkt. No. A-3341-07T3 (6/23/09), the Appellate Division reversed a trial court decision that had set aside a grievance arbitration award. The arbitrator had awarded an employee compensation after a temporary reassignment. The trial court found that the award violated public policy by severely restricting the police chief's statutory responsibility to promote and provide for public safety. The Appellate Division held that this argument overlooks the fact that the arbitration award does not prohibit the chief from making these personnel assignments. Because the arbitrator's decision was based on a reasonable, although fairly debatable interpretation of the contract, the Court stated that it was compelled to uphold it

In Wyckoff Tp. v. PBA Local 261, 409 N.J. Super. 344 (App. Div. 2009), the Appellate Division reversed a trial court decision that had vacated an arbitration award. The issue before the arbitrator was whether the Township violated the parties' contract when it required a police officer to work as a

civilian dispatcher during her pregnancy. The arbitrator ordered the Township to cease and desist from discriminating against the officer by assigning her to duties and schedules outside of her job description and from circumventing the intent of the negotiated sick leave provisions. The trial court vacated the award, in part because the officer had also filed a civil action claiming discrimination. The Appellate Division reversed. Finding that an arbitrator's award is entitled to a presumption of validity and the party opposing confirmation has the burden of establishing that the award should be vacated, the Appellate Division ruled that the trial court was mistaken in reversing the burden of proof, giving the Township as the challenger "the benefit of all favorable inferences" when determining that the arbitrator exceeded his powers. The Appellate Division also ruled that the trial court may not have used a deferential standard in reviewing the arbitrator's interpretation of the issue submitted to him. New Jersey precedent has held that there is a deferential standard of review of arbitrator's substantive decisions. This case extends that deference to a court's review of an arbitrator's interpretation of the issue submitted. Finally, the Appellate

Division ruled that the existence of a pending discrimination lawsuit did not bar pursuit of the arbitration; and the trial court improperly held that the award violated public policy, especially as the only remedy was a cease and desist order.

In Irvington Tp. and Irvington PBA Local 29, App. Div. Dkt. No. A-0152-08T1 (10/21/09), the trial court had confirmed a arbitration award and a supplemental award involving three negotiations units. The dispute stemmed from a 27-pay period year (2004). The arbitrator determined that as a result of the Township's unilateral adjustment of the pay periods, each affected employee was entitled to an additional ten days' compensation. The trial judge upheld the ruling on the merits but remanded to the arbitrator to consider an alternative remedy that might pose less of an immediate fiscal hardship on the Township. The arbitrator modified the remedy so that only 50% of the cash payments to officers would be due immediately. The remaining hours had to be used as time due or cashed in upon separation from employment. The trial judge then confirmed the supplemental award. The Appellate Division reviewed an arbitrator's obligation to consider the impact on the

public, held that the supplemental award was reasonably debatable, and affirmed the trial court decision confirming it. The Commission had previously held that the timing of paychecks is a negotiable and arbitrable issue. Township of Irvington, P.E.R.C. No. 2005-76, 31 NJPER 148 (¶66 2005).

In New Jersey Transit Corp. v. New Jersey Transit Police, App. Div. Dkt. No. A-4902-07T3 (1/11/10), the Appellate Division affirmed a trial court decision confirming a grievance arbitration award finding that NJ Transit improperly determined that an officer, who had been injured on duty, could no longer do his job without convening a board of doctors as set forth in the collective negotiations agreement. The dispute was also the subject of a scope of negotiations determination. In New Jersey Transit Corp., P.E.R.C. No. 2007-63, 33 NJPER 145 (¶51 2007), the Commission had held that the dispute over convening a board of doctors to assess the officer's medical condition was within the scope of negotiations and therefore legally arbitrable.

