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September 10, 2014

MEMORANDUM

TO: Commissioners
FROM: Counsel Staff
SUBJECT: Report on Developments in the Counsel's Office Since August 6, 2014

Commission Cases

New Appeals (party filing appeal in bold)

- State of New Jersey (DOT) and **Jane Lyons**, P.E.R.C. No. 2014-85
- City of **Elizabeth** and **Elizabeth Police SOA**, P.E.R.C. No. 2014-94
- **Bridgewater Tp.**, and **PBA Local 174**, P.E.R.C. No. 2015-11

Appeals settled or withdrawn

An appeal from two scope of negotiations petitions on which the Commission was evenly split, was, after the parties reached a settlement, dismissed by stipulation City of Atlantic City and Atlantic City PBA Local 24 and SOA, 2014 N.J. Super. Unpub. LEXIS 2063. The subject was the maximum carryover for unused vacation leave balances.

Decision Issued

New Jersey Transit Bus Operations, Inc., v. ATU New Jersey State Council and ATU Local 822, 2014 N.J. Super. Unpub. LEXIS 2166

The Appellate Division of the Superior Court affirms the Commission's ruling [P.E.R.C. No. 2013-45, 39 NJPER 267 (¶91 2012)] allowing arbitration of a grievance asserting that NJ Transit violated the parties' contract when it denied union representation to an employee who was being

investigated for theft from a fare box. The Court holds that the claim that the employee's rights under NLRB v Weingarten (held by the Commission and Courts to apply to public employees) were violated, is within the scope of negotiations and arbitration for NJ Transit employees.

Cases Related to Commission Cases/Jurisdiction

Duty of Fair Representation Claims/Jurisdiction

Robert Martin v. New Jersey Council 52 AFSCME, 2014 N.J. Super. Unpub. LEXIS 2075

The Appellate Division of the Superior Court affirms a trial court dismissal of a terminated employee's complaint against his majority representative based on a conclusion that the Commission had jurisdiction. Martin was terminated from his position with New Jersey Institute of Technology. He alleged that AFSCME failed to represent him during the termination process. Martin's complaint alleges "breach of contract/promise and fraud." At the conclusion of oral argument, the trial court stated, in relevant part, that:

the State has clearly, through the Public Employment Relations Act, . . . established a mechanism . . . by which one resolves these issues and that's via the Public Employment Relations Commission.

They can provide a remedy that . . . makes [plaintiff] whole if . . . they accept his argument as a matter of fact and as a matter of law. For that reason, [plaintiff] belongs in PERC.

Other Cases

State's Duty to Indemnify Employees Against Work-Related Lawsuits

Robert Lavezzi v. State of New Jersey, ___ N.J. ___, 2014 N.J. LEXIS 888

The Supreme Court unanimously holds that the State is obligated to defend and indemnify employees of a county prosecutor's office sued in a civil action arising from the loss of, and damage to, non-contraband items seized in the course of a criminal investigation. Items owned by the plaintiffs were seized by the Essex County Prosecutor's Office (Prosecutor's Office) while executing a search warrant issued in connection with a criminal investigation. The criminal probe was later abandoned and no civil forfeiture action was initiated. Claiming that their property was lost and damaged while in the custody of the Prosecutor's office, the plaintiffs sued the Prosecutor and three employees. The Attorney General's Office (Attorney General) was asked to defend and indemnify the suit pursuant to N.J.S.A. 59:10-1 and N.J.S.A. 59:10A-1 of the Tort Claims Act (TCA), and Wright v. State, 169 N.J. 422 (2001), providing that employees of a county prosecutor's office are entitled to defense and indemnification from the Attorney General when they are sued on the basis of actions taken in the performance of their law enforcement duties. The Attorney General had denied the requests asserting that the processing

and safeguarding of property were administrative acts not covered by Wright. The Appellate Division affirmed. The Supreme Court reasons that Wright applies and reverses. It holds the State is obligated to defend and indemnify the Prosecutor's Office employees because, on the limited record before the Court, the case arises from the performance of law enforcement duties.

