



**STATE OF NEW JERSEY
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November 21, 2017

TO: Commissioners

FROM: Counsel Staff

RE: Developments in the Counsel's Office Since October 19, 2017

Commission Cases

Court affirms ruling that tenure-on-hire procedures are negotiable; not preempted
In re State of New Jersey and Council of N.J. State College Locals, 2017 N.J. Super. Unpub
LEXIS (App. Div. Dkt No. A-4948-15T3)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Commission's scope of negotiations determination (P.E.R.C. No. 2016-14) and holds that procedures pertaining to the granting of tenure to newly hired college/university faculty members are mandatorily negotiable and not preempted by N.J.S.A. 18A:60-16. The statute authorizes colleges to grant tenure upon hire to new faculty members who were previously under tenure at an accredited college or university. It further requires colleges to develop procedures regarding the granting of tenure upon hire and to "include faculty members in the development of the procedures." While the Court observed that the Commission's interpretation of a statute other than the Employer-Employee Relations Act is not entitled to any special deference, it agreed with the Commission that the express language of N.J.S.A. 18A:60-16 requires, rather than preempts negotiations regarding tenure-upon-hire procedures. The Court also rejected the State's arguments that "faculty," as used in the statute, means faculty serving in a governance and managerial capacity and excludes faculty serving in a union member capacity. The Appellate Division rejected, too, the State's argument that Bethlehem Twp. Bd. of Educ. v. Bethlehem

Twp. Ed. Ass'n, 91 N.J. 38 (1982), on which the Commission relied in determining that tenure-upon-hire procedures are negotiable, was distinguishable. Lastly, the Appellate Division disagreed with the State that compelling negotiations over procedures would impinge on the substantive, policy determination of whether or not to grant tenure, stating that the hypotheticals offered by the State lack the requisite significant interference to render the procedures non-negotiable (copy attached).

New Appeals

Borough of Milltown and OPEIU Local 32, P.E.R.C. No. 2018-15, P.E.R.C. Dkt. No. SN-2017-50, App. Div. Dkt. No. A-1306-17T1

The Borough has appealed the Commission's decision declining to restrain arbitration over a grievance that part-time dispatchers were entitled to holiday pay.

Certification denied

In re CWA Local 1040, and N.J. Juvenile Justice Comm. v. Thorpe, 2017 N.J. LEXIS 1039 (Docket No. C-174 September Term 2017)

In CWA Local 1040, District One and State of NJ (Juvenile Justice) and Judy Thorpe, 2017 N.J. Super. Unpub. LEXIS 717, (App. Div. Dkt. Nos. A-0852-13T1 & A-0866-14T1), the Appellate Division of the Superior Court affirmed the Commission's dismissal (P.E.R.C. No. 2013-29 and 2014-9) of unfair practice charges filed by a terminated employee against CWA and the State. The Supreme Court has denied Thorpe's petition seeking review of that decision.

OTHER CASES

Procedural Protections of Title 40A statutes on discipline of fire fighters apply to fire districts

Barnett, v. Commissioners of Fire District No. 1 in Harrison Township, 2017 N.J. Super. Unpub. LEXIS 2706 (Docket No. A-0523-15T2)

In a case involving disciplinary action taken against a fire fighter employed by a fire district, the Appellate Division of the Superior Court holds that the disciplinary procedures of Title 40A apply. It rules:

We are satisfied that the Legislature intended for the notice and hearing requirements to apply to both municipal fire departments and fire districts alike and when a firefighter of a fire district is terminated, the firefighter is entitled to the statutory protections of N.J.S.A. 40A:14-19.

Arbitrator could determine if officers merged into Sheriff's office could receive retroactive pay

Bergen County Sheriff's Office and County of Bergen v. Policemen's Benevolent Association, Local 49, 2017 N.J. Super. Unpub. LEXIS 2787 (Dkt Nos. A-0485-16T2, A-0486-16T2)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court ruling and holds that the County of Bergen (County) agreed, in a collective bargaining agreement, to arbitrate whether the County police officers would receive a retroactive pay increase if the Bergen County Police Department merged into the Bergen County Sheriff's Office (Sheriff's Office). The County contends that the Bergen County Police Department was realigned with, but not merged into, the Sheriff's Office. The Police Benevolent Association, Local 49 (PBA 49), which represents the Bergen County police officers, argues that there was a merger thereby entitling County police officers to a retroactive pay raise. The Court determined that the parties agreed to arbitrate all issues concerning the interpretation of the contract and, therefore, the underlying question concerning the pay increase is to be decided by the arbitrator.

Trial Court improperly modified arbitration award by including conduct beyond the charges

South Jersey Transportation Authority v. IFPTE, Local 196, Chapter 2, et al., 2017 N.J. Super. Unpub. LEXIS ____ (Docket No. A-3898-15T3)

The Appellate Division of the Superior Court, in an unpublished opinion, holds that a trial judge improperly modified an arbitrator's award in a discipline case. An arbitrator sustained some, but not all of the charges against the employee, a parking lot attendant, and imposed a 45-day suspension. The lower court independently reviewed the evidence and held that public policy considerations mandated the termination of the employee, the penalty the employer originally sought to impose. The appeals court reversed and remanded the case to the trial judge. It reasoned:

We do so because the court's analysis — although it has considerable evidentiary support in the record — substantially rests upon findings of specific violations, including drug dealing, which were not charged against [the employee] and which were not adjudicated before the arbitrator. As such, the trial court's decision strays from the strict constraints imposed upon judicial review of arbitration awards under the New Jersey Arbitration Act, N.J.S.A. 2A:24-1 to -11.

In addition to remanding the decision to the trial court, the Appellate Division also remanded it to the arbitrator, stating:

The remand should not stop, however, at the trial court level. Because we share the court's misgivings about the relatively short forty-five-day length of the suspension the arbitrator selected as a sanction, we believe it is appropriate in these distinctive circumstances to: (1) uphold the arbitrator's factual findings, but (2) remand the case to the arbitrator to reconsider whether a longer period of suspension would be more consonant with the proven facts and the applicable public policies.