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October 22, 2014

MEMORANDUM

TO: Commissioners
FROM: Counsel Staff
SUBJECT: Report on Developments in the Counsel's Office Since September 10, 2014

Commission Cases

New Appeals (party filing in bold)

- Boro of So. Plainfield and **PBA Local 100 and PBA Local 100 SOA**, PERC 2015-9
- Rutgers, The State University and **FOP Lodge 62**, PERC 2015-8
- **Board of Fire Commr's, Fire Dist. No. 1** and Monroe Tp. Prof. Firefighters Ass'n, PERC 2015-14
- State of NJ (Juvenile Justice) and **Judy Thorpe**, PERC 2014-71

Other Cases

Overtime Assignment; No Distribution Protocol

Grieb and Kelsey v. Borough of Spring Lake Heights, 2014 N.J. Super. Unpub. LEXIS 2391

Two Borough employees alleged that they were "not offered the same opportunities as other (public works department) employees to work overtime" between 2006 and 2011. They made these claims against the Borough and the Superintendent of the PWD during the relevant years:

breach of contract; employment discrimination; punitive damages; costs of suit and attorney fees; Kelsey's claim of breach of contract by the Borough because he worked Saturdays, which after he left employment was determined to merit overtime; and costs of suit and attorney fees for Kelsey's cause of action against the Borough.

The Appellate Division of the Superior Court, after reviewing the facts in a light favorable to the employees, affirms the trial court's decision granting summary judgment to the defendants and dismissing the complaint. The Court accepted that overtime had been distributed based on favoritism. A 2009 to 2010 agreement between the Borough and the union representing PWD employees incorporated Borough personnel policies including one providing that "[o]vertime shall be kept to a minimum and only authorized on an individual basis for special and emergency reasons that serve proper operation of the department." The policy did not designate in what manner overtime will be offered to employees. The Court also noted that during the period covered by the lawsuit, when there was no CNA in effect, there was no evidence establishing that overtime was to be distributed equitably either by rotation or seniority.

No Disability/Discrimination Based on Adverse Reaction to Constructive Criticism

Casano v. Livingston Bd. of Educ., 2014 N.J. Super. Unpub. LEXIS 2377

The Appellate Division of the Superior Court affirms the trial court's decision granting summary judgment to the Board and several school administrators dismissing a teacher's claim that she suffered age-based hostile work environment through unjustified negative job evaluations; retaliation for filing a discrimination complaint; and denied her a reasonable accommodation of her disability, all in violation of the Law Against Discrimination defendants.

The teacher refused to sign or even to acknowledge her receipt of job evaluations with which she disagreed. Although the possibility of a transfer to another school was discussed, the teacher did not request it and other school principals did not want the teacher at their schools. The Court noted:

Nor does the record demonstrate that a transfer would have been a reasonable accommodation, even if plaintiff had requested it. An employee's emotional inability to accept constructive criticism is not a disability that an employer can reasonably be expected to accommodate. Transferring such an employee would simply shift a management burden from one school principal to another, without addressing the employee's work performance.

Whistleblowing: Principal had Free Speech Right to Report Illegal Diversion of School Aid

Yuli v. Lakewood Bd. of Educ., 2014 U.S. Dist. LEXIS 147606

Yuli, the principal of Lakewood High School, brought a multi-count federal lawsuit alleging that numerous adverse personnel actions violated her free speech rights and multiple provisions of state and federal anti-discrimination laws. A federal district judge denies motions to dismiss

filed by the Board and individual defendants including the former Superintendent, the former Board attorney and the former Board President. After becoming principal, Yuli alleged that state and federal funds had been illegally diverted to private religious schools. The Court holds that as her duties as principal did not include monitoring the use of district funds, accordingly, Yulli was acting as a citizen exercising free speech rights rather than a public employee carrying out her job duties:

A public employee speaks regarding a matter of public concern when the statement "can be fairly characterized as addressing a matter of political, social, or other community concern." The statement's content, form, and context are relevant considerations. Speech concerning potential wrongdoing or breach of public trust, for example, addresses social, political, and community concerns. When a statement "bring[s] to light actual or potential wrongdoing or breach of public trust," particularly by government officials, the content is related to a matter of public concern.

[T]he Court finds that because Yuli reported an alleged misuse of public funds, her statements implicated matters of public concern sufficient to survive a motion to dismiss.

OPRA: Public Bodies and Indigency of Requestor

L.R. ex rel. J.R. v. Cherry Hill Bd. of Ed., 2014 N.J. Super. Unpub. LEXIS 2392

Even though the issue is not addressed by the Open Public Records Act, the Appellate Division of the Superior Court holds that a public body or a trial court that receives an OPRA request from a person who claims status as an indigent person cannot deny the indigent's request simply because the OPRA law allows a successful litigant to be awarded counsel fees and costs. The requestor in the case had previously been determined to be indigent in another court case.