In South Amboy PBA Local 63 v. City of South Amboy, App. Div. Dkt. No. A-1089-08T3 (1/5/10), the Appellate Division

affirmed an order confirming an arbitration award that had held that the City had to maintain retired police officers' health and prescription benefits at the level set by the collective negotiations agreement. The City had moved from a self-insured plan to the State Health Benefits Program and the arbitrator ordered the City to reimburse retirees for the difference in prescription co-pays and for Medicare Part D premiums. The Court noted that the "reasonably debatable" standard of review has only been applied where the appellant is challenging an arbitration award under the Arbitration Act and that a party opposing a common-law action for confirmation may only avoid confirmation if it can demonstrate that the award is contrary to existing law or public policy.

In PBA, Local No. 11 v. City of Trenton, App. Div. Dkt. No. A-2303-08T3 (2/24/10), a split panel of the Appellate Division reversed a trial court decision that had vacated an arbitration award sustaining a grievance. The grievance claimed that the City violated the parties' contract by requiring police officers and detectives to report ten minutes before their shifts for muster without additional compensation. The trial court found that the

arbitrator rewrote the contract and that the matter was not "debatable, at all." The majority opinion reversed, finding that the arbitrator's interpretation of the contract was "reasonably debatable" given the actual text of the contract and fundamental principles of construction, and did not violate any clear mandate of public policy. Accordingly, it was entitled to deferential treatment. The dissenting opinion found the arbitrator's conclusion to be illogical and inconsistent with the contract. Because there was a dissenting opinion, the City has a right of appeal to the New Jersey Supreme Court.

### **Vacating Awards**

In Linden Bd. of Ed v. Linden Ed. Ass'n, App. Div. Dkt. No. A-1236-07T3 (4/17/09), the Appellate Division issued a split decision reversing a trial court order affirming an arbitration award that had set aside the termination of a school custodian. At an annual school dance, during which female students used several classrooms as changing rooms, a custodian entered at least one of the classrooms and began cleaning the glass on the door. The students, in various states of undress, asked him to leave, but he refused.

Applying County College of Morris Staff Ass'n v. Morris Cty. College, 100 N.J. 383 (1985), the Court held that since the parties' contract did not provide for progressive discipline, the arbitrator exceeded his authority by finding just cause for the termination and then reducing the penalty. The Court distinguished a situation where an arbitrator finds an employee guilty of the specified charges of misconduct, but concludes that the offenses do not rise to the level of misconduct that constitutes just cause for termination. One judge dissented, which gave the Education Association a right of appeal to the New Jersey Supreme Court. The Court heard argument on January 5, 2010.

In Pleasantville Bd. of Ed. v. Pleasantville Ed. Ass'n, App. Div. Dkt. No. A-2123-08T3 (8/25/09), the Appellate Division affirmed a trial court decision that had vacated an arbitration award. A State monitor had ordered a RIF of 22 non-tenured school aides over the school board's objection. The board then agreed and the arbitrator found that the RIF was without just cause. The trial court overturned the arbitration award on public policy grounds. The Appellate Division held that the decision

to implement a RIF involved a non-negotiable, non-arbitrable matter.

## Discipline

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 trial court had the power to modify a disciplinary penalty and properly applied the principle 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.

In New Jersey Transit Police Dept. v. Barroso, App. Div. Dkt. No. A-6287-06T1 (4/22/09), the Appellate Division reversed a determination of the Police Chief that a police officer's conduct warranted his termination. Contrary to the Administrative Procedures

Act, the Chief had rejected an Administrative Law Judge's credibility determinations without providing an explanation for doing so. The ALJ had found that the evidence did not support a finding of conduct unbecoming a police officer and the Court ordered the officer reinstated with mitigated back pay.

In In re Conway, App. Div. Dkt. No. A-6162-07T3 (9/8/09), the Appellate Division upheld a four-day suspension imposed against a New Jersey Transit police officer. The Court rejected claims that a three-year delay in hearing the charges violated due process, finding no constitutional violation and that the time frames in N.J.S.A. 40A:14-147 do not apply to NJ Transit police.

