



**STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

PO Box 429
TRENTON, NEW JERSEY 08625-0429

www.state.nj.us/perc

ADMINISTRATION/LEGAL
(609) 292-9830
CONCILIATION/ARBITRATION
(609) 292-9898
UNFAIR PRACTICE/REPRESENTATION
(609) 292-6780

For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089
EMAIL: mail@perc.state.nj.us

December 9, 2015

TO: Commissioners
FROM: Counsel Staff
RE: Developments in the Counsel's Office Since November 12, 2015

New Appeals

State of NJ Rowan Univ. and Committee of Interns and Residents SEIU Healthcare, P.E.R.C. No. 2016-38

CIR appeals the grant of a restraint of arbitration of a grievance challenging a resident's firing.

Elizabeth Bd. of Ed. and Elizabeth Ed. Ass'n, P.E.R.C. No. 2016-22

The Board appeals from the part of the decision allowing arbitration on assertions that the Board failed to provide the teacher with copies of derogatory materials that were placed in her file.

Commission Cases

Refusal to Negotiate; Retaliation for Protected Activity and Filing Unfair Practice Charge

Board of Fire Commissioners, Fire District No. 1, Monroe Township and Monroe Township Professional Firefighters Association, International Association of Firefighters, Local 3170, ___ N.J. Super. ___, 2015 N.J. Super. LEXIS 203

In a published, thus precedential, decision (copy attached), the Appellate Division of the Superior Court affirms the Commission's decision (P.E.R.C. 2015-14), which adopted the recommended decision of a Hearing Examiner (H.E. 2014-3), concluding that the Board had engaged in unfair practices when it :

- violated its duty to negotiate by unilaterally assigning bargaining unit work to non-unit per diem firefighters;
- retaliated against Local 3170 by discharging all of its full-time firefighters because it demanded to negotiate and filed an unfair practice charge;
- gave a baseless justification for its actions by asserting that it had acted because of hard economic times and to provide savings to its taxpayers.

The Court observed that both direct and circumstantial evidence “overwhelmingly” established the Board's hostility to Local 3170's protected conduct of seeking negotiations over using non-unit personnel and to the union's seeking to vindicate its rights by filing an unfair practice charge. The opinion finds that, although the parties litigated the dispute as a “dual motive” case, because the record contained no justification for the Board's actions, it could have been analyzed as a “pretext” case. The Court upheld the remedial order of requiring the Board to post a notice to employees and to offer to reinstate the full time firefighters with back pay. The opinion notes that compliance with the order would not prevent the Board in the future from restructuring its delivery of fire services for legitimate, non-discriminatory reasons. The Court held that the recent furlough cases (Borough of Keyport v. International Union of Operating Eng'rs, Local 68, 222 N.J. 314; 2015 N.J. LEXIS 790) were irrelevant as none of those employers was motivated by anti-union animus.

Cases related to Commission cases

Grievance challenging use of video from bus cameras not contractually arbitrable

New Jersey Transit Bus Operations, v. ATU Local 820, 2015 N.J. Super. Unpub. LEXIS 2631

New Jersey Transit Bus Operations (NJTBO), P.E.R.C. No. 2015-53, 41 NJPER 392 (¶123 2015), a case sent to the Commission by the Superior Court held that NJTBO was not required to negotiate with the ATU over using video from cameras in buses in counseling or disciplining employees. NJTBO agreed that ATU could use the video challenge discipline. The ruling was sent to the trial court which held that the grievance was not contractually arbitrable.

The Appellate Division of the Superior Court affirms the trial court's contractual arbitrability ruling. It notes that the merits of the Commission's negotiability ruling was not before it in the appeal. Unless the ATU is granted Supreme Court review and the contractual arbitrability ruling is reversed, the Commission's decision, which was not directly appealed, will not be reviewed.

Other Cases

Law requiring chief receive higher compensation is limited to base salary, not other benefits

Falco v. Zimmer, 2015 U.S. Dist. LEXIS 153538

A federal district court dismisses a retiring police chief's multi-count compensation claim for unused sick leave payments and other benefits at the time of retirement. The court holds that the statute requiring a police chief receive higher compensation than subordinates only applied to base salary. The court also finds that the definition of base salary in the interest arbitration law is not pertinent.

