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February 25, 2019

TO: Commissioners
FROM: Counsel Staff
RE: Counsel's Office Developments since January 17, 2019

COMMISSION CASES

DECISIONS

In Ocean Twp. Bd. of Educ. v. Waretown Educ. Ass'n, 2019 N.J. LEXIS 201, the Supreme Court denied the Board of Education's petition seeking review of the decision of the Superior Court Appellate Division (2018 N.J. Super. Unpub. LEXIS 1927). The Appellate Division reversed P.E.R.C. NO. 2017-45, 43 NJPER 325 (¶92 2017) that restrained arbitration of a grievance challenging the transfer of unit work to a confidential employee.

NEW APPEALS

The Burlington City Board of Education has appealed the Commission's decision, P.E.R.C. No. 2019-27, 45 NJPER 242 (¶64 2019), which denied its request to restrain arbitration over a grievance challenging the application of its sick leave verification policy.

OTHER CASES

Volunteer firefighter injured during fire covered by temporary disability laws despite being unemployed

Jennifer Kocanowski v. Township of Bridgewater 2019 N.J. LEXIS 264 (Dkt. No. A-55-17)

The Supreme Court holds that statutory language concerning whether volunteer firefighters must have other employment to be covered by temporary disability insurance was ambiguous. It concludes that the Appellate Division's judgment that the firefighter was ineligible for those benefits should be reversed. It construes the law's legislative history as showing a strong intent to provide temporary disability coverage to volunteer firefighters at the maximum compensation provided for in the Act. Kocanowski and other volunteer firefighters from Bridgewater responded to a multi-alarm fire in Franklin Township. While carrying equipment, Kocanowski slipped on ice. She broke the upper shaft of her right fibula, severely damaged her ankle, and tore several ligaments. Her doctors discovered two fractures in her foot, a torn meniscus in her acutely arthritic left knee, damage to the peroneal nerve on her right leg, and impairment to her back -- all sustained as a result of the fall. Kocanowski was unable to return to volunteer firefighting and her previous outside employment as a nanny or home health care aide. Kocanowski received \$125 per week in benefits from the Finderne Fire Department for one year following the accident, but had no other source of income.

Award of longevity credit and back pay during involuntary disability leave affirmed

Orange Police Department Superior Officers Association v. City Of Orange Township , 2019 N.J. Super. Unpub. LEXIS 96 (Dkt. No. A-1198-17T3)

The Appellate Division of the Superior Court, in an unpublished decision, affirms a trial court decision confirming a grievance arbitration award. The SOA filed a grievance on behalf of a police lieutenant who sought longevity credit and back pay for the 41 months she had been placed on an involuntary disability leave. An arbitrator awarded longevity credit and back pay with interest. The trial judge sustained the award. After discussing the procedural and substantive issues, the appeals court affirmed:

In summary, the City agreed to arbitrate this dispute, participated in the arbitration,

acknowledged that [the officer] was entitled to credit for the forty-one months she was on involuntary disability pension, repeatedly informed [the officer] that her longevity would be corrected, but now objects to the arbitrator's award of back pay and interest. Judge Moore comprehensively analyzed each of the City's arguments. The facts set forth in his opinion are based on credible evidence in the record. His summary of the governing law is correct. Having conducted a de novo review, we agree with Judge Moore's conclusion that there is no basis for vacating or modifying the arbitrator's awards. Accordingly, Judge Moore correctly confirmed the awards.

Arbitration award limiting increment withholding to one year reinstated

Trenton Board of Education v. Trenton Education Association, 2019 N.J. Super. Unpub. LEXIS 201 (Dkt. No. A-0262-17T4)

The Appellate Division of the Superior Court, in an unpublished decision, reverses a trial court ruling that had vacated an arbitrator's award limiting the withholding of a teaching staff member's salary increment to one year.

A middle school teacher was cited for various deficiencies in professional conduct including problems with teaching practices, failure to attend mandatory meetings or to submit required reports, and including in students' progress reports vulgar, expletive filled quotations of their alleged comments during classes. The Board approved the increment withholding at its May 31, 2016 meeting, stating that the withholding would be "effective September 1, 2016," without setting a termination date for that action.

