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September 19, 2013

MEMORANDUM

TO: Commissioners

FROM: Counsel Staff

SUBJECT: Report on Developments in the Counsel's Office Since August 1, 2013

COMMISSION CASES

Appellate Division Appeals

Appeals from final Commission decisions have filed in these cases:

- City of Garfield and PBA Local 46, P.E.R.C. No. 2013-88, 40 NJPER 54 (¶20 2013) (City appeals from decision holding it committed an unfair practice)
- Tp. of Edison and IAFF Local 1197, P.E.R.C. No. 2013-89, 40 NJPER 56 (¶21 2013) (Township appeals from denial of its request to restrain grievance arbitration)
- State of NJ Judiciary (Camden Vicinage) and PANJ, P.E.R.C. No. 2013-90, 40 NJPER 65 (¶24 2013) (PANJ appeals from grant of request to restrain grievance arbitration)
- State of NJ Judiciary (Monmouth Vicinage) and PANJ, P.E.R.C. No. 2013-90, 40 NJPER 67 (¶25 2013) (PANJ appeals from grant of request to restrain grievance arbitration)

- North Hudson FF Assn and North Hudson Reg Fire & Rescue, P.E.R.C. No. 2013-83, 40 NJPER 32 (¶13 2013) (Regional appeals from finding that it committed an unfair practice)

Supreme Court Appeals

On July 30, 2013, the Supreme Court declined to review the final published decision of the Appellate Division of the Superior Court. The appellate court had reversed and vacated an interest arbitration award and directed that the case be assigned to a different arbitrator. City of Camden and IAFF Local No. 788, P.E.R.C. No. 2012-18, 38 NJPER 188 (¶63 2012), rev'd 429 N.J. Super. 309 (App. Div. 2013), 2013 N.J. Super. LEXIS 8, 39 NJPER 275 (¶94 2013), certif. den. N.J. (2013).

Despite having obtained a favorable ruling from the Appellate Division of the Superior Court, the Burlington County Prosecutor is seeking Supreme Court review of the appeals court order remanding an interest arbitration award. Burlington County Prosecutor's Office and PBA Local 320, P.E.R.C. No. 2012-61, 39 NJPER 20 (¶4 2012), rem'd 40 NJPER 41 (¶17 2013), pet. for cert. pending. The court determined that the arbitrator's opinion did not adequately discuss how he applied the criteria listed in N.J.S.A. 34:13A-16(g). The Prosecutor is asserting that the entire arbitration proceeding should start from scratch with a different arbitrator.

On September 4, 2013 the Supreme Court declined to review Atlantic City Bd. of Ed. and Atlantic City Ed. Ass'n, P.E.R.C. No. 2012-31, 38 NJPER 257 (¶87 2011), aff'd 39 NJPER 431 (¶139 2013), certif. den. N.J. (2013). The Commission declined to restrain arbitration of a grievance seeking compensation for additional bilingual evaluations assigned, during the regular school day, to a school psychologist and speech therapist that were previously performed by them as outside contractors working on their own time. The Appellate Division of the Superior Court affirmed that determination.

Discipline, layoffs and terminations

Fraternal Order of Police-New Jersey Labor Council, Inc., et al. v. Township of Pennsville, 2013 N.J. Super. Unpub. LEXIS 2058

The Appellate Division of the Superior Court affirms a trial court decision confirming an arbitration award that found that the Township had just cause to issue a written reprimand to a police officer who failed to obey a subpoena to a grand jury proceeding. Although the officer did not contest the facts, he sought to have the discipline set aside asserting that department rules were not adopted in accordance with N.J.S.A. 40A:14-118. Citing several precedents, the appeals court rejects the officer's argument.

In the Matter of Thomas Sweeney, City of Hoboken, 2013 N.J. Super. Unpub. LEXIS 2220

The Appellate Division of the Superior Court affirms the decision of the Civil Service Commission (CSC) dismissing, as untimely, the appeal of a discharged City employee. The employee asserted that he had never been served with a final notice of disciplinary action and that he had been misled by his union representative who told him that the union would pursue an appeal before the CSC. The Court finds that the lack of service of a final notice does not make his appeal timely as he knew in November 2010 that his job had ended and no appeal was filed until September 2011.

Halpern v. Marion P. Thomas Charter Sch., 2013 N.J. Super. Unpub. LEXIS 2168

The Appellate Division of the Superior Court reverses a trial court's grant of summary judgment to a Newark-based charter school dismissing a charter school teacher's claim that her termination breached her individual employment contract. Noting that the teacher's contract, unlike prior contracts issued to the teacher, omitted any references to "at-will" employment and did not have a termination clause, the appeals court remands the case as it finds that there are unresolved issues of material fact that must be addressed.

Government "watchdog" groups and media shield protections

In Re Grand Jury Union County, ___ N.J. Super. ___, 2013 N.J. Super. LEXIS 124

In a decision that has been approved for publication, the Superior Court, Union County, Criminal Division grants (with one exception) a petition to quash a grand jury subpoena issued by the County Prosecutor to Tina Renna, the president of the Union County Watchdog Association (UCWA), a nonprofit organization which lists as its primary purpose, "monitoring the activity of [Union] County and advocating change to eliminate waste, corruption, and incompetence. The UCWA will act as a vehicle for the public to make their voices heard in the political forum, and to participate in the legislative process, holding elected officials accountable."