In Dylnicky v. Port Authority of New York and New Jersey, App. Div. Dkt. No. A-0758-07T2 (9/8/09), the Appellate Division reversed significant monetary awards in a tort suit against the Port Authority. Five electricians were terminated for sleeping on the job and not doing their assigned work. Their terminations were upheld in arbitration. The arbitrator had rejected the argument that the former employees' conduct was appropriate or authorized. Accordingly, the Court found that the employees' suit for malicious prosecution could not be sustained.

In Peck v. City of Hoboken, App. Div. Dkt. No. A-1203-08 (10/16/09), the Appellate Division affirmed a grant of summary judgment to plaintiff police officer James Peck in which the trial court granted Peck's application for attorneys' fees and costs pursuant to N.J.S.A. 40A:14-155. That statute permits an award of attorneys' fees to a police officer who obtains a dismissal of disciplinary charges filed against him, but only when the disciplinary charges arise out of, and are directly related to, the lawful exercise of police powers in the furtherance of the officer's official duties.

In In re Deborah Payton, App. Div. Dkt. No. A-6117-07T3 (12/31/09), the Appellate Division reversed a decision of the Merit System Board (now Civil Service Commission), that had reversed an ALJ initial decision sustaining a discharge. The MSB had previously reduced the penalty to a five-day suspension and the Appellate Division had reversed and remanded to the MSB. On remand, the MSB imposed a 30-day penalty and the Appellate Division reversed again. The Court stated that the MSB's action essentially rejected the ALJ's credibility determination that the employee took five one-dollar bills home intentionally rather than

negligently. The Court found that because the MSB failed to set forth any evidence that could reasonably support its implicit rejection of the ALJ's credibility determination, the MSB's action that was arbitrary, capricious and unreasonable.

<b>E-mail</b>
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In Stengart v. Loving Care Agency, Inc., \_\_ N.J. \_\_ (2009), the New Jersey Supreme Court held that an employee could have reasonably expected that e-mail communications with her lawyer through her personal, password-protected, web-based email account would remain private, and that sending and receiving them using a company laptop did not eliminate the attorney-client privilege that protected them.

In Guard Publishing Co. v. NLRB, 571 F.3d 53 (D.C. Cir. 2009), the Court of Appeals ruled that the employer violated the National Labor Relations Act by disciplining a copy editor who also was president of the union local for sending three union-related e-mails to her fellow employees' work e-mail addresses and by prohibiting a circulation employee from displaying union insignia.

## **Discrimination & Retaliation**

In Nini v. Mercer Cty. Community College, 406 N.J. Super. 547 (App. Div. 2009), certif. granted 200 N.J. 206, the Appellate Division held that the over-70 statutory exception to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-4 to -49, should be interpreted to equate a contract nonrenewal with a termination and to bar an age-based nonrenewal. The LAD excepts those over 70 from protection in hiring and promotion, but not from protection against discriminatory terminations. The New Jersey Supreme Court granted certification and heard argument on November 10, 2009.

In Frizalone v. New Jersey Transit, an Essex County jury awarded \$1.54 million to a New Jersey Transit police lieutenant who was passed over for promotion and given bad assignments after complaining about gender discrimination.

In In the Matter of Stephanie M. Carter-Green, Dept. of Corrections, App. Div. Dkt. No. A-1201-08T3 (11/4/09), in the course of sustaining a disciplinary determination of the Civil Service Commission, the Appellate Division upheld the State's right to adopt a policy of zero tolerance for discrimination or

harassment that affords broader protection to its employees than would be afforded in the private sphere under Lehmann v. Toys R Us, Inc., 132 N.J. 587 (1993).