Police Discipline

Authority of trial court in de novo review of termination

Ryan Saul v. Township of Manchester, 2015 N.J. Super. Unpub. LEXIS 2613

The Appellate Division of the Superior Court upholds a trial court's decision to overturn the Township's termination of a non-civil service police officer. The Court's opinion addresses procedural and substantive aspects of the statutory scheme (N.J.S.A. 40A:14-147 through 151) that allows police to appeal disciplinary sanctions to Superior Court, which conducts a de novo review of the case. In upholding the trial court's decision to overturn the termination, and instead impose a reprimand, the appeals court agreed that the trial court properly held:

- That failure to comply with the 10-day time limit to appeal from the municipality's action did not preclude Court review.
- The Court had the authority to take additional testimony and make independent findings of fact
- The officer did not qualify for attorneys fees because one disciplinary charge was upheld
- The officer was required to initiate a separate court action in order to obtain back pay.

Termination of officer who was sleeping while on extra duty job upheld

In re Reynolds, Township of Irvington 2015 N.J. Super. Unpub. LEXIS 2688

The Appellate Division of the Superior Court affirms the Civil Service Commission's adoption of an Administrative Law Judge's recommendation to terminate a police officer. While working

a “Job in Blue” assignment in his police uniform at a fast food restaurant, the officer was observed by personnel and a video camera to be asleep. The Court notes that the officer’s service weapon was openly displayed and could have been seized. The Court rejects a progressive discipline defense noting that the incident standing alone, and/or the officers’ prior disciplinary record justified the termination.

CEPA case filed by PBA representative reinstated

T.D. v. Borough of Tinton Falls, et al. 2015 N.J. Super. Unpub. LEXIS 2641

The Appellate Division of the Superior Court overturns a trial court’s dismissal of whistleblower and civil rights claims filed by a Borough police corporal. The CEPA lawsuit is reinstated, but the appeals court declines to address the civil rights suit, which includes allegations that the Borough retaliated against the officer for engaging in union activities.

T.D., a police corporal and a PBA representative was told by another officer that a sergeant was bypassing the water meter in his residence and was thus not paying for water. The officer told T.D. he had reported this to the Prosecutor’s office which then began a criminal investigation into the sergeant’s activity. When the name of the officer who made the report was discovered through an internal affairs investigation, he was charged with disciplinary violations. T.D. then contacted the P.B.A. attorney who directed him to inform the Prosecutor of the improper IA investigation and resultant disciplinary charges. Consequently, the Prosecutor told the Chief to cease the investigation and drop the charges. T.D. was accused by other officers of being disloyal, asserting T.D. should have “tipped off” the sergeant about the water meter probe. T.D. reported this to the Prosecutor as well. T.D. was investigated and passed over for promotion.

Back pay to 10-month employee includes years between discharge and arbitration award

Teamsters, Local 97 v. Borough of Carteret, 2015 N.J. Super. Unpub. LEXIS

The Appellate Division of the Superior Court affirms a trial court decision confirming a grievance arbitration award reinstating with back pay a crossing guard who was terminated without just cause. Crossing guards have a 10-month work year. In July 2011 a guidance counselor came to the crossing guard’s home and handed her an envelope containing student grades. As instructed by the counselor, the guard delivered the envelope to a teacher. On October 11, 2011, Carteret filed disciplinary charges seeking her removal, alleging that the guard improperly possessed and disseminated a confidential grading transcript of a graduating high school student. The guard, who had been employed for 20 years, with an unblemished disciplinary record, was terminated in April 2012. The Union grieved the termination, and on January 31, 2014 an arbitrator issued an award concluding that the guard was discharged without just cause. The arbitrator noted:

- The employer had not shown that the act of passing an envelope containing confidential student information was a transgression;
- The event occurred after the crossing guard's work year was over;
- Given the employee's spotless record, even if her action warranted discipline, the contract called for a verbal warning and not termination.

The Board sent the employee a check for the last two months of the year in which she was discharged but did not reinstate her asserting that a statute limited a crossing guard's term to one year and that the guard had no guarantee of re-employment for the school years between her termination and the award.

The Union filed suit to confirm the award including the back pay remedy for the years following the guard's discharge. The judge held that there was no basis to conclude that given the guard's long tenure, she would not have been reappointed absent the unjust termination. The court also held that Carteret's argument that it was only required to remit two months back pay to make her whole, if accepted, "would fly in the face of all notions of equity and the interest of justice."