



STATE OF NEW JERSEY
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January 17, 2020

TO: Commissioners
FROM: Counsel Staff
RE: Counsel's Office Developments since December 18, 2019

New or Continuing Appeals

Smith v NJEA, 2019 U.S. Dist. LEXIS 205960

The plaintiffs have filed a Notice of Appeal with the United States Court of Appeals for the Third Circuit from the decision of the U.S. District Court dismissing their lawsuit. A summary of the decision appears in the December 2019 counsel report. The Counsel's office has entered an appearance to represent the Chair and members of the Commission who were named defendants in Smith. The Smith appeal has been consolidated with a similar case, Fischer, in which the Commission members were not sued.

City of Burlington Bd. of Educ. v. City of Burlington Educ. Ass'n, 2019 N.J. Super. Unpub. LEXIS 2422 (Dkt No. A-2440-18T3)

The Board of Education is seeking review by the New Jersey Supreme Court of this decision involving the denial of sick leave. The teacher was not at work on the day of the Philadelphia Eagles Super Bowl parade and failed to produce a doctor's note. The Appellate Division upheld the Commission's ruling (P.E.R.C. No. 2019-027) that the dispute could be submitted to binding grievance arbitration.

City of Jersey City and Jersey City Pub Ees, Inc., Loc 245 and IBT, Loc 641, P.E.R.C. No. 2020-24, (Dkt. No. A-1823-19)

Local 245 has appealed the Commission's decision dismissing its clarification of unit petitions and related unfair practice charges seeking to clarify its unit to include former Jersey City Incinerator Authority (JCIA) employees.

Boro of Carteret and FMBA Local 67, P.E.R.C. No. 2020-23, (Dkt. No. A-1845-19)

The Borough has appealed the Commission's decision denying its request for a restraint of binding arbitration of Local 67's grievance contesting the Borough's failure to re-assign probationary firefighters from a daytime weekly work schedule to 24-shifts at the completion of their academy training.

City of Newark and Newark Police SOA, I.R. No. 2020-3, P.E.R.C. No. 2020-29, App. Div. Dkt. Nos. AM-0242-19

The City seeks leave to appeal from a Commission designee's order, which the Commission declined to reconsider, granting interim relief based on an unfair practice charge alleging that Newark repudiated a contract article and unilaterally changed terms and conditions of employment regarding investigations and disciplinary review procedures during collective negotiations for a successor agreement.

CASES

Commission decisions

Arbitrator could set salaries after merger of Bergen Cty offices

In re Bergen County Sheriff's Office, 2019 N.J. Super. Unpub. LEXIS 2629 (Dkt. No. A-1157-18T2)

In an unpublished opinion, the Appellate Division of the Superior Court affirms the decision of the Commission, (P.E.R.C. No. 2019-07) denying the Sheriff's request to restrain arbitration of a grievance filed by the PBA contesting the refusal to implement a compensation provision that was allegedly triggered by a merger/consolidation between the Sheriff's Office and the Bergen County Police Department. Affirming the Commission's ruling, the court ruled that the issue of what salary increases are due to the county police officers was properly held by the agency to be within the jurisdiction of an arbitrator. The Court also rejected a PBA cross-appeal attacking the Sheriff's standing to file a negotiability challenge.

OTHER CASES

Rules re leave exhaustion for light duty were discriminatory

Delanoy v. Twp. of Ocean, ___ N.J. Super. ___, 2020 N.J. Super. LEXIS 1 (Dkt. No. A-2899-17T4)

In a published, thus precedential opinion, the Appellate Division of the Superior Court reverses a trial court's dismissal of a pregnancy discrimination suit brought by a female police officer. The court construes, for the first time in a published opinion, the New Jersey Pregnant Workers Fairness Act ("PWFA"), a statute that explicitly prohibits pregnancy-based discrimination in employment and in other contexts. Among other things, the PWFA obligates employers, subject to an "undue hardship" exception, to provide "reasonable accommodations" in the workplace to pregnant women upon their request, and to not "penalize" such women because of their pregnant status. N.J.S.A. 10:5-12(s).

When Delanoy found out she was pregnant, she asked to be transferred to a light-duty or less strenuous position. She was assigned to non-patrol duty, under the department's maternity assignment policy. To take a maternity assignment, the officer must first use up all of her accumulated paid leave time. However, the Department's policy providing light-duty assignments for nonpregnant, injured officers, gives the Police Chief the authority to waive the exhaustion of leave condition.

The court vacates the trial court's entry of summary judgment in favor of defendants, holding that the maternity assignment policy, as written, unlawfully discriminates against pregnant employees as compared to nonpregnant employees who can seek and obtain a waiver of the loss-of-leave-time condition.

Teacher could not achieve tenure as bedside tutor

Mirda v. Board of Educ., Union County Educational Services Commission, 2019 N.J. Super. Unpub. LEXIS 2557 (Dkt. No. A-1477-18T4)

The Appellate Division of the Superior Court, in an unpublished opinion, upholds the ruling of the Commissioner of Education, that an employee who instructs hospitalized students could not acquire tenure as a "bedside tutor." The Educational Services Commission provides one-to-one bedside instruction at a regional medical center for students enrolled in various schools within the Commission's jurisdiction who are hospitalized and unable to attend regular classes. A person providing bedside instruction

is designated as either an Inpatient Teacher (Teacher) or Bedside Tutor (Tutor). A Teacher is a full-time salaried Commission employee. A Tutor is paid hourly and has no specific work hours. Mirda had the appropriate certifications and length of time to qualify for tenure unless a statutory exclusion applied. The Court held:

We agree that Mirda did not acquire tenure rights for the cogent reasons expressed by the ALJ. Based on the case law, statute, and applicable regulations, the [Administrative Law Judge] correctly concluded that bedside tutors whose function is akin to a substitute or temporary replacement teacher or home instructor are acting in place of students' regular classroom teachers and not entitled to tenure.

Suit alleging politics delayed promotion could be pursued

Garciga v. Town of W. N.Y., 2019 N.J. Super. Unpub. LEXIS 2649
(App. Div. Dkt. No. A-2828-16T3)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses a trial court's dismissal of a lawsuit filed by a West New York police officer against the mayor and the Public Safety Commissioner alleging he was passed over for promotion for political reasons in violation of civil rights and anti-racketeering statutes. Garciga placed second on a promotional exam. Then he began participating in a political campaign in support of his brother-in-law's candidacy for Freeholder. The officer at the top of the list was promoted to lieutenant but further promotions were delayed. Garciga who was eventually promoted, was pressured to support the candidate running against his brother-in-law. The trial court reasoned that because Garciga was promoted he suffered no adverse employment action. The appeals court held that sufficient facts had been alleged to overcome a motion to dismiss.