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February 19, 2015

TO: Commissioners  
FROM: Counsel Staff  
SUBJECT: Report on Developments in the Counsel's Office Since January 22, 2014

Commission Cases

New Appeals

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

The PBA is seeking Supreme Court review of the decision of the Appellate Division of the Superior Court, which, in agreement with the Commission, affirmed an interest arbitration award setting the terms of a successor agreement between the PBA and the Borough.

Court Decisions received

Atlantic City Bd. of Ed. v. Atlantic City Ed. Assoc., 2015 N.J. Super. Unpub. LEXIS 207

The Appellate Division of the Superior Court affirms the Commission's decision [P.E.R.C. No. 2014-35, 40 NJPER 275 (¶106 2013)] declining to restrain arbitration of a grievance contesting the withholding of a teacher's salary increments. During the 2010-2011 school year, the teacher was assigned to provide home instruction to a student three times a week. At the start of the 2011-2012 school year the student's mother requested that a different teacher be assigned to provide home instruction because the teacher who had been assigned only provided a total of five home instruction sessions. The Board determined that the teacher was falsifying records and claimed that she had made more home visits than had actually occurred. The Commission held that the sanction imposed on the teacher was a disciplinary action and was not related to teaching performance. Citing the standard used by the Commission to distinguish

between increment withholdings based on teaching performance and those that are predominantly disciplinary, the Court finds the Commission's decision was not arbitrary, capricious or unreasonable and is entitled to deference by a reviewing court.

Teaneck Tp. and FMBA Loc. No. 42, 2015 N.J. Super. Unpub. LEXIS 211

The Appellate Division of the Superior Court affirms the Commission's decision [P.E.R.C. No. 2013-60, 39 NJPER 423 (¶135 2013)] holding that a past practice of allowing a maximum of four firefighters per shift to schedule time off was not mandatorily negotiable because it would significantly interfere with the Township's ability to maintain its minimum staffing levels. The Commission held that the FMBA can not propose that the practice be included in a successor agreement between it and the Township.

Employer of State College Employees; Determination of managerial status

State of N.J. and Council of N.J. State College Locals, AFT, and Communications Workers of America, AFL-CIO, 2015 N.J. Super. Unpub. LEXIS 322

The Appellate Division of the Superior Court affirms in part and remands in part State of N.J. and Council of N.J. State College Locals, AFT, and Communications Workers of America, AFL-CIO, P.E.R.C. No. 2013-52, 39 NJPER 301 (¶101 2013), in which the Commission dismissed a clarification of unit petition in which CWA and the Council of New Jersey State College Locals claimed that employees working at state colleges, in formerly managerial titles, should be added to their respective units.

The court:

- Agrees with the Commission that the various boards of trustees of the state colleges, rather than the State, should be deemed the public employer.
- Holds that a determination should be made as to whether the disputed titles are managerial and directs that a hearing (rather than an administrative investigation) be held to receive evidence and testimony bearing on that issue.

Affirmance of Interest Arbitration Award

County of Morris, Morris County Sheriff's Office and PBA Local 298, 2015 N.J. Super. Unpub. LEXIS 343

The Appellate Division of the Superior Court, in agreement with the Commission, affirms the third interest arbitration award issued to set the terms of a successor agreement covering Morris County Sheriff's officers to succeed a CNA that had expired on December 31, 2010. The Commission remanded the initial award issued in 2012 and the County appealed from the Commission's affirmance of the arbitrator's supplemental award. In County of Morris,

Morris County Sheriff's Office and PBA Local 298 2013 N.J. Super. Unpub. LEXIS 2755, the Appellate Division remanded the matter back to the Commission to develop the record regarding the arbitrator's analysis of the factors established in N.J.S.A. 34:13A-16(g) consistent with its opinion. The court left the task to the discretion of the Commission and did not retain jurisdiction. The case was assigned to a new arbitrator. The Commission affirmed her award in P.E.R.C. No. 2014-69, 40 NJPER 503 (¶162 2014). In its second appeal the County argued that the arbitrator should only have issued an award regarding calendar year 2011. The Court held the Commission properly rejected that contention.

### OTHER CASES

#### Request for reimbursement for police officer's cost of defending criminal charge

Francesco Pagano v. Township of Pohatcong, et al., 2015 N.J. Super. Unpub. LEXIS 161

The Appellate Division of the Superior Court affirms a lower court ruling that a police officer, acquitted of criminal charges, was not entitled to reimbursement of the costs of his criminal defense under a statute addressing that issue. Pagano was indicted for official misconduct, perjury, and falsification of public records. After a jury found him not guilty, he filed suit seeking a determination that the charges arose out of the exercise of police powers in furtherance of his official duties, which would entitle him to reimbursement of the costs of his defense under N.J.S.A. 40A:14-155. The trial court found the officer knowingly made a false entry in the complaint report and made material, willfully false statements, while under oath before the grand jury and in the suppression hearing, which deviated significantly from what actually happened. The trial judge ruled that "entering false statements into a complaint report and testifying falsely under oath is not engaging in 'the lawful exercise of police powers' nor acting in 'furtherance of [a police officer's] official duties.'"

#### OPRA: Volunteer Fire Companies

Stern v. Lakewood Volunteer Fire Dept., 2015 N.J. Super. Unpub. LEXIS 255

Construing the term "public agency" in the Open Public Records Act, a Superior Court judge holds that volunteer fire companies created in the 19th century, but which are now administered by a Fire District established pursuant to statute, are subject to OPRA. The Court holds that the denial of Stern's request for copies of documents related to the Fire Companies' communication, operation, and financial records, including emails, meeting minutes, and check registry, violated OPRA.

Minor Discipline: Employer rejects its hearing officer's recommendation to reduce penalty

Donald Rambo v. Township of Lower Alloways Creek, 2015 N.J. Super. Unpub. LEXIS 268

The Appellate Division of the Superior Court declines to set aside minor discipline imposed on a Township police officer for recommending the issuance of a firearms permit to a person with a domestic violence conviction. The permit was one of 122 permits processed by Rambo during a three year period, all of which were countersigned by superior officers. The Township suspended Rambo for two days despite the recommendation of a hearing officer, appointed ad hoc, that the sanction be reduced to a written warning. Rambo then commenced an action in the trial division of the Superior Court asserting the employer was bound to follow the recommendation of its hearing officer. The trial court denied the officer's request as well as a request for a remand to further develop the record.

NOTE: The Township has a collective negotiations agreement with an FOP local that provides for binding arbitration to review the imposition of minor discipline. The opinion does not discuss whether the FOP has filed a grievance challenging the two day suspension.

Duty of Fair representation: Federal court lacks jurisdiction over public employee's claims

Anderson v. Mercer County Sheriff's Dep't, 2015 U.S. Dist. LEXIS 10051

A Mercer County Sheriff's officer alleged that her transfer to a new assignment was discriminatory. She initiated a grievance, but her majority representative, PBA Local 187 did not pursue her claim in the negotiated grievance procedure. She filed a federal court lawsuit alleging that Local 187 has breached its duty of fair representation by refusing to continue the grievance procedure, thereby violating §301 of the Labor Management Relations Act ("LMRA"), 29 U. S. C. §185. A federal district judge dismisses her claim holding that the statute expressly excludes any State or political subdivision thereof from the Act's definition of public employer. In defending the case the PBA asserted that her claim was cognizable only before the Public Employment Relations Commission.