



STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PO Box 429  
TRENTON, NEW JERSEY 08625-0429

[www.state.nj.us/perc](http://www.state.nj.us/perc)

ADMINISTRATION/LEGAL  
(609) 292-9830

CONCILIATION/ARBITRATION  
(609) 292-9898

UNFAIR PRACTICE/REPRESENTATION  
(609) 292-6780

*For Courier Delivery*  
495 WEST STATE STREET  
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089  
EMAIL: [mail@perc.state.nj.us](mailto:mail@perc.state.nj.us)

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**MEMORANDUM**

**TO:** Commissioners

**FROM:** Robert E. Anderson  
General Counsel

**SUBJECT:** Monthly Report on Developments in the Counsel's Office Since May 31, 2007

**Commission Cases**

An Appellate Division panel has issued a published opinion affirming the Commission's decisions in Camden Cty. Prosecutor and Camden County Assistant Prosecutors Ass'n, P.E.R.C. No. 2007-9, 32 NJPER 283 (¶117 2006) and Union Cty. Prosecutor and Union Cty. Asst. Prosecutor's Ass'n, P.E.R.C. No. 2007-10, 32 NJPER 286 (¶118 2006), consol. and aff'd, 2007 N.J. Super. LEXIS 186 (App. Div. 2007) (copy attached). In both cases, the Commission held that assistant prosecutors were not engaged in performing police services and thus were not entitled to invoke interest arbitration.

An Appellate Division panel has issued an unpublished decision reversing Bridgewater Tp. and Bridgewater Tp. PBA Local 174, P.E.R.C. No. 2006-62, 32 NJPER 46 (¶24 2006), rev'd App. Div. Dkt. No. A-3342-05T3 (6/5/07) (copy attached). The Commission had held that the Township was required to negotiate with the majority representatives of its police officers and superior officers before it ended a long-standing practice of allowing officers to use accumulated sick leave days for terminal leaves before they retired. A contract clause governed payment of a lump sum to employees who had retired based on their unused sick days, but did not address the terminal leave benefit and thus did not negate the statutory duty to negotiate over the elimination of that benefit. While the Township Council did not know that the previous mayor had authorized officers to take terminal leave, the Commission rejected the Township's argument that

continuing the benefit would be ultra vires. The Commission reasoned that the officers did not have a contractual right to have the benefit continued, just a statutory right to engage in negotiations before the benefit was ended and thus there was no question concerning the mayor's authority to bind the Township contractually. The panel reversed, reasoning that the contract calling for a lump sum payment governed the terminal leave benefit as well and deprived the mayor of any authority to grant a more generous benefit.

An Appellate Division panel has affirmed Bergenfield Bd. of Ed. and Bergenfield Ed. Ass'n, P.E.R.C. No. 2006-69, 32 NJPER 82 (¶42 2006), aff'd App. Div. Dkt. No. A-004519-05T2 (6/29/07) (copy attached). The Commission declined to restrain arbitration over an increment withholding given its determination that the withholding was predominately based on reasons besides teaching performance. The Court held that this determination was not arbitrary or capricious.

An appeal has been filed in Toms River Tp. v. Teamsters Local 97, P.E.R.C. No. 2007-56, 33 NJPER 108 (¶37 2007). The Commission held that an arbitration award upholding a grievance was within the scope of negotiations. The arbitrator concluded that the employer violated the parties' contract when it deprived unit members of overtime opportunities by allowing a subcontractor's workers to remove trees outside of regular work hours.

Judge Ciccone of the Somerset County Superior Court has ordered enforcement of the interest arbitration award affirmed by the Commission in Somerset Cty. Sheriff's Office and Somerset Cty. Sheriff FOP, Lodge No. 39, P.E.R.C. No. 2007-33, 32 NJPER 372 (¶156 2006), App. Div. Dkt. No. A-1899-06T3. But she denied the FOP's application for the counsel's fees incurred in seeking enforcement and for post-award interest on the withheld money. The FOP has appealed the denial of that application.

