



**STATE OF NEW JERSEY
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April 20, 2015

TO: Commissioners
FROM: Don Horowitz, Acting General Counsel
RE: Developments in the Counsel's Office Since March 25, 2015

Commission Cases

No new appeals or court decisions received

Other Decisions

Pension Board (PFRS) determination must be followed by Division of Pensions

Town of Harrison and Fraternal Order of Police, Lodge No. 116, et. als , ____ N.J. Super. ____,
2015 N.J. Super. LEXIS 62

In a published, thus precedential, decision, the Appellate Division of the Superior Court holds that the Acting Director of the Division of Pensions and Benefits must abide by the final, unappealed determination of the Board of Trustees of the Police and Firemen's Retirement System on an issue concerning creditable compensation for pension purposes under N.J.S.A. 43:16A-1(26)(a). The Board found certain longevity pay provisions in the collective bargaining agreements entered into by five separate municipalities and the unions representing their police and/or firefighters were part of pensionable compensation.¹ The municipalities and unions appealed from the Acting Director's refusal to implement the Board ruling. The appeals court, without reviewing the merits of the compensation issue, held that the Acting Director could not disregard the PFRS Board's decision. Only a reviewing court had authority to reverse it.

¹The other municipalities included Vernon Township, the Borough of Ramsey, Woodbridge Township and the City of Linden. The unions included the PBA, FOP and FMBA

Objections to “Directed Patrols” did not implicate free speech/CEPA; Policy not a ticket quota

FOP v. City of Camden, 2015 U.S. Dist. LEXIS 41125

The United States District Court for the District of New Jersey dismisses a suit filed by the FOP and individual police officers against the City of Camden alleging violations of state statutes regarding ticket quotas, whistle-blower laws, state and federal constitutional free speech guarantees and, with respect to one officer, the Family and Medical Leave Act. The dispute was prompted by the City’s adoption of a policy regarding "directed patrols." That policy is described as a police investigative tactic which required police officers:

- to patrol targeted crime "hot spots" in an effort to concentrate police presence in areas of the city that were known high-crime areas.
- to "engage" members of the public who were not suspected of committing any offense in an attempt to obtain information about the community and make the police presence known in the community.
- to approach citizens in the neighborhoods and attempt to obtain information about criminal activity in the neighborhood, and;
- to obtain personal identifying information from individuals if they agreed to provide it, such as the person's name, date of birth, residence, and social security number.

The FOP argued that the policy violated anti-quota laws (N.J.S.A. 40A:14-181.2). The lawsuit asserted that officers who criticized or spoke out against the policy, and/or who were adjudged deficient in their execution of the policy, had their working conditions and assignments changed in retaliation for doing so. However the Court concluded that the evidence does not support a causal connection between the officers’ objections and their adverse employment actions.

Negotiated Grievance Procedure did not impair constitutional rights of disciplined police officer

Bianchi v. University of Medicine and Dentistry of New Jersey,, 2015 N.J. Super. Unpub. LEXIS 877

The Appellate Division of the Superior Court affirms dismissal of a UMDNJ police officer’s lawsuit asserting that his rights were violated because he was not permitted to be represented in a grievance arbitration hearing by his own attorney and because only the majority representative may decide whether to take a grievance to arbitration. Bianchi, a campus police officer, received a three day suspension for missing work. Fraternal Order of Police Lodge 74, the majority representative of campus police filed a grievance challenging the suspension. Prior to an arbitration hearing Bianchi commenced a lawsuit alleging that the negotiated CNA disciplinary procedures violated his federal and New Jersey constitutional and statutory rights to due process and his common law right to administrative fairness. On the day of the arbitration hearing, Bianchi appeared with his own attorney who sought to participate in the proceeding. The Union’s attorney objected noting the majority representative had the exclusive right to file grievances. The arbitrator gave Bianchi the option of adjourning the arbitration pending the

outcome of his lawsuit. The officer agreed to have the FOP attorney proceed with the arbitration. Subsequently, the trial court dismissed Bianchi's complaint. The appeals court affirms holding UMDNJ's disciplinary procedures established pursuant to the CNA adequately protected the officer's procedural due process rights.

Disputed facts precluded summary judgment in duty of fair representation case.

Patricia Pezza v. Jackson Board of Education et al., 2015 N.J. Super. Unpub. LEXIS 741

The Appellate Division of the Superior Court reverses a trial court's dismissal on summary judgment of a duty of fair representation suit against Teamsters Local 97. Pezza was employed by the Board as a food truck driver. She alleged that she sustained serious injuries to her neck and back when a JBOE truck she was operating was struck from behind. Disputes arose over Pezza's course of treatment, the date she would be able to return to work and the extent of physical activity she could perform on her return. The Board wrote Pezza that if she did not return to work on a specified date, she would be deemed to have abandoned her job. Local 97 responded to the letter but did not file a grievance challenging Pezza's termination. Pezza filed suit alleging in part that the union breached its duty of fair representation because the union's failure to file a wrongful termination grievance on her behalf was arbitrary, discriminatory, or in bad faith. The union subsequently moved for summary judgment, which the judge granted. While agreeing with the trial judge that a union has wide discretion regarding grievance processing, the Court held that the existence of disputed facts precludes summary judgment.

CSC construction of CNA term upheld as reasonable

In the Matter of Rhonda Denson-Johnson, Atlantic County, 2015 N.J. Super. Unpub. LEXIS 844

The Appellate Division of the Superior Court upholds the Civil Service Commission's interpretation of term "served" in a collective negotiations agreement as affects the date of a change in policy regarding discipline for refusing mandatory overtime. In a memorandum of agreement, an "amnesty" or "erasure" provision, stated that the County and the FOP agreed to:

Remove all discipline for mandatory overtime infractions served after 10/13/2011 and provide employees with comp time for all suspension time served.

The County asserted that "served" refers to the date the officer was served with a notice of disciplinary action for an alleged mandatory overtime violation. The FOP argued that "served" means the date(s) the suspension was carried out. The CSC concluded that "a reasonable interpretation of the word 'served' in this context is that it refers to the service of the disciplinary notice, not the time when the suspension is actually implemented."

IT employee reinstated; evidence insufficient to show he confessed to protect co-worker

In re Cummins, 2015 N.J. Super. Unpub. LEXIS 748

The Appellate Division of the Superior Court affirms the decision of the Civil Service Commission to overturn the termination of Cummins, an Information Technology (IT) employee

of the City of Hoboken. During an investigation of a suspected breach of the City's computer system, conducted by the City attorney and the City's business administrator, they alleged that Cummins confessed to diverting e-mails to unauthorized third parties. However an FBI investigation showed that another employee, who was a friend of Cummins, had committed the breach. The FBI report asserted that Cummins had sought to protect the other employee. The City modified the disciplinary charges to specify that "[a]s a result of Cummins['s] false confession and deception" he committed misconduct pursuant to N.J.A.C. 4A:2-2.3(a), including (1) conduct unbecoming a public employee; (2) insubordination; and (3) neglect of duty. However the Administrative Law Judge held that the City failed to produce evidence needed to sustain the charges. She found:

Although the footnote contained in the affidavit with the criminal complaint against Ricciardi claims that Cummins had falsely confessed to City employees because of his friendship with Ricciardi, Cummins denied ever stating that to the affiant. The basis relied upon by that affiant remains unclear, but the City failed to present that affiant as a witness to refute Cummins's testimony that he never told anyone that he had falsely confessed.