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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

City of Newark and Newark SOA, I.R. No. 2015-1

The Appellate Division of the Superior Court has granted the City's application for leave to appeal an interim relief decision which directed that the City maintain, during the course of negotiations and interest arbitration, paying retiring employees their compensation for unused leave in a lump sum on their retirement date. A similar application, not yet decided has been made seeking review of I.R. No. 2015-003 involving the same parties and similar issues.

State of NJ and CNJSCL and CWA, 2015 N.J. Super. Unpub. LEXIS 322

The Communications Workers of America is seeking Supreme Court review of the decision of the Superior Court, Appellate Division which affirmed the Commission's determination that each individual state college, rather than the State of New Jersey, is the employer of employees at their respective campuses.

State of NJ and FOP Lodge No. 91, P.E.R.C. No. 2015-050

The FOP is seeking leave to appeal the Commission's order vacating the interest arbitration award and remanding it to the arbitrator for the issuance of a new award.

Joseph Isaacson and PERC

Discharged police officer Isaacson is appealing the Director of Arbitration's dismissal of his petition for special disciplinary arbitration. After the case was remanded by the Appellate Division of the Superior Court, in accordance with the Court's direction, the Director found that because the officer was alleged to have committed the crime of false swearing, he could not challenge his discharge through arbitration.

COURT DECISIONS RECEIVED

Interest Arbitration Awards Affirmed

In re City of Camden, 2015 N.J. Super. Unpub. LEXIS 536

The Appellate Division of the Superior Court, in agreement with the Commission affirms a final interest arbitration award that had been appealed by the Camden Organization of Police Superiors (COPS). The Court also dismisses an appeal that had been taken by the City from the Commission's order remanding the first award to the arbitrator for clarification of assertions and findings on three issues addressed in the award. As the final award favored the City, its appeal from the remand order was moot. The Court also clarifies that a Commission order remanding an interest arbitration award is an interlocutory action and may not be appealed without leave of the Court.

In re Burlington Cnty. Prosecutor's Office, 2015 N.J. Super. Unpub. LEXIS 477

Considering an interest arbitration award for the second time, the Appellate Division of the Superior Court agrees with the Commission that the interest arbitrator properly applied and explained the statutory factors that led to the awarding of salary increases for law enforcement personnel employed by the Prosecutor. In 2013, the Court had remanded the case finding that the arbitrator failed to adequately address all of the factors set forth in N.J.S.A. 34:13A-16(g).

Unfair Practice: Unilateral change in schedule of payments to retiring employees violated Act

In re North Hudson Reg'l Fire & Rescue, 2015 N.J. Super. Unpub. LEXIS 438

The Appellate Division of the Superior Court affirms the Commission's determination that the public employer engaged in an unfair practice when it unilaterally extended the payouts of deferred compensation earned by retiring employees for periods up to five years. Previously, the employees had received the compensation as a lump sum. The Court holds:

- A state statute authorizing extended payouts did not apply to the Regional which is a "joint meeting;" and;
- Negotiating over the timing of payments or making lump sum distributions was not shown to significantly interfere with managerial prerogatives.

Scope of Negotiations: Changes in work assignments not arbitrable; no severable impact

In re N.J. State Judiciary (Camden/Monmouth Vicinages), 2015 N.J. Super. Unpub. LEXIS 578

In two related and similar disputes, the Appellate Division of the Superior Court affirms the Commission's decision to restrain arbitration of grievances filed by the Probation Association of New Jersey, the representative of Professional Supervisory employees working in the Camden and Monmouth judicial vicinages. In the Camden vicinage, after employees in the Team Leader title retired, remaining Team leaders, who had previously been assigned to one judge each, were then assigned to two judges. In Monmouth the grievance challenged a pilot program that assigned Team Leader work to Senior Probation officers. The grievances also asserted that the reassignments had made de facto changes in work hours, safety and had the potential for subjecting employees to discipline if work assignments were not completed.

The Court agreed with the Commission that the new work assignments were not arbitrable because they were within the normal duties of Team Leaders. The Court also concurred with the Commission that the facts did not give rise to claimed severable changes in working conditions and that assertions of possible discipline were premature and speculative.

OTHER CASES

Confidential Employee: Agreement to pay retiring employee for unused leave/comp time valid

Town of West New York v. Janet Passante, 2015 N.J. Super. Unpub. LEXIS 397

The Appellate Division of the Superior Court affirms a trial court ruling that an agreement to pay a retiring employee for unused sick, vacation leave and comp time was valid even though it had been approved by resolution rather than an ordinance. The Town did not contest the employee's entitlement to payments, or argue that the terms of the agreement were circumscribed by civil service law. The Employee was not in a collective negotiations unit and her last position with the Town was as a confidential aide to Mayor. The Town had already paid the employee \$112,000 which was approximately one third of the agreed-upon amount.

Arbitrator could award benefits for retroactive promotion beyond those required by Civil Service

FOP, Newark Lodge No. 12 v. City of Newark 2015 N.J. Super. Unpub. LEXIS 382

Civil Service overturned a candidate's removal from the list for appointment as a police officer and established the date he should have been appointed. He was given a retroactive salary placement and seniority. The FOP then filed a grievance seeking to have other compensation applied retroactively to the officer. An arbitrator upheld the grievance but the Superior Court, Chancery Division reversed, holding that the arbitrator had inserted additional terms into the CNA rather than interpreting it. The appellate court disagreed holding that the arbitrator had interpreted the agreement; the award was reasonably debatable and thus entitled to be confirmed.

Court upholds arbitration award setting aside discipline for approving overtime

Paterson Police PBA Local 1 and Paterson Superior Officers Association, (SOA) v. City of Paterson, 2015 N.J. Super. Unpub. LEXIS 486

The Appellate Division of the Superior Court, in agreement with a trial court judge, affirms arbitration award sustaining a grievance filed by the PBA and SOA on behalf of a police Captain who was reassigned for disciplinary reasons because he allegedly approved overtime for officers who had their shifts extended to help in the investigation of the shooting of a suspect by an officer on New Year's Eve.

The Captain, who was nearing retirement, successfully bid for a shift that provided a 5% differential in order to increase his pensionable salary. Following a layoff, seven officers on a given patrol squad agreed to report for work three hours prior to their regular shifts without extra pay. These officers reported to the scene of the shooting. A Deputy Chief on the scene directed that the officers who had reported early continue to work through the usual end of their shifts. He and a squad lieutenant consulted with one another and approved overtime for the officers involved. The Captain, who was on vacation at the time, approved the overtime when he came back to work a day later, believing that such payment was required under the parties' CNA. The City initiated an internal affairs investigation. The Captain was reassigned to an administrative shift, lost the 5% differential and was directed to undergo counseling.

The grievance was upheld by an arbitrator. He found that the City's action was discipline without just cause and violated a settlement agreement produced by an earlier grievance. The City was directed to pay the Captain the 5% differential for calendar year 2012 and an additional two hours pay for each day (January 8, 2012 to December 31, 2012) he was assigned to the administrative command. Both courts determined that the award was reasonably debatable.