In Alexander v. Seton Hall Univ., 410 N.J. Super. 574 (App. Div. 2009), the Appellate Division held that, in interpreting the Law Against Discrimination, it will continue to apply the approach of the United States Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007). Ledbetter held that a pay-setting decision is a "discrete act" sufficient to trigger the start of the statute of limitations period. Ledbetter determined that a discrimination charge could not survive if the discriminatory act occurred outside of the limitations period and only the effects of that discrimination continued into the limitations period. In response to Ledbetter, Congress amended Title VII to include provisions known as the Lilly Ledbetter Fair Pay Act of 2009. Among other things, that amendment makes it an unlawful employment practice when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation are paid, resulting in whole or in part from a past discriminatory

decision or other practice. The Appellate Division in Alexander v. Seton Hall stated that it believed that it would be more faithful to our State jurisprudence to follow Ledbetter, particularly in the absence of a post-Ledbetter amendment to the LAD.

In Ross v. City of Asbury Park, App. Div. Dkt. No. A-0379-08T3/A-2174-08T3 (11/23/2009), the Appellate Division affirmed a workers' compensation court ruling that an employee had suffered compensable mental stress as a result of prolonged exposure to a hostile work environment including sexual innuendo and posting of offensive cartoons by a co-worker that the employer did not investigate after incidents were reported.

In Roa v. LAFE and Marino Roa, 200 N.J. 555 (2010), the New Jersey Supreme Court held that under New Jersey's Law Against Discrimination, the statute of limitations begins to run on a discrete retaliatory act, such as a discharge, on the date on which the act takes place, and a timely claim based on post-discharge retaliatory conduct does not sweep in a prior untimely discrete act which the victim knew or should have known gave rise to a retaliation claim. However, a discrete post-discharge act of retaliation is independently actionable even if

it does not relate to present or future employment, and evidence relating to barred claims may be admissible in the trial of the timely claim.

In Groslinger v. Wyckoff Tp., App. Div. Dkt. No. A-5861-07T2 (1/20/10), the Appellate Division upheld a grant of summary judgment dismissing an employee's LAD and CEPA claims. The Court stated that the result was not inconsistent with the arbitration award it had confirmed in the Wyckoff Tp. v. PBA Local 261 decision described on page 7. There, the factual basis for the arbitrator's conclusion was not challenged and the parties' focus was on the arbitrator's interpretation of the issue presented to him: whether the employer violated the discrimination provision in the collective negotiations agreement.

In a 5 to 4 decision in 14 Penn Plaza v. Pyett, \_\_ U.S. \_\_ (2009), the United States Supreme Court held that a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate Age Discrimination in Employment Act 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.

### **Conscientious Employee Protection Act (“CEPA”)**

In Nardello v. Voorhees Tp., App Div. Dkt. No. A-0605-06 (7/8/09), the Appellate Division reinstated a \$500,000 jury verdict in a case alleging various acts of retaliation in violation of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -18. The Court also reinstated allegations against the police chief and ordered a trial on those allegations.

### **Open Public Records Act (“OPRA”)**

In Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009), the New Jersey 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.

In Renna v. Union Cty., 407 N.J. Super. 230 (App. Div. 2009), the Court held that all

requests for OPRA records must be in writing; that such requests shall use the forms provided by the custodian of the records; however, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in N.J.S.A. 47:1A-5(f).

In Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009), certif. den. 200 N.J. 476 (2009), the Court held that N.J.S.A. 47:1A-5(g), which provides that an OPRA request be “in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian,” authorizes a custodian to direct that a request for a government record must be transmitted only by methods specified in a public agency's form, which need not include every method of transmission mentioned in N.J.S.A. 47:1A-5(g). In that case, the public agency could prohibit requests by fax.

In Asbury Park Press v. Monmouth Cty., 201 N.J. 5 (2010), the New Jersey Supreme Court held that the Open Public Records Act requires disclosure of an agreement between the County and an employee who filed a lawsuit claiming sex discrimination, sexual harassment, retaliation, and a hostile work environment.

In Smith v. Hudson Cty., \_\_\_ N.J. Super. \_\_\_ (App. Div. 2010), the Appellate Division held that effective July 1, 2010, government agencies may not charge requestors more than the "actual costs" of photocopying government records.

