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March 15, 2018

TO: Commissioners
FROM: Counsel Staff
RE: Developments in the Counsel's Office Since February 14, 2018

Commission Cases

Appeals Withdrawn

The Paterson State-Operated School District has voluntarily withdrawn its appeal of P.E.R.C. No. 2017-63, 43 NJPER 433 (¶121 2017).

The International Academy of Trenton Charter School and the International Academy of Trenton Charter School Education Association have entered into a stipulation dismissing with prejudice the Charter School's appeal of P.E.R.C. No. 2017-24, 43 NJPER 175 (¶54 2016).

Court Decisions

Statute did not preempt CNA requiring higher retiree health care payments

In re New Brunswick Municipal Employees Ass'n, ___ N.J. Super. ___, 2018 N.J. Super. LEXIS 33 (Docket No. A-1041-16T2) (copy attached)

In a published, thus precedential, decision, the Appellate Division of the Superior Court affirms P.E.R.C. No. 2017-22, 43 NJPER 173 (¶52 2016), in which the Commission held that the City of New Brunswick and the representative of its municipal employees could legally agree to have retirees pay a higher percentage of the cost of their health care coverage than the amount mandated by state statutes. Article XXI of the parties' 2015 contract required eligible retirees to pay fifty percent of the cost of their health benefits, but the majority representative argued that

the contribution was preempted by the lower, maximum contribution required by Chapter 78 as set forth in N.J.S.A. 40A:10-21.1 and N.J.S.A. 52:14-17.28c. Agreeing with the Commission's interpretation of the pertinent statutes, the Court stated that N.J.S.A. 40A:10-21.1(d) "plainly preserves the authority of [] employers to negotiate rates for eligible retirees higher than the percentages required by . . . N.J.S.A. 52:14-17.28c." The Court concluded that Article XXI was not preempted by N.J.S.A. 40A:10-21.1.

Other Cases

Whistle blower claim could not stand where officer found unfit for duty

Watts v. Township of West Orange, App. Div. No. A-3420-15T2, 2018 N.J. Super. Unpub. LEXIS 380 (Feb. 20, 2018)

The Appellate Division of the Superior Court, in an unpublished decision, affirms a trial court decision granting summary judgment to the Township and other defendants in a "whistle-blower" lawsuit filed by a discharged police officer. While employed, Watts was the subject of numerous internal affairs (IA) investigations resulting in charges that were sustained in some cases and, in other cases, were not. He received suspensions, remedial training, and transfers. In early 2011, officers were advised that the Township was initiating a restructuring of the police department. Watts alleged that on several occasions in February 2011 at patrol line-ups, supervisors advised officers not to issue summonses or arrest people, stating those functions financially supported the Township. In July 2011, Watts advised a captain of an alleged "work stoppage scheme" to be carried out by members of the police department. The Department initiated an IA investigation based on plaintiff's allegations. Watts then filed his complaint alleging a claim under the Conscientious Employee Protection Act (CEPA). On July 12, 2012, an IA investigation report was generated. The report stated that 101 agency members and one former agency member were interviewed in connection with the alleged work stoppage scheme, as well as six potential civilian witnesses outside the agency. None of those interviewed had knowledge of, directed, or participated in a work stoppage scheme. The report concluded plaintiff's allegations were unfounded. On August 6, 2012, a sergeant prepared a memorandum to a lieutenant requesting a medical and psychological evaluation be conducted on plaintiff. In early October 2012, a different sergeant reported that while on duty, Watts referred to a firehouse tower stating, "Wow, this is a great place to pick people off, I miss being behind a scope of a rifle." He was also alleged to have made a similar statement. Formal charges were issued and a psychological exam deemed Watts unfit for duty. He was then discharged. The trial court held that there was no causal connection between Watts' discharge and his reporting of the summons moratorium "work stoppage" plan and, therefore, Watts did not satisfy the fourth element of his CEPA claim.

Commissioner followed court instructions after appeal remanded

In re Tenure Hearing of Pugliese, App. Div. No. A-5064-14T1, 2018 N.J. Super. Unpub. LEXIS 416 (Feb. 23, 2018)

In a reported decision, [Pugliese v. State-Operated School District of City of Newark, 440 N.J. Super. 501 (App. Div. 2015)] the Appellate Division had remanded two tenure charge cases to allow legal defenses raised by the affected teachers to be considered. On June 1, 2015, the Commissioner of Education issued the following final agency decision:

As directed by the enclosed Appellate Division decision issued May 19, 2015, the Commissioner is returning to [the arbitrator] herewith the file in the above-captioned matter for [the arbitrator] to review the facts anew pursuant to the preponderance of the evidence standard in effect for inefficiency cases prior to the enactment of TEACHNJ, *subject to determination by [the arbitrator] each of respondent's defenses* and any motions filed with [the arbitrator].

[(Emphasis added).]

Pugliese then appealed, asserting that the Commissioner had not followed the court's instructions. In an unpublished opinion on the second appeal, the Court observed that an administrative agency is obligated to apply and follow the decision of an appellate court when acting on a remand from the court's ruling. The Court found that the Commissioner adhered to the remand instructions holding:

We are satisfied the Commissioner complied with our opinion and followed our remand instructions. We did not direct the Commissioner to decide any legal defenses. Rather, we directed the Commissioner to only decide those legal defenses that the Commissioner did not expressly delegate to the arbitrator to decide. [440 N.J. Super. at 503.] In accordance with our decision, the Commissioner delegated all legal defenses to the arbitrator to decide.

