



**STATE OF NEW JERSEY  
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December 16, 2016

TO: Commissioners  
FROM: Counsel Staff  
RE: Developments in the Counsel's Office Since November 15, 2016

Commission cases

Elimination of In-Service Days and Compensation not Excused by Fiscal Crisis

Robbinsville Twp. Bd. of Educ. v. Washington Twp. Educ. Ass'n., \_\_\_ N.J. \_\_\_, 2016 N.J. LEXIS 1275 (copy attached)

The Supreme Court, in a unanimous opinion, reverses the decision of the Appellate Division of the Superior Court. The appeals court [2015 N.J. Super. Unpub. LEXIS 1909] had affirmed the Commission's determination [P.E.R.C. No. 2014-30, 40 NJPER 253 (¶96 2013)] that the Board did not violate its obligation to negotiate, when, in response to substantial cuts in state aid and other undisputed fiscal constraints, eliminated three in-service days from the faculty work year and proportionately reduced compensation, rather than permanently lay off more staff or eliminate additional educational programs. Before taking that action, the Board thrice asked the Association to reopen the parties' collective negotiations agreement and discuss what changes could be made to help alleviate the crisis. The Association declined those invitations. While noting that "public employees disregard their duties if they do not engage in negotiations fairly and in good faith," the Court holds that the Board's action was not a matter of inherent managerial prerogative. The Court holds that the presence of a fiscal crisis does not allow a public employer to disregard contractual obligations.

Justice LaVecchia's opinion asserts that the Appellate Division took an overly broad view of Borough of Keyport v. Int'l Union of Operating Engineers, Local 68, 222 N.J. 314 (2015), where unpaid temporary furloughs of public employees were implemented while a temporary civil service regulation was in force. It found that the absence of a regulation made the Robbinsville dispute distinguishable. The Court issued this Order: "The judgment of the Appellate Division is reversed and the matter is remanded for any further proceedings consistent with this opinion."

#### Challenge to Order Directing Accumulated Leave Payments Dismissed

Newark and Newark Police SOA, 2016 NJ Super Unpub LEXIS 2634 (copy attached)

The Appellate Division of the Superior Court dismisses an appeal filed by the City of Newark from an interim relief order issued by a Commission designee [I.R. No. 2015-5, 41 NJPER 435 (¶136 2015)] in an unfair practice proceeding. In this, and three other cases, the SOA challenged the City's alteration, during collective negotiations, of the timing and amount of accumulated leave payments receivable by officers who were retiring or separating from service on the dates their active employment ended. The City had proposed changes in those terms and conditions of employment, but the SOA had not accepted those offers. The City sought appellate review of all interim relief orders issued and of the recommended decision of a Hearing Examiner without first filing exceptions with the full Commission as expressly permitted by the rules. The SOA's charges also asserted that the City had repudiated the grievance procedure because grievances it had filed had been sustained by a City representative, but not implemented by the City. With this decision, all of the City's appeals have been dismissed.

#### Other Court Cases

Police HQ external video OPRA exempt; common law may apply

Patricia Gilleran v. Township of Bloomfield, \_\_\_ N.J. \_\_\_, 2016 N.J. LEXIS 1274

The Supreme Court reverses a decision of the Appellate Division compelling release, pursuant to the Open Public Records Act (OPRA), of video footage from a security camera attached to a municipal building. The Court reasoned that compelling release, on demand, of security surveillance video would be contrary to the legislative intent motivating OPRA's exemptions based on security concerns. The Court also found adequate the Township's explanation for denying the request for the footage - that it would undermine the purpose of having the security system to protect the building and persons in it. The Court stated that requests for video from surveillance cameras protecting public facilities are better analyzed under the common law right of access, and it remanded the matter for further proceedings based on the unresolved common law claim.

Patrol Policy not covered by Ticket Quota Law

Fraternal Order of Police, Lodge 1 v. City of Camden, 2016 U.S. App. LEXIS 20600

The United States Court of Appeals for the Third Circuit affirms a lower court's dismissal of the portion of the FOP's lawsuit alleging that the City's "directed patrol" policy violated a state law prohibiting ticket quotas, N.J.S.A. 40A:14-181.2.<sup>1</sup>

Reprimand for Photo Used Teaching Approved Essay did not violate Teacher's Civil Rights

Melynk v. Teaneck Bd. of Educ., 2016 U.S. Dist. LEXIS 161524

A tenured high school teacher of literature and creative writing led a class discussion of an essay that was part of her approved curriculum. The essay concerned a Dutch holiday tradition of people dressing up as Zwarte Piet, a black man who accompanied Santa Claus on his rounds. The teacher, who is of Dutch ancestry, told her class that this tradition still persists in the Netherlands, and she showed them a picture on her cell phone of her Dutch relatives dressed in black face. An African-American student responded that she found the picture to be racist and offensive. The teacher replied "in defense of her family . . . that it was a culture difference" and that the Dutch had abolished slavery before the United States. The matter was investigated and the teacher was reprimanded. The reprimand was challenged in the grievance procedure and an arbitrator ordered it removed. The award was confirmed in Superior Court. Subsequently, the teacher filed a federal lawsuit alleging violation of her rights including free speech.

In this decision, the court dismisses the teacher's federal claims. With regard to the free speech claim, the court noted that the U.S. Supreme Court has established a two-step inquiry to determine whether a public employee's speech is protected by the First Amendment. First, it has to be determined whether the employee spoke as a citizen on a matter of public concern. If so, a balancing test is used to ascertain whether the government entity had an "adequate justification" for treating the employee differently from a member of the general public. In dismissing the claim, the court observed that in-classroom speech made by an educator as part of a curriculum has not been regarded as speech on a matter of public concern.

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<sup>1</sup>As described by the Court:

"[D]irected patrols" [require] police officers to engage with city residents even though the residents are not suspected of any wrongdoing. The announced purpose of the program was to obtain information about the community while making the police presence more visible. . . The directed patrols program consisted of "a structured 15-20 minute deployment into a targeted area to accomplish a specific patrol or crime reduction function."