



**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

April 20, 2016

TO: Commissioners
FROM: Counsel Staff
RE: Developments in the Counsel's Office Since March 31, 2016

New Appeals or Court decisions

No new appeals or court decisions have been taken from or issued on Commission Cases. However, Bridgewater Township, Atlantic County and the Commission have notified the Supreme Court of their intentions to file petitions for certification seeking review of :

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.

Cases related to Commission Cases/Jurisdiction

Arbitration award holding change in retiree Rx co-pays violated contracts reversed

Township of Toms River v. FOP Lodge No. 156, Dkt. No. A-0827-14T3, 2016 N.J. Super. Unpub. LEXIS 611

The Appellate Division of the Superior Court reverses the trial court's decision confirming an arbitration award. The arbitrator ruled that Toms River violated collectively negotiated agreements by changing the prescription drug co-pays of already retired employees and that the co-pays for employees who retired between 2003 and 2012 were fixed for life. Before the court

litigation, the FOP had filed a grievance and an unfair practice charge contesting the change in co-pays. The Commission deferred the charge to arbitration. The Appellate Division held that the arbitrator's interpretation of the agreements under which the employees retired, as well as his construction of the most recent agreement, was not reasonably debatable. It acknowledged that the Commission had held in Township of Voorhees v. Voorhees Police Officers Ass'n, P.E.R.C. No. 2012-13 (2011), aff'd 2012 N.J. Super. Unpub. LEXIS 2046, that a union could enforce the terms of agreements in effect when employees retired. However, the court went on to hold that the benefits of already retired employees could be changed by the terms of future contracts. The Commission has consistently held that a union and a public employer cannot negotiate over the benefits of already retired employees. But the court, citing private sector labor law cases on permissive negotiability, wrote:

The PERC decision did not hold that a union and employer cannot choose to negotiate about the benefits of persons already retired. Rather, it simply noted that an employer is not under an obligation to negotiate over benefits of already retired employees, citing Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971).

However, Allied Chemical & Alkali Workers made clear that "nothing in this opinion precludes" a union from "permissive bargaining over the benefits of already retired employees" "if the employer agrees." . . . In M&G Polymers, supra, the United States Supreme Court rejected reliance "on the premise that retiree health care benefits are not subjects of mandatory collective bargaining. Parties, however, can and do voluntarily agree to make retiree benefits a subject of mandatory collective bargaining. Indeed, the employer and union in this case [previously] entered such an agreement." . . . Similarly, in the 2003 and 2007 agreements, the parties here had previously negotiated the benefits of officers who had already retired, just as they did in the 2013 agreement.

Other Cases

Labor relations panel had jurisdiction over alleged promotional procedures violations

Otero v. Port Auth. of N.Y. & N.J., 2016 U.S. Dist. LEXIS 43332

The United States District Court for New Jersey dismisses several counts of a complaint brought by 56 Port Authority Police Officers who passed written examinations for promotion to Sergeant. The candidates alleged, among other things, that the Port Authority violated promotional procedures in the post-exam stages of the promotional process. Two of them also alleged that the Port Authority retaliated against them based on their union activities. The Court holds that the Port Authority Employment Relations Panel (Panel) had jurisdiction to hear charges that the Port Authority violated promotional procedures and the plaintiffs' failure to invoke the Panel's jurisdiction warranted dismissal of those allegations for failure to exhaust administrative

remedies. When a decision of the Panel is challenged in a New Jersey Court, the Panel can request that PERC's General Counsel defend the Panel's decision on appeal. See In re Alleged Improper Practice Under Section XI, Paragraph A(d) of the Port Auth. Labor Relations Instruction, 194 N.J. 314 (2008).

Mendez v. Port Auth. of N.Y. & N.J., 2016 U.S. Dist. LEXIS 42157

The same result described in Otero had been previously reached in this case, which involved a sergeant who passed the written exam for lieutenant and had sought a promotion to that position.

Arbitration of race-based firefighter transfers pursuant to Court Order

Lomack v. City of Newark, 2016 U.S. Dist. LEXIS 44375

The United States District Court for New Jersey confirms an arbitration award finding that the rescission of a Battalion Chief's approved transfer to the Arson squad was racially motivated. In 2004, Newark firefighters or firefighter unions, brought suit against the City alleging that the firefighter plaintiffs were transferred or denied requests for transfer based on race. A 2008 Order ending the litigation provided for binding arbitration upon request by a union in certain transfer situations where race was believed to be the motive. In 2013, Battalion Chief Arthur Mauriello, a member of Local 1860, requested a transfer to the arson unit. The transfer order was approved by the outgoing Fire Director on his last day in office, but rescinded by the new Fire Director on his second day in office. Suspecting a racial motivation for the action, Mauriello invoked the arbitration procedures laid out in the 2008 Order. An arbitrator ruled in his favor.

Merit and fitness not required to be used to break ties in layoff and demotion

In re Romary, Van Wolde, Altmann, et al, 2016 N.J. Super. Unpub. LEXIS 898

The Appellate Division of the Superior Court affirms the order of the Civil Service Commission (CSC) dismissing a challenge to a CSC-approved layoff plan for the Paterson police department. Seven officers holding ranks of sergeant and lieutenant, who were demoted as a result of the plan, asserted that breaking ties among officers promoted on the same date based on total seniority with the department violated the "merit and fitness" requirement of the State Constitution. The officers argued that such ties should be broken based on the scores of promotional examinations and that failing to do so harmed them financially because they would have retained their higher ranks and the salary applicable thereto. The Court held that the merit and fitness requirement applied to appointments and promotions. Noting that employees affected by economic layoffs had already satisfied the merit/fitness standard, it held that using seniority in layoff/demotion instances did not violate that requirement and was consistent with Legislative enactments. The Court cites two Commission cases that reached the Supreme Court holding that: (1) merit and fitness did not bar the State from subcontracting [Local 195 v. State, 88 N.J.

393 (1982)] and (2) specific civil service laws and regulations preempted negotiations over issues pertaining to promotions [State v. State Supervisory Employees Ass'n., 78 N.J. 54 (1978)].

Constitutional Challenge to Public Sector Agency Shop fails with tie vote in U.S. Supreme Court

Friedrichs v. Cal. Teachers Ass'n, 84 U.S.L.W. 4159, 2016 U.S. LEXIS 2264

On January 11, 2016, the United States Supreme Court heard oral argument in this case which challenged the constitutionality of public sector agency shop laws. Following the death of Justice Antonin Scalia, the Court split 4-4 on the issues presented. The tie vote was announced in a one-sentence March 29 order, “Judgment affirmed by an equally divided Court.” That means that the decisions of the lower federal courts, rejecting the constitutional challenge, stands.

Bargaining/Negotiations unit members not employees of Unions for purposes of LMRDA

Michael Mraz v. Local 254 of the United Brotherhood of Carpenters and Joiners of America, 2016 N.J. Super. Unpub. LEXIS 753

The Appellate Division of the Superior Court affirms the trial court’s dismissal of Mraz’s claims against the Union based on CEPA and an alleged violation of the employee handbook doctrine established by Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980) Mraz, a member of Local 254, asserted that the Union and union officials were misappropriating funds to further political agendas. The court held that Mraz was not an employee of the Union and therefore neither CEPA nor the Pierce doctrine applied. The Court cited a prior case [Figueroa v. City of Camden, 580 F. Supp. 2d 390 (D.N.J. 2008)] involving unionized public sector firefighters that had reached the same conclusion.