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February 18, 2016

TO: Commissioners
FROM: Counsel Staff
RE: Developments in the Counsel's Office Since January 20, 2016

Commission Cases

In the Matter of the State of New Jersey and New Jersey Law Enforcement Supervisors Ass'n, ___ N.J. Super. ___ 2016 N.J. Super. LEXIS 9 (App. Div. 2016)

The Association is seeking Supreme Court review of the decisions by the Commission and the Appellate Division of the Superior Court affirming an interest arbitration award.

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

The Board of Fire Commissioners is seeking Supreme Court review of the decision of the Appellate Division of the Superior Court, affirming the Commission's decision that the Board engaged in unfair practices when it discharged all of its regular full-time firefighters.

Cases related to Commission Cases

Just cause provision of contract held applicable to disciplinary termination cast as non-renewal, but not to non-disciplinary non-renewal of non-tenured, non-certificated staff under N.J.S.A. 18A:27-4.1.

The Board renewed the employment contract of a paraprofessional for the upcoming school year, but later revoked the contract before the school year started. In addition, the Board did not renew the contract of a custodian. The Association filed grievances challenging both actions. In PERC No. 2015-10, the Commission declined to restrain arbitration of the grievances. The Board did not appeal the scope ruling. Instead, the Board sought a restraint in Superior Court, Chancery Division, asserting the grievances were not contractually arbitrable. Its application was denied, and the Board appealed.

In a lengthy opinion that explains the differences between negotiability issues and contractual arbitrability defenses, the Appellate Division holds that the claim of the paraprofessional may be arbitrated, but not the custodian's. In the paraprofessional's case, the Court rejected the Board's argument that its action was a non-renewal under N.J.S.A. 18A:27-4.1. Since the revocation "followed on the heels of a disciplinary review of a child protective services agency's investigation of alleged abusive conduct," the action was discipline and, therefore, subject to arbitrable review under the collective negotiations agreement (CNA). In contrast, the Court found no facts in the custodian's case that the Board's action "resulted from a grievable disciplinary determination" requiring just cause under the CNA. Therefore, the Chancery Division erred when it failed to recognize as not arbitrable, the Board's "proper exercise of its statutorily authorized managerial prerogative not to renew the fixed term, non-tenured employment contract" of the custodian.

Other Cases

Agency order remanding case to trier of fact is interlocutory.

Christina Silvieira-Francisco v. Board of Education of the City of Elizabeth, 2016 N.J. LEXIS 53

The Supreme Court holds that an order from an agency head remanding a case back to an Administrative Law Judge is an interlocutory ruling that cannot be reviewed by an appeals court except through the filing and granting of a motion for leave to appeal. It further holds that if the aggrieved party does not seek leave to appeal, it has not waived its right to seek appellate review of any rulings that remain in dispute after the agency head issues a final order. Finally, the Court holds that parties may not, by consent, give an appellate court jurisdiction over an administrative ruling that is not ripe for review.

This case involved a dispute over a principal who was returned to the classroom due to a reduction in force (RIF). She petitioned the Commissioner of Education to establish her tenure and seniority rights, and the school board challenged her certification as principal. The

Commissioner's decision rejected the ALJ's initial decision and remanded the case to the Office of Administrative Law for calculation of tenure and seniority rights.

Termination resulting from entering into shared services agreement.

Gerrity v. Cnty. of Salem, 2016 N.J. Super. Unpub. LEXIS 73

The Appellate Division of the Superior Court upholds a trial court's decision rejecting the claim of a terminated Salem County Health Officer that she had job security protections pursuant to a state statutory scheme. Her separation occurred when Salem County and Gloucester County entered into Shared Services Agreement (SSA) under the 2007 Uniform Shared Services and Consolidation Act. The SSA provided that Gloucester County would provide a health officer whom Salem County would designate as its health officer. This shared health officer would serve as the enforcement agent for both Salem County and Gloucester County. In return, the SSA required Salem County to pay a negotiable amount for the services of the shared Health Officer. The plaintiff claimed that another statute, specifically, the 1975 Local Health Services Act (Act), entitled her to be transferred to Gloucester County's Health Department with comparable pay and duties when Salem County terminated her employment on account of the SSA. The Appellate Division agreed with the trial court's interpretation of the Act as providing the claimed job protection only when another local health agency assumed all of the responsibilities and activities of another. Since Salem County continued to operate a health department, the trial court concluded, and the Appellate Division affirmed, that the job protection afforded by the Act did not apply to the plaintiff.