In addition, once the Commissioner determined the tenure charges against Pugliese were sufficient to warrant dismissal or reduction in salary, he was required to refer the case to the arbitrator, and had no authority to hear the case, make a final determination, or overturn the arbitrator's decision. N.J.S.A. 18A:6-10, -16 and -17.1(e). Accordingly, the Commissioner's decision to refer the legal defenses to the arbitrator complied with the legal mandates of the TEHL and TEACHNJ.

Charges against coach properly remanded for Board hearing under anti-bullying law

S.G. v. Board of Educ. of the Hunterdon Cent. Reg'l Sch. Dist., App. Div. Docket No. A-5199-15T3, 2018 N.J. Super. Unpub. LEXIS 476 (Mar. 1, 2018)

The Appellate Division, in an unpublished decision, affirms a decision of the Commissioner of Education, remanding to the Board of Education bullying and harassment charges against a wrestling coach for a hearing under an anti-bullying law. The coach was accused of harassing and bullying a special education student. The Court found the Commissioner's decision to be consistent with the governing statute and not arbitrary, capricious, or unreasonable. It also rejected the coach's arguments that he cannot receive due process because the Board is hostile to his position and that the hearing would take place years after the incident. The Court found that the coach made no showing that the passage of time would undermine his due process rights or that the Board cannot be an impartial decision maker.

Lower standard of review where agency could not act on ALJ decision

In re Corbo, App. Div. Docket No. A-5610-15T3, 2018 N.J. Super. Unpub. LEXIS 479 (Mar. 1, 2018)

In an unpublished opinion, Appellate Division holds that the Civil Service Commission (CSC) could not review the initial decision of an Administrative Law Judge (ALJ) because it could not muster a quorum. Corbo appealed from a decision issued by the CSC upholding an ALJ's initial decision removing him as a Union City police officer because he ingested cocaine. On appeal Corbo asserted that the CSC acted without a quorum and used unreliable hearsay to prove the charges against him in violation of the residuum rule. The Court agreed that the record did not contain competent evidence to uphold the dismissal and reversed it. Regarding the quorum issue it held:

We apply the standard of review recently announced in In re Hendrickson, 451 N.J. Super. 262, 272-73, 166 A.3d 269 (App. Div.), certif. granted, 231 N.J. 143, 172 A.3d 1082 (2017), and will, in our limited role, affirm an ALJ's findings if "they are supported by substantial credible evidence in the record," but afford no deference to the ALJ's legal conclusions and review them de novo. As in Hendrickson, the ALJ's decision was deemed adopted because the CSC, for reasons beyond its control, could not muster a quorum. But without the CSC's review, there is no extant "particular and superior expertise in the legislative arena in which [the agency] functions." Id. at 273. Thus we apply, not our usual "highly deferential review of agency decisions," but the less deferential bench trial standard of review. Ibid.

We determine Corbo's argument that the CSC's decision was invalid because it acted without a quorum is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). The CSC did not act without a quorum. The ALJ's decision was deemed adopted pursuant to N.J.S.A. 40A:14-204 without any action by the CSC.

No conflict in having Board counsel represent Board and Board attorneys testify in tenure arbitration against supervisor who was not client of the law firm

Helen Tobia v. Board of Education of Lakewood Township, App. Div. Docket No. A-5336-15T1, 2018 N.J. Super. Unpub. LEXIS 550 (Mar. 12, 2018)

In an unpublished opinion, the Appellate Division of the Superior Court affirms a trial court ruling that no conflict of interest occurred from a law firm's representation of the Board in proceedings to discharge a tenured teacher. Tenure charges filed against a special education supervisor were sustained by an arbitrator and she was discharged. The supervisor often appeared at arbitration hearings with an attorney from the law firm that represented the Board. That same firm represented the Board at the arbitration hearings on the tenure charges, and firm attorneys testified against her. Before the arbitration, Tobia sought to preclude the attorneys from testifying and the firm from representing the Board arguing that it presented a conflict of interest. The arbitrator rejected that motion. Tobia also filed a complaint to vacate the arbitration decision, and the trial court found that although Tobia provided testimony at the arbitration hearings, she was not a client within the meaning of the rules of professional conduct and the firm's representation and testimony of its attorneys in the tenure charge arbitration did not present a disqualifying conflict of interest.

Discharged employee's federal court claims alleging breach of CNA are dismissed.

Burke v. Borough of Red Bank, Civ. Action No. 17-1800, 2018 U.S. Dist. LEXIS 40501 (Mar. 12, 2018)

The United States District Court for the District of New Jersey grants summary judgment dismissing a discharged public works employee's breach of contract claims against his employer. Burke alleged that he had a learning disability and would not be able to obtain a commercial driver's license (CDL) that Red Bank said he was required to possess. Neither the collective negotiations agreement (CNA) nor the personnel manual covering Burke's laborer job description contained a CDL requirement. The Red Bank defendants argued, and the Court agreed, that Burke's claims asserting violations of the CNA were barred by N.J.S.A. 34:13A-29, providing in part that "[t]he grievance procedures that employers covered by this act are required to negotiate pursuant to section 7 of P.L.1968, c.303 (C.34:13A-5.3) shall be deemed to require binding arbitration as the terminal step with respect to disputes concerning imposition of reprimands and discipline as that term is defined in this act." The Court held that the breach of

contract claims could only be heard in arbitration. Burke's claims against Red Bank alleging constitutional violations and violations of the New Jersey Law Against Discrimination as well as his claims against his majority representative were not affected by the dismissal of the contract claims.