Retired Employee Benefits/Payouts to Retiring Employees

Marini v. City of Camden, 2014 N.J. Super. Unpub. LEXIS 2096

The Appellate Division of the Superior Court, reverses a lower court decision and holds that a retiring fire chief was not entitled to an additional \$200,000 in "severance pay" over and above the \$235,000 he had already received. The claim for additional payments was based on an assertion that his unused vacation leave and comp time should be calculated on ten hour work days, even though Marini worked eight hour days after becoming chief. The court rules:

- The payout already received was properly based on 8-hour days; and
- There was no basis for Marini to be compensated for comp time accumulations.

The Court introduced and encapsulated its analysis by noting:

Against the background of extraordinary legislative effort directed explicitly at Camden's disastrous economic situation, the persuasive capacity of arguments that these issues should be governed by promises or prior policy, unsupported by any statute, ordinance, contractual agreement, or arbitration award, is nil. For the reasons that follow, we reverse.

Toms River v. Fraternal Order of Police Lodge #156, 2014 N.J. Super. Unpub. LEXIS 2093

A trial court upholds an arbitration award sustaining a grievance challenging an increase in prescription co-pays for already retired police officers. The FOP had also filed an unfair practice charge, but both parties agreed to have the matter resolved through binding grievance arbitration. In sustaining the grievance the arbitrator relied on (Voorhees Tp. and Voorhees Police Offrs Assn, Voorhees Sgts Assn and Sr Offrs Assn of FOP Lodge 56 and FOP, NJ Labor Counsel, 2012 N.J. Super. Unpub. LEXIS 2046; 39 NJPER 69 (¶27 2012)). The Court observed:

[T]he arbitrator's interpretation of the parties' collective agreements is at least reasonably debatable. The court finds that a fair reading of the collective agreements could support the arbitrator's position that the 2013 agreement did not affect the co-pay benefits of officers who retired under the 2003 and 2007 agreements.

Application of Preemption/Carryover of Negotiated State Employee PLB Leave Days

CWA et. al. v. Civil Service Commission, 2014 N.J. Super. Unpub. LEXIS 2197,

Issuing its second opinion in this controversy, the Appellate Division of the Superior Court holds that the Civil Service Commission improperly held that State employees could not carryover from year to year banked personal leave (PLB) days. The PLB days were a result of collective negotiations among the State, CWA, Local 195, IFPTE and AFSCME, Council 1. The benefit was agreed to in light of state employees having been furloughed without pay for up to 10 days prior to July 1, 2010. Despite clear language in the negotiated agreements allowing the PLB days to be carried over from year to year, the CSC proposed a regulation that would treat PLBs in the same manner as vacation leave which had limited carryover flexibility and duration.

The Court held that the CSC's analysis was flawed as it concluded that, in the absence of a specific legislative authorization, the leave could not be carried over. It holds that the CSC should have applied the principles of preemption which provides:

"[i]n the absence of a statute or regulation precluding a public employer from agreeing to a particular type of provision, the employer's general grant of authority, by statute, provides the authority to agree to those provisions. State v. Int'l Fed'n of Prof'l & Technical Eng'rs, Local 195, 169 N.J. 505, 525 (2001). "[T]here is no need for specific statutory authorization for every possible item to which the public employer and the bargaining unit may agree." Id. at 526.

Cases holding 2010 pension/benefit changes were valid apply to L. 2011, c. 78.

Powell v. State, 2014 N.J. Super. Unpub. LEXIS 2036

Individual municipal firefighters challenged the constitutionality of L. 2011, c. 78, which requires public employees to pay a sliding scale percentage of the cost of health benefits for themselves and their dependents, but establishes a floor for employee contribution of 1.5% of base salary. Noting that the issues had been litigated in other cases, including those making similar challenges to L. 2010, c. 1 to 3, the Appellate Division of the Superior Court observed:

[T]he arguments raised by appellants recycled the arguments . . . raised in [the other cases]. We rejected the arguments raised, explaining in great detail the basis for our holding, . . . consequently, we adopt our reasoning in [Teamsters Local 97 v. State, 434 N.J. Super. 393, 407-25 (App. Div. 2014)] in affirming the Law Division here.

The court makes these points:

- Any state constitutional or statutory right to negotiate terms and conditions

of employment is subject to preemptive legislative action that sets or limits employer discretion over that topic.

- The law did not impair any contractual obligation and thus did not offend the contract clause of the federal constitution as it expressly provides that it would only take effect after any existing agreements expired;
- There was no violation of any substantive due process or equal protection guarantees.