Oral argument has been scheduled for July 24 in State of New Jersey and Policemen's Benevolent Ass'n, Local 105 and New Jersey State Corrections Ass'n, FOP Lodge 200, D.R. No. 2006-18, 32 NJPER 145 (¶66 2006), review denied P.E.R.C. No. 2006-92, 32 NJPER 223 (¶92 2006). The agency dismissed the FOP's election objections and certified the PBA as the majority representative of correction officers employed by the State of New Jersey.

The Appellate Division has granted the Commission's motion for a remand in Berkeley Tp. and Berkeley Tp. Police SOA, P.E.R.C. No. 2007-25, 32 NJPER 344 (¶144 2006). The Commission held that a State Health Benefits regulation preempted the employer's successor contract proposal to modify health benefits to include premium sharing for dependents. After this decision was issued, the Legislature amended the statute governing the State Health Benefits Program in a manner which may affect the outcome of this case. The parties and the Commission thus agreed the case should be remanded for the Commission to consider the significance of the amendment. The Commission must issue its decision by September 11.

Judges Lefelt and Kestin of the Appellate Division have denied an emergent stay application and a motion for leave to appeal an interlocutory order in State of New Jersey Judiciary and Probation Ass'n of NJ, Case-Related Prof. Unit, I.R. No. 2007-14, \_\_\_ NJPER \_\_\_ (¶\_\_\_ 2007). A Commission designee denied PANJ's request for interim relief to the extent it sought to block a directive requiring probation officers to perform home inspections or to require the Judiciary to provide training first. But the designee ordered the Judiciary to negotiate over certain safety matters. The Judiciary then filed its application and motion with the Appellate Division, but the Court denied these requests for failure to exhaust administrative remedies. Under R. 2:9-7, an application for a stay pending appeal must be filed with the agency; by Commission resolution, the authority to entertain such applications has been delegated to the Chairman. The Chairman later stayed the interim relief order until the Commission's next meeting.

### **Other Cases**

In Raspa v. Office of the Sheriff of the County of Gloucester, 2007 N.J. LEXIS 693 (2007), the New Jersey Supreme Court dismissed a Law Against Discrimination lawsuit filed by a county corrections officer against the sheriff. The officer contended that the sheriff violated the duty to reasonably accommodate his Graves' disease disability when it terminated his light duty assignment and sought involuntary disability retirement benefits for the officer. The Court held that the officer did not possess the bona fide occupational qualifications for his position since his eye condition precluded contact with inmates and that the employer was permitted to limit light duty assignments to those employees who had temporary disabilities. Justices Long and Zazzali dissented.

The New Jersey Supreme Court has upheld a Merit System Board determination that termination was the appropriate penalty for a police officer repeatedly found to have been sleeping on duty. In re Carter, 2007 N.J. LEXIS 702 (2007). The Court reversed an Appellate Division decision finding that the MSB should have applied progressive discipline concepts to reduce the penalty and concluded instead that the officer's infractions were serious enough to support the penalty even without prior discipline.

In In re Herrmann, 2007 N.J. LEXIS 721 (2007), the Division of Youth and Family Services discharged a Family Services Specialist Trainee who held a lit cigarette lighter in front of a child's face and near oxygen tanks during an investigation of suspected child abuse. The Merit System Board upheld the termination, but an Appellate Division panel vacated it on the basis that the MSB should have applied progressive discipline principles to reduce the penalty. The New Jersey Supreme Court rejected that approach and upheld the MSB's penalty removing the employee. The Court concluded:

... the MSB decision recognized legitimate public policy reasons for not insisting that DYFS retain an employee who, in so short a time, lost the trust of her employer. The Appellate Division

impermissibly imposed its own judgment as to the proper penalty in this matter when the MSB's penalty could not be said to be either illegal or unreasonable, let alone "shocking" any sense of fairness. (Slip opin. at 26-27).

