



**STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

PO Box 429  
TRENTON, NEW JERSEY 08625-0429

[www.state.nj.us/perc](http://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](mailto:mail@perc.state.nj.us)

March 23, 2017

TO: Commissioners  
FROM: Counsel Staff  
RE: Developments in the Counsel's Office Since February 15, 2017

**COMMISSION CASES**

**New Appeals**

West Orange Bd. of Education and West Orange Education Ass'n, P.E.R.C. No. 2017-37  
The Association has appealed the Commission's decision holding that arbitration of a grievance contesting the termination of a teaching staff member must be restrained due to her not possessing the requisite license/certification to be employed as an occupational therapist.

**Court Decisions**

Selection of best employee for assignment, not based on seniority, is managerial prerogative

Somerset County Sheriff's Office and Policemen's Benevolent Ass'n Local 177, A-0949-15T1, 2017 N.J. Super. Unpub. LEXIS 605 (App. Div. March 10, 2017)

The Appellate Division of the Superior Court, in an unpublished opinion (copy attached), affirms the decision of the Commission [P.E.R.C. No. 2016-23, 42 NJPER 219 (¶61 2015)] restraining arbitration of a grievance contesting the County's refusal to fill a vacant Records Classification Supervisor [Sergeant] position with the most senior qualified officer. The Court agreed with the Commission that the County's selection for the position was a non-negotiable exercise of the County's managerial prerogative to match the best qualified employee with a particular job.

Denials of tuition reimbursement requests preempted by statute and are not arbitrable

Hillsborough Twp. Bd. of Educ. v. Hillsborough Twp. Educ. Ass'n, A-3765-15T2, 2017 N.J. Super. Unpub. LEXIS 457 (App. Div. Mar. 2, 2017)

The Appellate Division of the Superior Court, in an unpublished opinion (copy attached), affirms the decision of the Commission [P.E.R.C. No. 2016-64, 42 NJPER 475 (¶130 2016)] restraining arbitration of grievances filed by the Association seeking reimbursement for college course work taken by a teaching staff member and instructional aides. The Court agreed with the Commission that N.J.S.A. 18A:6-8.5 reserves to the Superintendent decisions to approve or disapprove tuition reimbursement requests subject only to review by the Board of Education. The Court agreed with the Commission that the statute was preemptive.

Conduct that could be basis of criminal charges exempts police termination from special disciplinary arbitration

Isaacson v. Public Empl. Rels. Comm'n, A-2991-14T4, 2017 N.J. Super. Unpub. LEXIS 466 (App. Div. Feb. 27, 2017)

The Appellate Division of the Superior Court, in an unpublished opinion, (copy attached) affirms the decision of the Commission's Director of Arbitration, administratively dismissing former Hardyston Township police officer Joseph Isaacson's petition to have a special disciplinary arbitrator review his termination pursuant to N.J.S.A. 40A:14-209. Because Isaacson's conduct could have provided the basis for criminal charges he was not eligible for the statutory arbitration procedure. Initially, the Director had allowed Isaacson to use the statutory procedure, declined to rule on whether criminal liability was present (no charges had been filed). An arbitrator reduced his penalty. However, the Township, a non-civil service municipality, appealed and, in 2014, the appeals court vacated the award and remanded the case to the Commission for a threshold determination as to whether allegations that Isaacson's conduct could result in criminal charges barred him from having his termination reviewed in arbitration. See Township of Hardyston v. Isaacson, 2014 N.J. Super. Unpub. LEXIS 1663 (App. Div., July 9, 2014)

Termination of Isaacson should not have been reduced by trial court

In the Matter of Joseph Isaacson and Township of Hardyston, A-5119-14T4, 2017 N.J. Super. Unpub. LEXIS 460 (App. Div. Feb. 27, 2017)

The Appellate Division of the Superior Court, in an unpublished opinion related to the above appeal, upholds Isaacson's termination and dismisses an award of attorneys fees to him. After the Commission's Director of Arbitration, on remand, dismissed Isaacson's request to have his termination reviewed by a special discipline arbitrator, he filed an action in Superior Court pursuant to N.J.S.A. 40A:14-147 *et seq.* to have a trial judge conduct a *de novo* review of his termination based on the record adduced at an internal departmental hearing. The trial judge

reduced Isaacson's penalty to a ten-day suspension. The appeals court holds (1) there was no credible evidence supporting a reduction of the penalty of termination based upon lack of training for out-of-jurisdiction stops, and (2) attorneys fees are not available unless the officer is acquitted of all charges.

