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September 24, 2018

TO: Commissioners
FROM: Counsel Staff
RE: Developments in the Counsel's Office Since
August 13, 2018

Commission Cases

**Confidential secretary could not retain coordinator positions
under unit work rule**

Ocean Twp. Bd. of Educ. v. Waretown Educ. Ass'n, 2018 N.J. Super.
Unpub. LEXIS 1927, Dkt. No. A-3457-16T2

The Appellate Division of the Superior Court, in an unpublished decision, reverses the Commission's decision [P.E.R.C. No. 2017-45, 43 NJPER 325 (¶92 2017)] that restrained arbitration of a grievance alleging that the Board should not have allowed unit work to be performed by a confidential employee outside of the unit. The employee had performed the coordinator duties prior to her promotion to a position that was confidential. The Court agreed with the Education Association, "that whoever is hired to fill the positions must be part of WEA because the unit represents the positions. We are convinced that to rule otherwise would deny WEA its collectively bargained right to grieve alleged violations of the CBA; in this case, concerns over the transfer of WEA unit work without negotiation."

Other Cases

Where agency does not review ALJ recommendation, review standard is unchanged

In the Matter of William R. Hendrickson, Jr., Department of Community Affairs, ___ N.J. ___, 2018 N.J. LEXIS 1100

The Supreme Court unanimously reverses the decision of the Appellate Division of the Superior Court which had held that the normal standard of review of an administrative agency decision does not apply where a "deemed adopted" recommended decision of an Administrative Law Judge, becomes the final decision of the agency. An ALJ recommended that a proposed disciplinary termination of a Department of Community Affairs (DCA) employee be reduced to a six month unpaid suspension. The Civil Service Commission was unable to review the ALJ's ruling because it lacked a quorum. Because the CSC did not review the recommendation, under N.J.S.A. 52:14B-10(c) it became the final action of the CSC. The DCA appealed to the Appellate Division which ruled that "the deemed-adopted statute does not require traditional deferential appellate review of the ALJ's decision," and reinstated termination as the penalty. The Supreme Court held: "[W]e do not substitute our judgment for that of the ALJ merely because we might have come to a different outcome. So long as reasonable minds might differ about the appropriateness of the disciplinary sanction, we have no charge to second-guess the call made by the ALJ." It also observed: "Additionally, merely because the factual findings and rulings made by ALJs are oftentimes contingent on whether an agency accepts, rejects, or modifies an ALJ's decision does not mean that ALJs are second-tier players or hold an inferior status as factfinders." The six month suspension was reinstated as the penalty.

Grievance Arbitration Cases

Contract did not require reimbursement of retiree spouse's Medicaid premium

Rutherford PBA Local 300 v. Borough of Rutherford, 2018 N.J. Super. Unpub. LEXIS 2050, Dkt. No. A-2055-16T1

The Appellate Division of the Superior Court, in an unpublished decision, affirms a trial court ruling that confirmed a grievance arbitration award. The award held that the Borough did not violate the parties collective negotiations agreement when it declined to reimburse a retired officer for the cost of Medicare

premiums paid by his spouse. The Court summarized the award:

[T]he arbitrator issued a written opinion concluding that Local 300 did not establish by a preponderance of the evidence that the Borough breached the CNA when it declined to reimburse the retiree for his wife's Medicare Part B premiums. The arbitrator found that the provision of Article XXXII obligating the Borough to pay the cost of benefits applies only to the insurance coverage of active employees and their families. He concluded that the provision addressing retirees required the Borough to provide a parity in benefits, not costs, between active employees and retirees, with an obligation on the Borough to bear the cost only of a wrap-around plan to bridge any gap in benefits.

Court holds arbitration award revoking tenure and dismissing gym teacher was based on substantial evidence.

