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August 6, 2014

**MEMORANDUM**

**TO:** Commissioners  
**FROM:** Counsel Staff  
**SUBJECT:** Report on Developments in the Counsel's Office Since June 19, 2014

**Commission Cases**

City of Jersey City and Jersey City PSOA, POBA, Jersey City Public Employees Local 246, IAFF Locals 1066 and 1064, P.E.R.C. No. 2013-38, 38 NJPER 387 (¶130 2012), aff'd 2014 N.J. Super. Unpub. LEXIS 1741

The Appellate Division of the Superior Court affirms the Commission's decision declining to restrain arbitration of grievances brought by several unions representing City employees. In 2011, the City filed a complaint in the Law Division seeking a declaratory judgment that its Collective Negotiations Agreements with the unions did not require it to continue to provide retirees with health benefits at no cost. The trial court dismissed the complaint, finding that the Commission had primary jurisdiction and an appeals court affirmed. City of Jersey City v. Jersey City Police Officers Benevolent Ass'n., 2013 N.J. Super. Unpub. LEXIS 1863 .

The Commission has consistently permitted unions to seek arbitration to enforce a contract on behalf of retired employees because they have a cognizable interest in ensuring that the terms of their CNAs, regarding the retirement benefits that were contracted for in the agreement that were in effect at the time an employee retired, are honored. In a previous case, the Commission's holding to that effect was also affirmed on appeal. Voorhees Tp. and Voorhees Police Offrs Assn, Voorhees Sgts Assn and Sr Offrs Assn of FOP Lodge 56 and FOP, NJ Labor Counsel, P.E.R.C. No. 2012-13, 38 NJPER 155 (¶44 2011), aff'd 39 NJPER 69 (¶27 2012)

Twp. of Hardyston v. Isaacson, 2014 N.J. Super. Unpub. LEXIS 1663, notice of petition for certification filed.

This consolidated appeal was taken from the Commission's appointment of an arbitrator to review the disciplinary termination of Hardyston police officer Isaacson, and from the arbitrator's award reducing his termination to a ten day suspension. The Township had asserted that Isaacson was not eligible for arbitration because his actions violated criminal laws. Prior to the arbitrator's appointment no criminal charges had been filed. The Appellate Division of the Superior Court holds that the Commission has implicit jurisdiction to determine whether arbitration is available. The Court relies on N.J.S.A. 40A:14-211(b) providing:

[PERC] shall promulgate rules and regulations to effectuate the purposes of [N.J.S.A. 40A:14-209 and N.J.S.A. 40A:14-210]. These rules and regulations shall include, **but not be limited to** practices and procedures governing matters such as discovery, motions and the conduct of hearings and shall be designed to ensure that all disciplinary cases subject to the provisions of [N.J.S.A. 40A:14-200 to -212] are brought to resolution expeditiously.

The Court sets aside the arbitrator's appointment and his award and remands the case to the Commission to determine the jurisdictional issue. Isaacson is seeking to have the Supreme Court review the decision.

City of Rahway and FMBA Local 33, P.E.R.C. No. 2013-13, 39 NJPER 152 (¶48 2012), aff'd., 2014 N.J. Super. Unpub. LEXIS 1900

The Appellate Division of the Superior Court affirms the Commission's decision restraining arbitration of a grievance challenging a policy change made regarding firefighters assigned to a shift as an "acting Captain." The directive provides that a firefighter will henceforth only earn acting Captain's pay on a shift when a fire alarm is answered. The Court agreed with the Commission's determination that the thrust of the grievance, through framed as a compensation issue, challenged the City's determination to use firefighters as acting captains for the purpose of responding to emergencies (i.e. fire alarms) and not to have firefighters perform and be compensated for routine administrative duties associated with the higher rank.

### **Cases Related to Commission Cases**

Marucci v. Township of W. Orange, 2014 N.J. Super. Unpub. LEXIS 1716

After his discharge from the West Orange police department was upheld by the Civil Service Commission, Marucci filed a complaint alleging claims of harassment and retaliation under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8, and violation of the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-1 to -2. The trial court granted

summary judgment dismissing the lawsuit and, in this ruling, the Appellate Division of the Superior Court affirms. Marucci alleged that he suffered adverse employment actions in retaliation for an unfair labor practice filed against the Township on his behalf by P.B.A. Local #25. The grievance was based upon the denial of his request for overtime, when he was off duty but was designated the "on call" detective assigned to the Criminal Investigations Division (CID). That retaliation claim had not been raised in his CSC appeal. The Director of Unfair Practices deferred the overtime claim to binding grievance arbitration. The Court's opinion recites that the arbitrator sustained the claim for overtime compensation.

### **Other Cases**

#### Leaves of Absence: Overpayment to employees on military leave

Irvington Police Benevolent Ass'n, Local 29 v. Twp. of Irvington, 2014 N.J. Super. Unpub. LEXIS 1467, 199 L.R.R.M. 3833

A state statute and a consistent Township ordinance provide that a public employee called to active military service may receive full pay for the first 90 days of military leave and thereafter the difference between his/her salary as a public employee and the compensation paid by the federal government. Irvington overpaid four police officers called to active service for varying periods of time and sued to recoup the overpayments. The Appellate Division of the Superior Court affirms the trial court ruling, based on equitable principles, that the Township can only seek overpayments going back four years. The Court remands to the trial court the issue of how to determine how many hours are in a normal work day, an issue critical to determine the amount of regular employee compensation.

#### Leaves of Absence: FMLA leave time credited toward acquisition of tenure.

Darcy J. Kolodziej Vs. Board of Education of Southern Regional High School District, \_\_\_ N.J. Super. \_\_\_, 2014 N.J. Super. LEXIS 105

In a published, thus precedential, decision the Appellate Division of the Superior Court, reverses the Commissioner of Education and holds that time spent on leave under the Family and Medical Leave Act (FMLA) is to be counted towards the acquisition of tenure. The Court rules that the Commissioner erred in finding that the teacher's one-year maternity leave represented a break in employment that prevented her from achieving tenure, notwithstanding her three years of continuous employment and tenure evaluations that preceded the leave, and thus the Board incorrectly held that she was not entitled to be rehired when a position became available. Maternity leave constituted continued employment under N.J.S.A. § 18A:28-5(a), entitling the teacher to tenure protection and status under the school district's Reduction In Force plan

Reinstatement Denial: Issue decided by federal court cannot be re-litigated in civil service appeal

In the Matter of Darren Nance, City of Newark, 2014 N.J. Super. Unpub. LEXIS 1902

The Appellate Division of the Superior Court affirms the Civil Service Commission's dismissal of an appeal by a terminated Newark police officer seeking reinstatement, because the issue had already been litigated in a federal court which exercised its discretion not to reinstate the officer even though he successfully obtained damages for violations of his civil rights.

Nance had appealed his 1996 discharge from the Newark police force to the Civil Service Commission. However his appeal was held in abeyance pending his federal court lawsuit alleging that his firing violated state and federal civil rights laws. Ultimately, after many years, a federal court jury awarded him \$600,000 in compensatory and punitive damages. The federal judge denied Nance's motion seeking reinstatement. A federal appeals court affirmed the refusal to reinstate Nance citing the trial judge's reasons that:

- he had been deemed psychologically unfit for duty;
- his reinstatement might pose a risk to public safety;
- his fourteen-year absence from the police force made his return impracticable because of changes in police department protocols;
- he would have required complete retraining;
- the animosity between Nance and the Department made reinstatement "a recipe for disaster."