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May 18, 2016

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

Commission Cases

Court Decisions Received

Supreme Court declines to review decision affirming interest arbitration award

In the Matter of the State of New Jersey and New Jersey Law Enforcement Supervisors Ass'n,
certif. den. ___ N.J. ___, 2016 N.J. LEXIS 472

The Supreme Court has declined to review the Appellate Division's decision [443 N.J. Super. 380 (App. Div. 2016)] affirming a Commission decision [P.E.R.C. No. 2014-60, 40 NJPER 495 (¶160 2014)] upholding an interest arbitration award. The award established a first contract between the State and the New Jersey Law Enforcement Supervisors Association ("LESA").

The Appellate Division rejected LESA's argument that the arbitrator should have used its scattergram and methodology, rather than the State's, to calculate the cost of the salary award in determining whether the award complied with N.J.S.A. 34:13A-16.7(b), commonly known as the 2% salary cap. It also rejected the Association's argument that the Commission's decision contravened earlier ones interpreting the Interest Arbitration Reform Act not to provide for the majority representative to be credited with savings that a public employer receives from retirements or other cost reduction due to changes occurring after the scattergram is prepared, nor for the majority representative to be debited for any increased costs to the public employer on account of promotions and other costs associated with maintaining the workforce reflected in the

scattergram.

Parties can agree to have state and federal family leaves run consecutively

In the Matter of Madison Board of Education and Madison Education Association,
2016 N.J. Super. Unpub. LEXIS 1038

The Appellate Division of the Superior Court holds that the Association's grievance asserting that an employee's family leave entitlements under federal and state laws could be used consecutively, rather than concurrently, was not preempted and could be submitted to binding grievance arbitration. The Commission did not issue a ruling as the six Commissioners eligible to participate were split 3-3 on whether the Board's application for a restraint of arbitration should be granted. That effectively denied the Board's application and arbitration was permitted to go forward. The Appellate Division agreed that the outcome of the case turned on preemption. But after reviewing the applicable statutes and regulations, it concluded, as argued by the Association, that they allowed parties to agree that leave could be used consecutively, rather than only concurrently.

Grievance seeking appointment to baseball coach post arbitrable

Belleville Tp. Bd. of Educ. v. Belleville Tp. Educ. Ass'n, 2016 N.J. Super. Unpub. LEXIS 1126

The Appellate Division of the Superior Court affirms the Commission's decision [P.E.R.C. No. 2015-72, 41 NJPER 490 (¶151 2015)], allowing a portion of a grievance filed by the Association to be submitted to binding grievance arbitration. The grievance challenged an assistant baseball coach's non-renewal when the Board reduced the number of baseball coaches from three to two. Applying N.J.S.A. 34:13A-23, which makes "all aspects of assignment to, retention in, dismissal from, and any terms and conditions of employment concerning extracurricular activities" mandatorily negotiable, the Commission declined to restrain binding arbitration of the Board's decision not to assign the Grievant to one of the remaining assistant baseball coach positions, and to the extent the grievance challenged the workload or compensation of the two remaining baseball coaches. The Court affirmed the Commission relying on Jackson Twp. Bd. of Educ. v. Jackson Educ. Ass'n, 334 N.J. Super. 162 (App. Div.), certif. denied, 165 N.J. 678 (2000) in finding the baseball coach assignment and workload/compensation issues mandatorily negotiable pursuant to N.J.S.A. 34:13A-23. The Association did not appeal the portions of the Commission's order that restrained arbitration of some aspects of the Board's action, principally its determination to have only two, rather than three, baseball coaches.

Cases Related to Commission Cases or Jurisdiction

Constitutional claims of retaliation for union activity can be pursued in federal court

Palardy v. Township of Millburn, 2016 U.S. Dist. LEXIS 57904 (unpublished)

Palardy, who reached the rank of Captain with the Millburn police department, alleged that Millburn retaliated against him because of his activities on behalf of the Patrolmen's Benevolent Association and the Superior Officers Association. This included commissioning a study that concluded the department did not need the rank of Captain (Palardy was the only Captain) and denying him retroactive wage increases which allegedly had the effect of reducing his pension entitlement. His suit alleged these counts:

- unconstitutional interference with his employment contract;
- unconstitutional violations of state and federal free speech and association rights;
- unconstitutional violation of federal due process protection;
- unconstitutional violation of state and federal equal protection clauses; and
- conspiracy to deprive his civil rights.

