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January 22, 2015

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

Commission Cases

No New Appeals.

Court Decisions Received

Interest Arbitration: Award Affirmed

Borough of Tenafly, v. PBA Local 376, 2015 N.J. Super. Unpub. LEXIS 37

The Appellate Division of the Superior Court affirms the Commission's decision [P.E.R.C. No. 2013-87, 40 NJPER 90 (¶34 2013)], which upheld an interest arbitration award issued to resolve an impasse over the terms of a successor agreement between Tenafly and the PBA. The Court concludes, "PERC's findings on the sufficiency of [Arbitrator Robert] Gifford's award are well-supported by record evidence, and PERC was firmly within its statutory authority to interpret N.J.S.A. 34:13A-16.7 via adjudication and not rulemaking." The Court did not accept the PBA's assertions "that PERC should have proceeded by rulemaking and not adjudication; PERC erred by failing to remand and direct the arbitrator to "cost-out the modified provisions for each year of the CBA; and PERC was obligated to remand because the arbitrator did not adequately explain his decision on two of the nine statutory factors." The court's 13-page opinion reviews the interest arbitration and comprehensively dissects the parties' arguments and the Commission's analysis.

Scope of Negotiations: Refusal to Restrain Arbitration Affirmed

In re Twp. of Edison, 2014 N.J. Super. Unpub. LEXIS 2946

The Appellate Division of the Superior Court affirms the Commission's decision [P.E.R.C. No. 2013-89, 40 NJPER 56 (¶21 2013)], which declined to restrain arbitration of a grievance filed by Local 1197 of the International Association of Firefighters (IAFF) regarding compensation of certain firefighters who were also trained and licensed emergency medical technicians (firefighter/EMTs). The Court quoted and affirmed the Commission's identification of the issues presented for arbitration and its reasoning that:

[T]he contractual claim for pay differential for performance of EMS duties may be arbitrated because it does not significantly interfere with the employer's prerogative to eliminate the Firefighter/EMT rotation and hire more civilian EMTs. What EMS duties the Firefighter/EMTs are now performing, and whether those duties are eligible for the Article 49, Section 6 salary differential, are questions for the arbitrator to decide.

Other Cases

Authority to enter into subcontract for provision of detention and penal facilities

Essex County Corrections Officers PBA Local No. 382, et al. v. County of Essex, et al., ___ N.J. Super. ___, 2014 N.J. Super. LEXIS 176 (App. Div.)

In a published, thus precedential, decision, the Appellate Division of the Superior Court holds that the majority representative of Essex County Corrections Officers is entitled to a plenary trial court hearing on its claim that Essex County lacked authority to contract with a private company to provide the core services of operating detention and penal facilities. The court upholds the County's contract with a private company to provide substance abuse treatment and related rehabilitative services. The appellate court reverses a Superior Court decision granting summary judgment to the County and dismissing the PBA's complaint.

Employee Discipline

Employee may withdraw civil service disciplinary appeal and seek relief in court.

Thomas Hunt v. Borough of Wildwood Crest, 2014 N.J. Super. Unpub. LEXIS 2892

The Appellate Division of the Superior Court affirms a decision of the Civil Service Commission allowing an employee to withdraw a disciplinary appeal. After he was terminated, Hunt, a police sergeant, appealed to the CSC. He also filed a lawsuit in the U.S. District Court alleging his firing was retaliation for engaging in union activities. A day into his administrative hearing, the New Jersey Supreme Court held, in Winters v. North Hudson Regional Fire and Rescue, 212 N.J. 67 (2012), that where the CSC issues a final decision on a disciplinary appeal,

the employee is barred from challenging the personnel action in another forum. Hunt then moved and was granted permission to withdraw his CSC appeal. Calling the circumstances unique, the appellate court holds that the CSC's approval of the withdrawal request was not arbitrary or capricious and that Winters does not bar Hunt from pursuing his retaliation claim in federal court.

Dismissal of marijuana possession charges does not mandate teacher's reinstatement

Rasmussen v. Vineland Board of Education, et al., 2014 N.J. Super. Unpub. LEXIS 2929

The Appellate Division of the Superior Court upholds an arbitration award sustaining the mid-year termination of a non-tenured teacher. Rasmussen had a contentious relationship with supervisors and administrators and made "whistle-blowing" type complaints (e.g. collusion in grading). He was twice recommended for termination, but the Board refused to let him go on both occasions. The second time the Board and Rasmussen entered into a written settlement agreement. However, shortly after the teacher signed the agreement, he was arrested for marijuana possession in Atlantic City. The Board then terminated his employment. A month later the charges against him were dismissed. The arbitrator concluded that despite the dismissal of the criminal charges, the Board had just cause to terminate the teacher. The Court notes:

As the arbitrator found, there was sufficient proof that [Rasmussen] possessed marijuana. [Rasmussen] refused to provide information to counter the charges, even after the dismissal of his charges in November, weeks before his termination was to take effect. . . [U]nrefuted evidence was ultimately bolstered by the State Lab report.

Insubordination: Work Now-Grieve Later

Zielinski v. City of Wildwood, 2014 U.S. Dist. LEXIS 170717

The United States District Court dismisses a police officer's retaliation claims based on the Fair Labor Standards Act and the First Amendment. Zielinski and other officers filed FLSA claims that the City's refusal to compensate them for muster time violated federal law. However, Zielinski repeatedly refused to report for duty 15 minutes prior to his shift and was disciplined and ultimately terminated for doing so. In ruling against the officer the Court observed:

The fundamental mistake in plaintiff's argument is his insistence that he was engaged in protected activity when he reported late for work. The Court agrees that plaintiff's oral and court complaints were protected activity. However, plaintiff's decision to knowingly flaunt the work requirement that he report to work fifteen minutes before his shift started was not protected activity but instead was

insubordination. . . This is true even if it is the case, as plaintiff argues, that he was not paid for his muster time. Plaintiff's recourse was to seek compensation for his muster time, which he did in this case by filing his complaint, rather than to defy his work rules.