



STATE OF NEW JERSEY
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March 23, 2016

TO: Commissioners
FROM: Counsel Staff
RE: Developments in the Counsel's Office Since February 18, 2016

New Appeals

Clark Tp. and Union Council No. 8, IFPTE, AFL-CIO, P.E.R.C. No. 2016-55.
Council No. 8 has appealed the Commission's order restraining arbitration of its grievance challenging the change in work hours of a records clerk.

Commission Cases

Payment of increments under expired contract

In the Matter of County of Atlantic, PBA Local 243, FOP Lodge 34 and PBA Local 77,
-and-

In the Matter of Township of Bridgewater, and PBA Local 174, ___ N.J. Super. ___ 2016 N.J. Super. LEXIS 37

The Appellate Division of the Superior Court, in a published, thus precedential, decision (copy attached), reverses the Commission's decision in an unfair practice case (Atlantic County, P.E.R.C. No. 2014-40) and a scope of negotiations case (Bridgewater Township, P.E.R.C. No. 2015-11). The Commission had held that Atlantic County did not breach its obligation to negotiate by ending its practice of paying increments in accordance with expired salary guides while the parties were engaged in negotiations for a successor collective negotiations agreement.

The Commission granted Bridgewater's request to restrain arbitration of a grievance seeking payment of the increments following expiration of the parties' CNA.

The affected Unions in each case appealed, urging that the Commission's rulings were a change in its "dynamic status quo" policy, pursuant to which such increments would normally be paid to employees even though the CNAs had expired. After oral argument the Appellate Division consolidated the two cases. The Court held "PERC's abandonment of the dynamic status quo doctrine was action outside the scope of its legislative mandate, which is the implementation of the New Jersey Employer-Employee Relations Act (Act)."

The Court began its analysis by stating that:

PERC is charged with safeguarding the rights of public employees. Galloway Twp. Bd. of Educ. v. Galloway Twp. Ass'n (Galloway), 78 N.J. 25, 36. It "bear[s] the dual responsibilities of adjudicating violations of the unfair practice provisions and the Act and taking all steps necessary to enforce that which the Legislature has declared to be the public policy of this State in public employment labor relations."

It further held:

1. The fact that the dynamic status quo doctrine had been in place for decades without action by the Legislation shows that the Legislature intends the Act to be administered in a manner consistent with the doctrine.
2. While the Supreme Court cases (Galloway, Neptune) involving post expiration increment payments were based on salary guide statutes, those rulings also contained *dicta* endorsing the dynamic status quo doctrine, and the Commission did not have authority to disregard such statements.
3. The Commission did not have authority to consider the demands of the tax levy cap statutes as there is no absolute inconsistency between them and the dynamic status quo doctrine given that the employer may adjust and balance its budget, if necessary, from other expenditures. Additionally, employers have the capacity to recoup increments from non-tenured employees.

Cases related to Commission Cases

State of New Jersey Judiciary v. Probation Association New Jersey, Case Related Professional Unit, 2016 N.J. Super. Unpub. LEXIS 376

The Appellate Division of the Superior Court overturns a trial court ruling and vacates an arbitration award. The Court noted that the dispute was similar to two other cases where the

Commission had restrained arbitration and the Court had affirmed the Commission on appeal. In re N.J. State Judiciary (Camden/Monmouth Vicinages), 2015 N.J. Super. Unpub. LEXIS 578. The grievance before the Court sought additional compensation for probation officers who were assigned to function as Court Coordinators. The arbitrator concluded that the Monmouth County Vicinage violated a contract provision that entitled employees appointed to serve in an acting capacity in a professional supervisory position to additional compensation. The Court found that since the arbitrator never sought to interpret the phrase "professional supervisory position," he had not put forward an interpretation of the contract that was "reasonably debatable." Instead, the arbitrator ignored plain and unambiguous language in the contract.

Employee Discipline

Female Trooper's off-duty failure to arrest violent bikers not grounds for discipline

New Jersey State Police v. Trooper I Michelle Garitta, 2016 N.J. Super. Unpub. LEXIS 360

The Appellate Division of the Superior Court reverses a 10-day suspension imposed on a female State Trooper by the Superintendent of State Police. While off-duty, the Trooper and her husband attended a country music concert at the PNC Arts Center. Leaving the concert, they were confronted by five motorcycle gang members who verbally harassed her and then physically assaulted and injured her husband. Knowing other troopers were in the area, she summoned them with her cell phone and they quickly responded, apprehending three of the five assailants. Fourteen months after an investigation, the Superintendent charged the Trooper, who had an unblemished disciplinary record, with neglect of duty for failing to promptly report and take proper police action in any situation reasonably requiring such action. The Trooper appealed. An Administrative Law Judge sustained the charges but recommended reducing the penalty to a six-day suspension. The Superintendent imposed a 10-day suspension. The Court found that the record did not support the Superintendent's conclusion that the Trooper neglected her duty under the totality of the circumstances presented.

Correction officer's distribution of vulgar, altered photo of co-worker not criminal harassment

State of New Jersey v. William Burkert, ___ N.J. Super. ___, 2016 N.J. Super. LEXIS 42

In a published, thus precedential, opinion, the Appellate Division of the Superior Court overturns the harassment conviction of a corrections officer. The Court finds the convicted officer's speech to have been vulgar and offensive but holds that it could not be the basis for a prosecution as it amounted to constitutionally protected speech.

Burkert, a former Union County corrections officer, appealed his conviction on two counts of harassment, a petty disorderly offense, N.J.S.A. 2C:33-4(c). The conviction was based upon his creation of two flyers containing the wedding photo of a fellow Union County corrections officer (the Sergeant), which had been altered to include vulgar handwritten comments in speech

bubbles. The Court noted that the Sergeant and Burkert (defendant) had been co-workers for twenty years. Throughout that time, "tension" and "animosity" developed between the two, in part, because each was a member of a different union that represented corrections officers. Interpreting the statute that was applied to Burkert, the Court holds:

In this case, the evidence does not support a finding that defendant's creation of the flyer found in two areas of the jail were directed to and invaded the privacy rights of the Sergeant. Also, no proof supports such acts were a direct attempt to alarm or seriously annoy the Sergeant. Rather, defendant's uncouth annotations to the Sergeant's wedding photograph that was generally circulated amounts to a constitutionally protected expression, despite its boorish content, which bothered or embarrassed the Sergeant.

The Court concluded:

Defendant's comments were unprofessional, puerile, and inappropriate for the workplace. Our opinion does not address whether the nature of defendant's written comments, which were posted in his workplace, may subject him to discipline by his employer. However, they do not amount to criminal harassment.