### **Cases Related to Commission Cases**

#### **Sex/pay discrimination claims proceed where men's lacrosse coach was not classified full-time**

Kevin Zulauf v. Stockton University, et al., 2017 U.S. Dist. LEXIS 24457 (D.N.J. Feb. 22, 2017)

The U.S. District Court for the District of New Jersey grants in part, and denies in part, Stockton University's motion for summary judgment seeking dismissal of a complaint filed by its head coach for the men's lacrosse team. The coach alleged that he had been unlawfully paid less than his female counterpart and that Stockton retaliated against him after he complained about the pay differential by reducing his position from full to part-time. The Court notes that in 2013, Zulauf filed a grievance against Stockton asserting that he had been performing the work of a full-time coach and should therefore be classified and compensated accordingly per the relevant collective negotiations agreement (CNA).

Not discussed by the Court is that Stockton had filed a scope of negotiations petition with the Commission seeking to restrain arbitration of that grievance. The Commission granted Stockton's request in part, and denied it in part (P.E.R.C. No. 2016-5, 42 NJPER 102 (¶28 2015)). The Commission held that the Council of New Jersey State College Locals could arbitrate whether the coach was performing the work of a position covered by the parties' CNA and if so, the applicable salary and benefits, but that it could not challenge in arbitration Stockton's managerial prerogative to create non-unit temporary or part-time seasonal lacrosse coaches.

Here the Court, finding that Stockton is an arm of the State and therefore not an "employer" under N.J.S.A. 34:11-56.1(b) of the New Jersey Wage and Hour Law for purposes of the coach's discrimination in wages claim, grants summary judgment for Stockton on that count. The Court denies Stockton's motion regarding the coach's Equal Pay Act claim, finding that there are factual disputes as to whether he and the female women's lacrosse head coach (who is classified and compensated as full-time) performed equal work. Notably, the plaintiff's direct supervisor testified that the coach's job responsibilities were very similar to those of the full-time female coach, that he attended the same meetings, and that he regularly worked more than his part-time hours because it was necessary for him to properly perform his job responsibilities. The Court questioned the legitimacy of Stockton's proffered non-discriminatory reason for the pay differential that it was trying to comply with Title IX and encourage female students' participation in athletic programs.

The Court also denies Stockton's motion on the coach's NJ Law Against Discrimination (NJLAD) claim, finding that under the McDonnell Douglas burden-shifting framework, the

plaintiff established a prima facie case of sex discrimination and, in response to Stockton's proffered legitimate non-discriminatory reasons, supplied sufficient evidence to demonstrate that Stockton's reasons are pretextual. Finally, the Court denies summary judgment on plaintiff's NJLAD retaliation claim for removing some of his job responsibilities in retaliation for his union grievance, his individual liability claim as to the Athletic Director, and his claim for punitive damages.

### OTHER CASES

Arbitrator hearing tenure charges improperly applied sexual harassment burden of proof

Bound Brook Bd. of Educ. v. Glenn Ciripompa, \_ N.J. \_ (2017), 2017 N.J. LEXIS 227

The Supreme Court reverses the decision of the Appellate Division and vacates an arbitration award issued pursuant to the Tenure Employees Hearing Law. The Board of Education had filed two counts of unbecoming conduct charges against the teacher after an investigation uncovered his pervasive misuse of his District-issued laptop and iPad, as well as evidence of inappropriate behavior toward female colleagues (transmitting nude photographs, asking them on dates, commenting on their physical appearance), often in the presence of students. The arbitrator sustained the computer misuse count but held that the Board failed to prove that the conduct amounted to sexual harassment and reduced the penalty from termination to a six-month unpaid suspension. The Court held that the arbitrator improperly changed the second count of unbecoming conduct into one of sexual harassment, a standard not related to the actual charges. The Court ruled that the arbitrator "imperfectly executed his powers" and exceeded his authority by failing to decide whether Count II stated a successful claim of unbecoming conduct in support of termination. The Court remanded the case for a new arbitration to be conducted by a different arbitrator.