Taylor v. Bd. of Education of Englewood, 2018 N.J. Super. Unpub. LEXIS 1919, Dkt. No. A-1867-16T3

The Appellate Division of the Superior Court, in an unpublished decision, agrees with a trial court that an arbitration award, revoking a gym teacher's tenure, should be affirmed. In confirming the award the trial judge applied the "reasonably debatable" standard normally applicable to public sector grievance arbitration award. The teacher argued that because the arbitration was mandated by the Tenure Employees Hearing Law, there should be stricter scrutiny of the award. The court held:

Here, because the arbitration was compelled by statute under N.J.S.A. 18A:6-16, "judicial review should extend to consideration of whether the [arbitration] award is supported by substantial credible evidence present in the record." The court used the reasonably debatable standard that applied before N.J.S.A. 18A:6-16 was amended in 2012. L. 2012, c. 26, § 8. That said however, based on our review of the record, we conclude that the arbitrator's findings are supported by substantial credible evidence. We have no basis to disturb them.

Court vacates award reducing penalty for insubordination

City of Newark v. SEIU Local 617, 2018 N.J. Super. Unpub. LEXIS 2026, Dkt. No. A-1470-16

The Appellate Division of the Superior Court, in an unpublished decision, reverses a trial court and vacates an arbitration award which had overturned a three-day suspension issued for insubordination. The arbitrator reasoned that had not carried its burden of proving the employee "knowingly and willfully" engaged in an act of insubordination and directed that the employee attend a corrective conference. The appeals court holds that the arbitrator did not have grounds to conclude that an act of insubordination was subject to the City's progressive discipline policy and could be the basis for a suspension.

Discharge and demotion cases

Officer's firing violated Free speech and Freedom of Association

Foster v. Twp. of Pennsauken, 2018 U.S. Dist. LEXIS 132487

The United States District Court for the District of New Jersey finds, under the facts and circumstances of this case, that the Township retaliated against a police officer by discharging him because of his advocacy of twelve hour shifts and his union activity in connection with that position.

Commissioner's calculation of seniority rights after RIF affirmed

Concato v. Board of Educ. of the River Dell Reg'l High Sch. Dist., 2018 N.J. Super. Unpub. LEXIS 1914, Dkt No. A-3066-16T2

The Appellate Division of the Superior Court, in an unpublished decision, affirms the decision of the Commissioner of Education regarding the seniority rights of a tenured, full-time industrial arts teacher whose position was reduced to part-time for reasons of economy. The Commissioner held that the teacher could not bump into the full-time technology position he sought because he did not possess the required certification.

Court upholds discharge of at will sheriff's investigators

Jarema v. Middlesex Cty., 2018 N.J. Super. Unpub. LEXIS 1943, Dkt. Nos. A-5250-14T3, A-5328-14T3

The Appellate Division of the Superior Court, in an unpublished decision, affirms, based on the reasoning of the trial court, an order upholding the discharge of two sheriff's investigators from their at-will positions. A departmental hearing officer determined that the two investigators obtained their jobs from the former sheriff under a "pay to play" arrangement. A trial judge conducted a trial de novo based on the record developed before the Hearing Officer, and dismissed plaintiffs' complaints. The Judge memorialized his findings and explained the legal basis of his ruling in a comprehensive letter-opinion. The appeals court agreed there was overwhelming evidence to support the successor Sheriff's decision to terminate the employment of both investigators.

Absent showing that City adopted sexual harassment policy, police lieutenant's claim could not be dismissed on summary judgment

Deborah Upchurch v. City of Orange Township, et al., 2018 N.J. Super. Unpub. LEXIS 2070, Dkt. No. A-0236-16T4

The Appellate Division of the Superior Court, in an unpublished decision, affirms a trial court orders granting summary judgment dismissing a police lieutenant's claims of sexual harassment against the Director of Police, but reverses an order granting summary judgment for the City and the Police Department. The trial court found that there was no evidence the City had knowledge of the alleged harassment. However, the appeals court noted:

Significantly, the trial court never mentioned whether the Orange defendants had a policy in place to prevent sexual harassment. It does not appear from the appellate record the Orange defendants included or argued such a policy in support of their summary judgment motion. That flaw is fatal.