Among Millburn's defenses were that Palardy's contract claims should have been raised via a grievance pursuant to the collective negotiations agreement and that any claims based on alleged retaliation for protected union activity had to be litigated through the filing of unfair practice charges with the Commission under the New Jersey Employer-Employee Relations Act. Ruling on Millburn's motion for judgment on the pleadings, the U.S. District Court agrees that Palardy's contract-based claims were cognizable as grievances and dismisses that part of the complaint. However, the Court declines to dismiss those counts alleging retaliation for protected union activity. It notes that the Town did not cite any authority holding that PERC had exclusive jurisdiction "over free speech claims under the First Amendment and the New Jersey Constitution." It also observes that there were no prior rulings by or pending claims before the Commission on the issues raised in Palardy's federal lawsuit. The Court holds in part:

As this matter is not on appeal from PERC, nor is there a related matter pending before PERC, it appears Defendants argue that this Court lacks jurisdiction . . . because Plaintiff failed to first bring his free speech claims before PERC. . . . However, plaintiffs need not exhaust state administrative remedies before bringing civil rights claims pursuant to [federal law].

Other Cases

Suit allowed for punishment of public employee for perceived exercise of protected speech

Heffernan v City of Paterson, 2016 U.S. LEXIS 2924; 84 U.S.L.W. 4239

The United States Supreme Court holds that where a public employer takes adverse action against an employee, here a Paterson police officer, based on its belief that the employee had engaged in political activity protected by the First Amendment to the United States Constitution, the employee is entitled to sue the employer, even if the employee did not engage in such activity. Here the facts showed:

- During a mayoral campaign, Heffernan’s mother, who was bedridden, asked him to drive downtown and pick up a large campaign sign for a candidate, Spagnola, who was running against the incumbent mayor. Heffernan was a good friend of Spagnola’s. A smaller sign had been stolen from the mother’s yard.
- While at the candidate’s headquarters, he spoke to campaign staff. Other members of the police force saw him, sign in hand, talking to campaign workers, and word spread throughout the force.
- The next day, Heffernan’s supervisors demoted him from detective to patrol officer and assigned him to a “walking post.”

The Court reasoned that the public employer punished Heffernan for what their officials thought was his “overt involvement” in Spagnola’s campaign. In fact, Heffernan was not involved in the campaign but had picked up the sign simply to help his mother. Heffernan’s supervisors had made a factual mistake. It held:

We conclude that . . . the government’s reason for demoting Heffernan is what counts here. When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U. S. C. §1983—even if, as here, the employer makes a factual mistake about the employee’s behavior.

Attorney General Directive on Use of Body Cameras Not Subject to Rule-Making Process

State Troopers Fraternal Association of New Jersey, etc. v. State of New Jersey, Office of the Attorney General, etc., et al., 2016 N.J. Super. Unpub. LEXIS 1096

The Appellate Division of the Superior Court holds that the promulgation of an Attorney General’s directive concerning “Body Worn Cameras” (“BWCs”) did not have to go through the formal process for adopting administrative rules before it was issued and implemented. The AG’s directive gives law enforcement agencies discretion whether to use BWCs. However, if a department chooses to do so, the AG’s directive must be followed. It governs:

[W]hen officers are required to activate their BWCs, when officers are permitted to turn off the recording device during an ongoing police-civilian encounter, and when and for what purposes law enforcement agencies and officers are authorized to access, view, copy, or disseminate stored BWC recordings.

The State Troopers Fraternal Association and the State Troopers Non-Commissioned Officers Association sought and were denied an injunction to prevent implementation of the directive arguing that the rule-making procedures must first be followed. The Appellate Division holds that the directive is exempt from the rule-making procedures under the statutory exclusion for intra-agency and possibly inter-agency statements:

[W]hether the Directive is viewed as an intra-agency or inter-agency statement, we conclude that it is exempt from the formal rule-making process because it does not have a substantial impact on the rights or legitimate interests of the regulated public. We expect that . . . any such impact will be minimal.

Discipline: Ban on surreptitious recording of co-workers upheld in officer's discharge

Palladino v. Township of Waterford , 2016 N.J. Super. Unpub. LEXIS 999

The Appellate Division of the Superior Court sustains a trial court's decision dismissing a non-civil service police officer in a proceeding conducted pursuant to N.J.S.A. 40A:14-150. Among the charges against Palladino was that he surreptitiously recorded statements of fellow officers in violation of departmental policy. Commenting on the policy, the Court states (citations omitted):

Surreptitious audio-recording among officers is inimical to the values of confidentiality and loyalty: one cannot speak freely to fellow officers when every word might be secretly recorded. As confidentiality and loyalty among officers degrade, morale and unit cohesion must suffer, leading ultimately to disruptions in discipline and operational efficiency. It is well-established that "because of the special degree of trust and discipline required in a police force there may be a stronger governmental interest in regulating the speech of police officers than in regulating the speech of other governmental employees." Thus the Department's interests are advanced by the audio-recording ban to the extent any violation could threaten harmony among co-workers, and a loyal close relationship between officers and their superiors.

The Court later notes that Palladino's expressed goal of publicizing under staffing in the department could be accomplished without violating the ban against surreptitious recording.