Off-duty, out-of-state, aggravated misconduct by Trooper warranted her termination

New Jersey State Police v. Trooper Nicole Cusanelli, A-5611-14T4, 2017 N.J. Super. Unpub. LEXIS 411 (App. Div. Feb. 22, 2017)

The Appellate Division of the Superior Court, in an unpublished opinion, sustains the decision of the Superintendent of State Police terminating a trooper. While off-duty, the trooper was involved in an auto accident in Philadelphia after which she left the scene and drove into New Jersey. She stopped her car on a highway, lied to responding officers, and was observed to be intoxicated. After she was placed in the custody of Philadelphia police, she:

[G]rew agitated, began banging on the windows, and screamed and directed profanity at the officers. Cusanelli was placed under arrest for disorderly conduct, handcuffed, and placed back in the patrol car. Several officers testified that Cusanelli aggressively resisted arrest. Shortly thereafter, Cusanelli slipped out of

her handcuffs and resumed banging on the window. She was again removed from the patrol car, and continued to struggle with the officers while she was handcuffed a second time.

After lengthy disciplinary proceedings she was terminated. The appeals court rejects arguments that the trooper was denied due process and her statutory rights and that the penalty was excessive.

#### Negotiated sidebar agreement held to be illegal early retirement incentive

East Windsor Regional Board of Education v. Board of Trustees of the Teachers' Pension and Annuity Fund, A-1570-15T1, 2017 N.J. Super. Unpub. LEXIS 527 (App. Div. Mar. 7, 2017)

The Appellate Division of the Superior Court, in an unpublished decision, affirms the Board of Trustees of the Teachers' Pension and Annuity Fund (Board). The Board's decision found that the East Windsor Regional Board of Education (BOE) offered its employees an unauthorized Early Retirement Incentive (ERI) and the BOE was therefore assessed the resultant increased pension liability to the Fund. The BOE and the East Windsor Education Association (Association) had approved a Sidebar Agreement (Agreement) to their 2006-2009 collective negotiations agreement (CNA) that provided teachers with 20 or more years of employment with the BOE who voluntarily terminated their service by June 30, 2007 would be paid for accumulated unused sick days at the rate of \$200 for the first 100, and \$100 for sick days beyond 100, up to a maximum of \$30,000. The Division of Pensions and Benefits determined that the program was an unauthorized ERI program and assessed BOE \$1,519,000 in additional pension liability due to the "acceleration cost" of the incentive.

The BOE appealed the Board's determination, arguing that the Agreement was not an ERI but a labor agreement addressing a mandatorily negotiable term and condition of employment. The Board responded that the Agreement provided an enhanced sick leave payout contingent upon the termination of services by a specific date and was targeted to and attractive only to retirement-eligible employees because it only available to those with 20 or more years of service. The Board explained that negotiations over public employee pensions are preempted by statute and that the Supreme Court decision in Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ., 79 N.J. 574 (1979), clearly held that arrangements offered to employees as an incentive to retire are impermissible unless provided through permissive legislation. The Court finds that the Board's decision was comprehensive and well-reasoned, addressed the issues raised by the BOE, and explained that the Agreement's early retirement incentives were clear and unambiguous.

#### Employer and CSC could not retroactively reduce required time in grade service for promotion

County Correction Captain (PC1189P) and County Correction Lieutenant (PC1202P), Hudson County, A-2162-14T3, 2017 N.J. Super. Unpub. LEXIS 595 (App. Div. Mar. 9, 2017)

The Appellate Division of the Superior Court, in an unpublished decision, reverses and remands the decision of the Civil Service Commission (CSC). The CSC retroactively amended announcements for examinations to allow individuals to be promoted to the titles of Lieutenant and Captain in the County of Hudson's correction system even though they lacked "one year of continuous permanent service" in their prior titles as required by N.J.A.C. 4A:4-2.6(a)(1). The appellants, who had taken the Captain and Lieutenant examinations but were not promoted, challenged the promotion of employees who had been "appointed" to their respective titles for at least one year but had not "served" the duties of their respective titles for at least one year.