The arbitrator found just cause for the Board's action but stated, "it is characteristic of an increment withholding that its effects put the disciplined employee at a lower step than he would have been for the rest of his career until he reaches top pay on the salary guide." She found that in light of certain mitigating conduct, an increment withholding of one year was appropriate. She ordered plaintiff to "prospectively, but not retroactively," restore the teacher's salary in September 2017 to where it would have been had he not been disciplined. The appeals court reasoned:

Simply stated, the arbitrator here was within her authority to determine whether there was just cause to impose an indefinite salary increment withholding or some other remedy once she determined [the teacher's] conduct was "unbecoming." The fact that the question put to the arbitrator did not contain the word "permanent" did not limit the arbitrator's authority to modify the discipline imposed once she determined it was not warranted.

Resignation to avoid tenure charges/refusal to accept suitable work barred unemployment benefits

Ann T. Seiderman v. Board of Review, et al., 2019 N.J. Super. Unpub. LEXIS 212 (Dkt. No. A-0885-17T3)

The Appellate Division of the Superior Court, in an unpublished decision, affirms the ruling of an unemployment tribunal denying unemployment compensation to a tenured teaching staff member. Seiderman resigned her position with the New Brunswick Board of Education rather than face tenure charges alleging "unsatisfactory professional competence."

Before the 2016-2017 school year began, Seiderman had received evaluations specifying her deficiencies and her salary increment for the previous year was withheld. In July 2016, she was offered, but rejected, a paraprofessional position despite being told that the Board was planning to file tenure charges against her. Seiderman was notified that the Board would review tenure charges at its November 15, 2016 meeting. She submitted her resignation on November 14, 2016, with an effective date of December 31, 2016.

The appeals court rejects the teacher's claim that her resignation was involuntary, as well as other procedural arguments.

Operative date of discharge is date of last salary payment, not notice of termination

Sandra Turner-Barnes v. Camden Cty. Coll., 2019 N.J. Super. Unpub. LEXIS 253, Dkt. No. A-1639-17T3

The Appellate Division of the Superior Court, in an unpublished decision, reverses a trial court decision dismissing Turner-Barnes' Law Against Discrimination lawsuit on grounds that she failed to file it within the applicable statute of limitations.

On January 23, 2015 Turner-Barnes was given a letter that her employment would cease that same day, but that she would "remain on the payroll and receive [her] full salary through June 30, 2015," and "[a]ny accrued, unused vacation [would] be paid to [her] no later than July 2015."

Turner-Barnes' February 10, 2015 filing with the Division on Civil Rights listed her discharge date as January 23, 2015. That filing was withdrawn after Turner-Barnes filed a superior court complaint, based on the LAD on June 29, 2015. The trial judge dismissed the complaint filing it was filed after expiration of the statute of limitations.

In ruling that Turner-Barnes' lawsuit was timely the appeals court relied found the reasoning and holding of Alderiso v. Medical Center of Ocean County, 167 N.J. 191, 194-195 (2001) applicable to LAD lawsuits. The Supreme Court ruled:

We hold that when the employer's alleged conduct consists of wrongful termination, the employee's cause of action under CEPA accrues on the date of actual discharge. We interpret that date to mean the last day for which the employee is paid a regular salary or wage. It does not include any subsequent date on which severance, health, or other extended benefits are paid. For computation purposes, the first day to be included in the . . . limitations period is the day after the date of discharge.

Police discipline/termination non-civil service jurisdiction G.Y. v. Township of Hanover, 2019 N.J. Super. Unpub. LEXIS 381 (Dkt. No. A-2600-17T1)

The Appellate Division of the Superior Court, in an unpublished decision, affirms a trial court decision sustaining a police officer's discharge. After an internal affairs investigation that followed an alleged domestic violence incident involving G.Y. and his wife, the Hanover officer was terminated. A two-day trial court *de novo* hearing upheld the disciplinary discharge. In addition to procedural and evidentiary arguments, the officer, who, prior to the domestic violence incidents had 13 disciplinary sanctions on his record, argued to the appeals court that termination was inconsistent with the concept of progressive discipline.