



**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

January 19, 2017

TO: Commissioners
FROM: Counsel Staff
RE: Developments in the Counsel's Office Since December 16, 2016

Commission Cases

Court Decisions Received

Interest Arbitration Award upheld; Court finds arbitrator made complete and accurate analysis

Borough of Oakland and PBA 164, 2017 N.J. Super. Unpub. LEXIS 23

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Commission's decision [P.E.R.C. No. 2015-75, 42 NJPER 30 (¶7 2015)] upholding an interest arbitration award issued by Arbitrator Robert Gifford to establish the terms of a collective negotiations agreement between the Borough and PBA Local 164 for years 2014 through 2016. The court found that the arbitrator's 2% cap calculations were consistent with Commission precedent interpreting the Act. The court also went into some detail regarding the 16(g) factors of the interest arbitration law to show that the arbitrator addressed all of them and explained the weight given. For example, the court noted that the arbitrator appropriately used existing personnel numbers for the twelve months preceding the new CNA to project costs over its full duration. The court also stated: "Besides reciting general standards, the PBA does not specifically explain where Gifford's analysis fell short or what type of analysis was required instead."

New Appeal

Middlesex County Sheriff and Phillip Mandato

Sheriff's Officer Mandato has appealed the Commission's decision [P.E.R.C. No. 2017-8, 43 NJPER 90 (¶26 2016)] dismissing his unfair practice charge against the Middlesex County Sheriff because it was not timely filed.

OTHER CASES

Sidebar to CNA established an illegal early retirement incentive

Middletown Tp. Bd. of Educ. v. Div. of Pensions, 2016 N.J. Super. Unpub. LEXIS 2735

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a ruling of the Division of Pensions that the Board offered its employees an unauthorized early retirement incentive (ERI). The Board and the Middletown Education Association supplemented their 2005 to 2008 collective negotiations agreement with a program giving veteran teachers and staff who retired or resigned payment for unused sick leave at \$225 per day to a maximum of \$40,000. Some 41 employees accepted this incentive. Shortly after the Board approved the program in 2007, the Division began an investigation. The Board provided requested information in August 2008. The Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) next contacted the Board in February 2014 advising that the program was an unauthorized ERI and the Board was liable for an additional \$5.4 million dollars in pension payments. Before appealing to the Appellate Division, the Board challenged the TPAF's decision in an administrative appeal. Its request for an evidentiary hearing before an Administrative Law Judge was denied.

Montclair State is part of State of New Jersey for 11th amendment immunity purposes

Maliandi v. Montclair State Univ., 2016 U.S. App. LEXIS 23286

The United States Court of Appeals for the Third Circuit, reversing a federal district court, holds that Montclair State University (MSU) is an arm of the State of New Jersey and, pursuant to the Eleventh Amendment to the United States Constitution, is immune from a private suit filed in federal court.¹ After her return to work from breast cancer treatment, Maliandi allegedly was denied her original position and instead was offered an inferior position, which she declined. She was subsequently terminated. Maliandi then filed suit against MSU for wrongful termination, seeking money damages and equitable relief under both the federal Family Medical Leave Act and state law. The unpublished opinion of the appeals court concludes:

¹Eleventh Amendment immunity analysis is complex and fact-sensitive. This decision means that other State colleges will likely be treated the same as Montclair State. But, the opinion notes that, because of its autonomy, Rutgers has not been held to be an arm of the State.

[W]here, as here, the State creates an entity [MSU] that functions on balance as an arm of the State, the Eleventh Amendment's protection must carry the day. . . [U]nless the District Court determines . . . that New Jersey has waived its immunity for Maliandi's [state discrimination] claim, the suit must be dismissed.

Pay Freeze After Move to New Unified Salary Guide did not Violate Tenure Laws or CNA

Paterson Educ. Ass'n v. State-Operated School District of the City of Paterson, 2017 N.J. Super. Unpub. LEXIS 74

The Appellate Division of the Superior Court, affirming a trial court ruling, upholds an arbitration award denying a grievance filed by the Association. Collective negotiations between the District and the Association resulted in two new successive contracts (2010 to 2014 and 2014 to 2017). The second CNA contained two salary guides. One was a traditional, 16-step guide with vertical advancement based upon experience and horizontal movement tied to degrees and/or educational credits. The other guide gave teaching staff members the option of being compensated under an eighteen-step single salary guide regardless of any advanced degree or credits with vertical movement linked to evaluations.

Teaching staff at step 16 of the old guide who had chosen to move to the new guide and had received an “effective” rating would have experienced a reduction in pay. The Association argued that the affected staff should move up two steps to receive a salary increase. The District disagreed and advanced them to step 17 of the “degree-less” guide. To avoid a pay reduction contrary to the tenure laws, the District froze them at the salary they were receiving under the old guide. Interpreting the CNA, the arbitrator held that a two-step advancement was based upon receiving a “highly effective” rating and that the Association failed to prove that the parties agreed to move teaching staff members rated “effective” two steps. The arbitrator and the court also rejected the argument that freezing the employees’ salaries was a de facto loss of an increment. In its unpublished opinion, the court holds that the arbitrator’s analysis was reasonably debatable and, thus, the award should be confirmed.

Correctional Facility could bar Officer from wearing Muslim head covering while on duty

Tisby v. Camden Cnty. Correctional Facility, ___ N.J. Super. ___ (App. Div. 2017), 2017 N.J. Super. LEXIS ___

In a published opinion, the Appellate Division of the Superior Court holds that a public employer was not required to allow a female correction officer to wear a “khimar” (also known as a “hijab”), a tight fitting, veil-less traditional Muslim head covering while on duty. The court affirms a trial court’s dismissal of two, essentially identical, lawsuits filed by the corrections officer. Tisby had been employed since 2002. In 2015 she reverted to the Sunni Muslim faith. She began coming to work wearing the khimar, but was told that doing so violated the facility’s uniform policy. She was sent home and disciplined but advised that if she reported in the

standard uniform, no action would be taken against her. When she kept reporting to work wearing the khimar she was eventually terminated.

The warden acknowledged that Tisby's religious beliefs were sincere but that wearing the garment "would constitute an undue hardship to the Department to allow an officer to wear head-coverings or other non-uniform clothing." Noting that similar cases had been decided in other jurisdictions, the appeals court held that the employer had overcome a prima facie case of discrimination because the head covering could pose a safety threat. The trial judge had noted that accommodating Tisby's request would impose an undue hardship on the facility because of overriding safety concerns, the potential for concealment of contraband, and the importance of uniform neutrality. The opinion also cites a federal appeals court decision noting that khimars, as well as other headgear, would present safety concerns in a prison setting because they could be used as a weapon to choke someone.