The CSC found that it was inappropriate for the County to order a retroactive appointment date when the promoted officers had not actually served and performed the duties of their titles in order to be eligible for the exams per N.J.A.C. 4A:4-2.6(a)(1). However, the CSC held on equitable grounds that it would reduce the one-year service requirement for the examinations to the completion of the working test period.

The Court found that none of the possible exceptions contained in N.J.A.C. 4A:4-2.6(g) to the time requirements for promotional examination eligibility applied. First, although the Commission could have granted the appointing authority's request to reduce the year in grade requirement to the working test period at the time of the subject announcement, the County did not make such a request and the CSC did not grant such reduction prior to examination. The Court also found no evidence that the applicants actually and successfully completed a working test period, and that the CSC could not presume such completion without evidence. The Court noted that even assuming the applicants had completed the working testing period, retroactively changing the announcement after holding the examination was contrary to CSC regulations because even amended requirements must be met by the announcement closing date. The Court also rejected the CSC's argument that the promoted applicants had a reasonable belief of eligibility based on their appointment dates, holding that the County used the retroactive appointment date in violation of N.J.A.C. 4A:4-1.10(c) and that the applicants knew they had not been serving in their appointed titles long enough. The Court ordered the promoted applicants removed from the promotional lists.

Weingarten rights not implicated by meeting asking for signature to confirm receipt of reprimand

Freddie Mitchell v. Borough of Roseland Police Department, A-3046-15T3, 2017 N.J. Super. Unpub. LEXIS 638 (App. Div. March 15, 2017)

The Appellate Division of the Superior Court, in an unpublished decision, reverses the trial court's order setting aside an officer's reprimand and 8-day suspension for insubordination for refusing to comply with an order to sign a performance notice. The trial judge held that the Borough violated the officer's Weingarten rights, finding that he had made a timely request for union representation prior to a meeting with superiors at which he was asked to sign a performance notice regarding excessive use of sick time. The judge also found that the officer had requested clarification regarding the performance notice before signing it, but had not

received it, and that the Borough had not proven by a preponderance of the evidence that the officer was insubordinate or failed to obey a lawful order by not signing the form.

The Appellate Division finds that the officer's meeting regarding the sick leave performance notice was not investigatory because it only involved the presentation of a written reprimand and a request that the officer sign to acknowledge his receipt. Therefore, Weingarten did not apply, and the officer was not entitled to representation at the meeting. The Court also holds that the trial court erred by finding that the officer was not subordinate. It notes that the officer refused to sign the form because he believed the reprimand was not justified, which was not a valid reason for refusing to comply with the order to sign it only to acknowledge his receipt. The Court reinstates the officer's 8-day suspension without pay.

Supervisor not entitled to overtime for stand-by duty under non-supervisory union contract

William F. Bassett, Jr. and Northwest Bergen County Utility Authority, 2017 N.J. Super. Unpub. LEXIS 592 (Law. Div. Mar. 3, 2017)

The Law Division of the Superior Court, in an unpublished opinion, grants the Utility Authority's motion for summary judgment on a claim made by Bassett, a former Maintenance Supervisor. Bassett alleged that the Authority failed to provide him with compensation for "standby duty" he performed from 1989 to 2013 when he was required to be and was on-call for job duties during emergencies. The trial court rejects Bassett's argument that the union contract between the Authority and the "Northwest Bergen County Non-Supervisory Employees Group" applies to him because the contract's recognition clause specifically excludes supervisors, and Bassett had been a supervisory employee since 1988. The trial court also rejects Bassett's reliance on the Authority's Policies and Procedures Manual because the manual states that nothing in it creates a promise of benefits or any contractual right, and Bassett had signed acknowledgement forms that he had read and received it. Therefore, neither the union contract nor the manual were evidence of an enforceable contract between Bassett and the Authority. Finally, the trial court found that Bassett was exempt from the Fair Labor Standards Act's overtime requirements because he was a supervisory employee.