Employee Discipline

Suspension based on employee's refusal to take psychiatric exam reversed.

In re Williams, 2016 N.J. Super. LEXIS 15

In a published, thus precedential decision, the Appellate Division of the Superior Court reverses the action of the Civil Service Commission (CSC) suspending an employee based on his refusal to submit to a psychiatric examination. The directive was issued eight months after the employer had received an anonymous letter complaining about Williams' disruptive behavior in the workplace. Williams' employer terminated him for insubordination and the truck driver appealed to the CSC. An administrative law judge, applying the Americans with Disabilities Act (ADA), overturned the discipline. In doing so, the judge stated:

Here, there was no evidence of a risk of injury to a fellow employee or the public, and no evidence or allegation of physical contact with another employee. The evidence offered by the [Township] is an anonymous letter that the Township took eight months to act on. There is no showing of an investigation into the anonymous letter. [The DPW director] credibly testified that appellant may be

confrontational at times; however, this observation regarding appellant was not the asserted basis for the Township's request for a psychological fitness-for-duty examination of [appellant].

[Appellant] did fail to attend the psychological fitness-for-duty examination, but without a reasonable basis for the request that he undergo the examination, the Township cannot punish him for failure to attend. Such an examination was not job-related and consistent with business necessity.

Discussing the CSC's decision to reverse the administrative judge and impose a six-month suspension on Williams, the Court noted that the CSC failed to address Williams' contention that the Township's demand that he undergo a psychological examination was impermissible under the ADA. The Court remanded the case to the CSC to calculate entitlements to back pay and counsel fees.

Civil Service failed to conduct hearing where material facts were in dispute.

In the Matter of J.L., Kean University, 2016 N.J. Super. Unpub. LEXIS 292

In an unpublished decision, the Appellate Division reverses a decision of the Civil Service Commission (CSC) which, without conducting a hearing, sustained Kean University's finding that an employee violated the New Jersey State Policy Prohibiting Discrimination in the Workplace, N.J.A.C. 4A:7-3.1. Noting that the employee denied the allegations, the Court held that material disputed facts prevented a determination by the CSC without a hearing. The Court remands the case to the CSC for hearing in the Office of Administrative Law.

Law barring arbitration of police officer's major discipline did not violate due process.

Bianchi v. Rutgers, 2016 U.S. Dist. LEXIS 12538

Bianchi, a Rutgers police officer, received a 20-day suspension and a written warning for two separate incidents. He challenged both actions under the grievance procedure of the collective negotiations agreement between Rutgers and the Fraternal Order of Police, Lodge 74 (FOP). The FOP, representing Bianchi, sought the appointment of an arbitrator by the Public Employment Relations Commission (AR 2013-794). Days later, Bianchi filed a complaint in Superior Court to review the 20-day suspension, alleging that there was "insufficient testimony to justify his suspension," that it was contrary to Rutgers' policies, and that it lacked just cause and was excessive. Although the challenge to the written warning was settled during the grievance procedure, Bianchi also sought review of that sanction in Superior Court. Rutgers removed the litigation to federal court given that Bianchi also asserted a due process claim under federal law.

In the course of that proceeding, the parties admitted that "PERC does not have jurisdiction over major disciplinary incidents involving police officers, which include suspensions over 5 days."

Rutgers moved for summary judgment. Addressing the procedural due process claim, the Court stated:

Plaintiff has argued the procedures available to him were per se inadequate without the option of PERC arbitration of his 20-day suspension “before a presumably neutral arbitrator.” Plaintiff points out that arbitration was part of the collectively negotiated grievance procedures held to comply with procedural due process in cases like [Jackson v. Danberg, 594 F.3d 210, 227 (3d Cir. 2010) and Dykes v. SEPTA, 68 F.3d 1564, 1572 n.6 (3d Cir. 1995)]. However, the Court does not read either case to require arbitration in order to comply with procedural due process. Additionally, while arbitration was unavailable to Plaintiff by law, Plaintiff received more procedural protection than the employees in Dykes and Jackson because Plaintiff received a pre-deprivation hearing. Given the pre-deprivation hearing, the availability of two post-deprivation hearings as an additional check against erroneous deprivation, and Plaintiff’s subsequent filing in Superior Court for review, the Court fails to see how the availability of arbitration, in this case, “would have led to a different result.” Balancing the weight of a temporary suspension with the procedures Plaintiff received and the probable value of an additional proceeding, the Court is satisfied that the process Plaintiff received was constitutionally adequate. . .

The Court granted Rutgers’ motion.