### **Pensions**

In In re Lynette Butler, App. Div. Dkt. No. A-5582-07T1 (5/27/09), the Appellate Division held that the Police and Firemen's Retirement System does not delegate any authority to the PFRS to award backpay or counsel's fees to a member of the system if it denies an application by an employer to involuntarily retire the member on an ordinary disability pension. When the Legislature has determined that a State administrative agency should have authority to award back pay and/or counsel fees, it has expressly so provided in the agency's enabling legislation.

In CWA v. Board of Trustees of PERS, App. Div. Dkt. No. A-3807-07T1 (11/9/09), the Appellate Division held that although PERS is not required to engage in the Administrative Procedures Act's rule-making process when setting the contribution rate for members of the Prosecutors Part, and the appellants are not entitled to a "contested

case" hearing under the APA to challenge the Board's rate-setting determination, the appellants should be afforded prior notice and an opportunity to comment on any proposed change in the rate.

In New Jersey Education Association v. State of New Jersey, \_\_\_ N.J. Super. \_\_\_ (App. Div. 2010), the Appellate Division held that Teachers' Pension and Annuity Fund (TPAF) members, although entitled by law to the receipt of vested benefits upon retirement, possess no constitutionally-protected contract right to the particular level, manner or method of State funding provided in the statute.

### **Miscellaneous Court Cases**

In Leang v. Jersey City Bd. of Ed., \_\_\_ N.J. \_\_\_ (2009), the New Jersey Supreme Court held, among other things, that a non-tenured teacher whose employment contract was not renewed could not maintain a claim under the Contractual Liability Act, N.J.S.A. 59:13-1 to -10. School boards are statutorily authorized to sue and be sued and are therefore exempt from that Act. In addition, in light of the Board's clear statutory right to decline to renew plaintiff's contract, her breach of contract claim failed because that claim was based on the board's non-renewal decision.

In a case of first impression, a bankruptcy judge in California 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). 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.

In In re Vacation Leave Entitlement, Vineland City School Dist., App. Div. Dkt. No. A-3029-07 (7/22/09), the Appellate Division held that N.J.S.A. 11A:6-3, a statute providing for vacation time for local government Civil Service employees, does not

require that vacation time be front loaded where employees receive their annual allotment at the beginning of the year. The Court rejected the argument that local government employees should be treated the same as State employees who, by regulation, have front-loaded vacation leave.

### **Legislation**

L. 2009, c. 314, effective January 18, 2010, amended N.J.S.A. 34:13A-3 to provide that for the State of New Jersey, managerial executives means persons who formulate management policies and practices, but shall not mean persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in the case of the Executive Branch of the State of New Jersey, "managerial executive" shall include only personnel at or above the level of assistant commissioner. The law also amended the definition of confidential employee for the State of New Jersey to mean employees who have direct involvement in representing the State in the collective negotiations process making their membership in any appropriate negotiating unit incompatible with their official duties. In addition, the law expanded

the number of civilian Executive Branch negotiations units to 12 to permit collective negotiations for managers and deputy attorneys general.

P.L. 2010, c. 1, effective May 21, 2010, makes a number of changes to the State-administered retirement systems concerning eligibility, the retirement allowance formula, the definition of compensation, the positions eligible for service credit, the non-forfeitable right to a pension, the prosecutor's part of the Public Employees Retirement System (PERS), special retirement under the Police and Firemen's Retirement System (PFRS), and employer contributions to the retirement systems.

P.L. 2010, c. 2, effective May 21, 2010, makes changes to the State Health Benefits Program and the School Employees' Health Benefits Program concerning eligibility, cost sharing, choice of a plan, the application of benefit changes, the waiver of coverage, and multiple coverage under such plans. It also requires contributions toward the cost of health care benefits coverage by public employees and certain retirees.

P.L. 2010, c. 3, effective May 21, 2010, makes changes concerning payments to public

employees for unused sick leave, carrying forward of vacation leave by public employees, sick leave for injury while in State service, and accidental and ordinary disability retirement for members of the Public Employees' Retirement System (PERS) and the Teachers' Pension and Annuity Fund (TPAF).