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TO: Commissioners
FROM: Counsel Staff
SUBJECT: Report on Developments in the Counsel's Office Since November 17, 2014

Commission Cases

No new appeals or court decisions.

Other Cases

Non-reappointment: Separation of powers bars use of anti-retaliation section of bankruptcy law

Michael P. Mullen v. State of New Jersey, 2014 N.J. Super. Unpub. LEXIS 2670

The Appellate Division of the Superior Court upholds a trial court decision concluding that the failure to nominate a worker's compensation judge for reappointment did not violate anti-retaliation restrictions of federal bankruptcy law. Mullen was appointed as a worker's compensation judge in 2004 for a three-year term. Before his nomination he had disclosed that he was having financial problems. Near the end of his term he filed for bankruptcy. Consideration of his renomination, which would have given him tenure, did not advance and he served as a holdover for an additional three and a half years. In March 2011 the Governor's office advised Mullen that he would not be re-nominated and he was immediately removed from office. Mullen sued arguing that the failure to re-nominate him violated a federal law that makes it unlawful to terminate a person solely because that person is or has been a debtor under the Bankruptcy code. The Court held that the issue of Mullen's reappointment was essentially a political question and also implicated the constitution's separation of powers [Executive branch v Judicial branch] provisions:

Denial of the State's motion [to dismiss] would allow the judiciary to pry into the renomination process of the holder of a quasi-judicial position to determine if the individual was not re-nominated solely because of his status as a bankruptcy debtor. We conclude such review would violate the Constitution's separation of powers clause. N.J. Const. art. III, ¶1.

Promotions: Civil Service

Rule of Three: Statement of reasons for bypass still required despite repeal of rule

Communications Workers of America, AFL-CIO v. New Jersey Civil Service Commission, 2014 N.J. Super. Unpub. LEXIS 2771

The Appellate Division of the Superior Court upholds the Civil Service Commission's (CSC) repeal of a regulation that had required that an appointing authority, bypassing a higher-ranked candidate, provide: "A statement of the reasons why the appointee was selected instead of a higher ranked eligible or an eligible in the same rank due to a tied score;". In 2011, the Supreme Court had construed that regulation to mean that a general statement that the bypass "best met the needs" of the employer was insufficient. CWA challenged the repeal asserting that the removal of the statement of reasons requirement was inconsistent with the Supreme Court's decision as well as constitutional merit and fitness requirements. The appellate court holds that while the CSC had discretion to repeal the rule, an employer who uses the rule of three to bypass higher-ranked candidate is still obligated to explain why it did so. The Court holds that the employer, in such cases:

[R]emains bound to provide a statement of the reasons why the appointee was selected instead of a higher ranked eligible. An appointing authority's failure to provide this statement of reasons would render the appointment violative of the constitutional principles underpinning the requirement that appointments be based on "merit and fitness.

Promotion of lower-ranked candidate held not discriminatory

In re Ruben Morales, Department of Corrections, 2014 N.J. Super. Unpub. LEXIS 2738

The Appellate Division of the Superior Court upholds a Civil Service ruling that the removal of Morales, a State corrections officer, from the eligible list for promotion to Sergeant was not shown to have been discriminatory. Morales, who is Hispanic, passed the exam and was interviewed. He was removed from the list because a policy limited eligibility to officers free from major disciplinary action for three years and he had received a major disciplinary sanction within that period. However, an African-American candidate, with a lower score, was promoted

some months later even though he had received more than one major disciplinary sanction within the past three years. An internal investigation concluded that a clerical error caused the omission of that candidate's infraction from his work history.

Layoff: Contract allowed employer to depart from seniority based on disciplinary record

Tigner v. Jersey City Hous. Auth., 2014 U.S. Dist. LEXIS 160018

The United States District Court dismisses a multi-count lawsuit filed by a housing authority employee who had been laid off in May 2012. The court found her lawsuit did not assert sustainable claims of: sexual harassment (time-barred); and retaliation for exercising first amendment speech (comments were made in the workplace and concerned her job, not matter of public concern). Because of economic necessity the Authority had to lay off four employees in Tigner's title. Although seniority would have normally preserved her job, she lost that protection based on this provision of the collective negotiations agreement (CNA) between the Authority and the Independent Service Workers of America ("ISWA"), her majority representative:

ISWA agrees that in any future layoff actions, the application of "merit along with seniority," as provided for in Article 24 of the ISWA collective bargaining agreement, will be defined as follows:

An employee who has had four or more days suspension (or loss of vacation in lieu of suspension) within the last three years will lose seniority rights for the purposes of layoff, demotion in lieu of layoff or recall.

The Court observed that, even if Tigner could establish *prima facie* violations of her various claims, her disciplinary record gave the Authority a non-discriminatory reason to lay her off, without regard to seniority, consistent with its CNA with the ISWA.

Disability Pension: Injuries from heroic rescue were from "undesigned and unexpected." event.

Moran v. Board of Trustees, Police and Firemen's Retirement System, ___ N.J. Super. ___, 2014 N.J. Super. LEXIS 162

The Appellate Division of the Superior Court reverses the denial of a hero fire fighter's application for an accidental disability retirement pension. Moran saved two victims from a burning building by kicking in the door, suffering disabling injuries as a result. The fire call reported that the blaze was in an abandoned vacant building. As a result, a truck with equipment for breaking down doors was not initially dispatched. However, after hearing screaming from inside the structure Moran hurled his shoulder into the door and used his legs until the door gave way. Breaking into burning buildings was not Moran's normal unit assignment. He was part of an "engine company" whose role was to take the hoses into the burning building and put out the

fire. The applicable statute lists the criteria for eligibility for an accidental disability pension including that the traumatic event was “undesigned and unexpected.” The only issue before the pension board was whether that criterion had been met. An Administrative Law Judge recommended that the pension be granted, but the board reversed. The Court, in a published, thus precedential, opinion, holds that the decision was inconsistent with the pertinent statute as construed by the state supreme court. In so doing it cited other recent decisions in which denials of disability pensions had been reversed on appeal.