The New Jersey Supreme Court has also upheld a Merit System Board determination that a six-month suspension was the appropriate penalty for a deputy municipal court administrator who pled guilty to reckless driving and disturbing the peace. Thurber v. City of Burlington, 2007 N.J. LEXIS 701 (2007). Since the Court had designated the employee's position as in the career service rather than the unclassified service, the MSB could constitutionally review the case and determine the proper penalty. Given the employee's unblemished record and long service, the MSB reasonably held that a six-month suspension rather than termination was the proper penalty for her infractions.

In Trooper Ronald Roberts, Jr., v. State of New Jersey (Division of State Police), 2007 N.J. LEXIS 704 (2007), the New Jersey Supreme Court held that internal disciplinary charges against a state trooper were timely initiated under N.J.S.A. 53:1-33. That statute generally mandates that charges be brought within 45 days of the date the person filing the complaint obtains sufficient information to file the complaint, but further provides that when there is a concurrent criminal investigation, the time for filing a complaint does not begin running until the day after the disposition of the criminal investigation. In this case, a criminal investigation resulted in a decision not to prosecute but an internal investigation was promptly commenced and then completed with the filing of an investigative report recommending that charges be filed. The Court held that the Superintendent's receipt of that report was the starting point for counting the 45 day period.

In Davenport v. Washington Education Ass'n, 2007 U.S. LEXIS 7722 (2007), the United States Supreme Court upheld the constitutionality of a state law requiring majority representatives to obtain an employee's affirmative authorization before spending his or her agency shop fees for election-related purposes rather than collective bargaining purposes. Since the Washington State Legislature could eliminate agency fee authorizations entirely, the Court reasoned that the State could impose a far less restrictive limitation on a union's authorization to exact money from government employees. It also concluded that the restriction on the state-bestowed entitlement was reasonably limited to the state-created injury that the voters sought to remedy when they approved an initiative restricting the ability of unions to influence elections by using agency shop fees without employee consent.

In State of New Jersey Division of State Police v. Sergeant Robert Sobolusky, Badge No. 4003, App. Div. Dkt. No. A-4987-05T3 (7/3/07), an Appellate Division panel upheld a 30-day suspension of a State trooper who wore a T-shirt featuring the words "Lords of Discipline" to a national police picnic. The Court held that the suspension did not violate the trooper's constitutional right of free speech given the "Lords of Discipline" had an unquestioned reputation as a racist, sexist association and the Court's conclusion that wearing the shirt to this

quasi-official gathering amounted to an act of contempt for the efforts of the Division of State Police to repudiate its historical association with racial profiling.

In Van Duren v. Rzasas-Ormes, 2007 N.J. Super. LEXIS 199 (App. Div. 2007), an Appellate Division panel held that parties in a private business affair could agree to waive Appellate Division review of an arbitration award dividing their joint property. However, an agreement to waive trial court review violates public policy because it eliminates all judicial scrutiny and results in rubberstamping awards in confirmation proceedings.

In Lourdes Medical Center of Burlington Cty. v. Board of Review, 2007 N.J. Super. LEXIS 248 (App. Div. 2007), the Court considered whether nurses were entitled to receive unemployment compensation benefits while they were on strike. N.J.S.A. 43:21-5(d) disqualifies striking workers from receiving benefits if “it is found that the unemployment is due to a stoppage of work which exists because of a labor dispute....” A regulation adopted by the Department of Labor defines a “stoppage of work” as a “substantial curtailment of work which is due to a labor dispute” and “substantial curtailment” is defined as occurring “if not more than 80 percent of the normal production of goods or services is met.” On this appeal, the Court upheld the validity of the regulation and its 80 % rule, but remanded to the DOL’s Board of Review to reconsider its determination that there was no curtailment of the hospital’s work processes given the hiring of replacement nurses. The Court determined that the yardstick of overall work processes did not apply and that the Board of Review should focus instead on whether “the financial expense to which the hospital was put to maintain normal levels of service to the community, including its net revenue, constitutes a stoppage of work within the meaning and intent of the statute and regulations here at issue.” (Slip opin. at p. 27).

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Attachments