Since 2005, Renna, as UCWA's president, had authored a blog posted on the UCWA web site. After Hurricane Sandy, the blog reported that several County employees had used County-owned generators and other equipment at their personal residences. The Prosecutor commenced an investigation and subpoenaed Renna to testify before a Grand Jury to provide names of the employees who had allegedly used the County equipment. Renna asserted that she was protected by New Jersey's shield law barring the compelled disclosure of a journalist's sources. Superior Court Judge Karen Cassidy first held that Renna had waived the privilege as to one person because she had disclosed that individual's name to the FBI. But after evaluating the standards set by the state Supreme Court for determining whether the Shield Law applied, Judge Cassidy concluded that Renna's activities and writings were shielded.

School calendar change: sending-receiving districts

Bethlehem Township Education Association v. Board of Education of Bethlehem Township, 2013 N.J. Super. Unpub. LEXIS 2212

The Appellate Division of the Superior Court affirms a Department of Education ruling, dismissing as untimely, the Association's petition challenging the Board's decision to change the starting date of the 2011-2012 academic year. The Board sends its secondary school students to the North Hunterdon Regional School District. Prior to 2011-2012, the two districts sometimes opened the school year on different dates. Responding to complaints of families who had children in both elementary and secondary grades, the Board adopted a resolution providing that it would follow the school calendar of North Hudson in order to minimize disruption of summer vacation plans, camp schedules, jobs as well as matching up dates for the Spring recess. The Board passed a resolution so providing at its September 2010 public meeting. But, the Association did not file its petition until June, 2011. A challenge to an alleged violation of the school laws must be filed within 90 days.

Challenge to promotions; change in criteria

Allen Solimando v. Mayor and Council of the Borough of Emerson, et al., 2013 N.J. Super. Unpub. LEXIS 2219

The Appellate Division of the Superior Court affirms a trial court's dismissal of a challenge to the Borough's promotion of two officers to lieutenant and captain, made after the elimination of an existing educational requirement. This is the chronology of the promotional process:

- August 2008, the Borough makes no promotions as it finds that no candidate meets the educational requirements for the positions;
- March 2009, the Borough introduced and adopted, effective March 20, an ordinance providing that "police officers who have been members of the department continuously since January 1, 2001, [and who] possess[] . . . a minimum [of seven] years progressive supervisory and management experience in law enforcement[,] shall be deemed to satisfy the college/university credit requirement;"
- April 14, and May 5, 2009, respectively, the Borough introduced and adopted an ordinance which eliminated the requirements for competitive written examinations for the rank of Lieutenant;
- April 14, 2009, the Borough interviewed a number of candidates and voted unanimously to promote an officer to the position of Captain;
- May 19, 2009, the Borough interviewed candidates and promoted an officer to the

position of Lieutenant;

In June 2009, plaintiff filed a lawsuit challenging the promotions alleging that the promotions were made before the elimination of the educational criteria requirement and that the Borough used no objective standard to measure the fitness of the officer's for promotion.

Improper reclassification; equitable estoppel applied to Civil Service Commission

In the Matter of John C. Johnson, Cape May County, ___ N.J. ___ 2013 N.J. LEXIS 844

The Supreme Court reverses the decision of the Appellate Division of Superior Court that had affirmed a reclassification decision of the Civil Service Commission holding that an unclassified "prosecutor's agent" should be placed in the classified title of property clerk.

In 1989, the CSC (then the Department of Personnel) determined the number of civilian Prosecutor's Agents (PA), unclassified positions, each Prosecutor would be allowed to employ. The Cape May County Prosecutor was allotted two such positions. In 2004 the DOP/CSC permitted the hiring of additional Prosecutor's agents but Cape May did not hire more PAs.

On October 19, 2006, DOP advised all county prosecutors stating that the DOP would be reviewing the duties performed by incumbent prosecutor's agents to avoid impingement on career service titles. The memorandum included a "title specification" for the position that would apply to new appointments stating that the newly-adopted specification would not apply to current employees. The unclassified position of prosecutor's agent was defined as "perform[ing] non-law enforcement duties to assist the Prosecutor in one or more of the following areas: trial preparation; administration; media/community relations; research and data analysis; [and] other related duties as required." The classified position of property clerk was "responsible for the collection, recording, and safe storage of property and other valuables."

After one of the Cape May PAs, who had held that position since 1984, filled out a CSC questionnaire describing his duties and the percentage of his time spent performing each task, the CSC reclassified him as a property clerk. Cape May appealed the action but the reclassification was upheld in turn by the CSC and the Appellate Division.

The Supreme Court held

- The reclassification decision does not demonstrate a thorough understanding of the duties of the position or consultation with relevant employees.
- The administrative decision contradicts prior assurances provided to prosecutors and their incumbent prosecutor's agents.

The Court notes that although the duties of a PA and a property clerk overlap in some cases the majority of Johnson's duties go beyond those of a property clerk. It finds that the CSC's analysis was flawed and is not entitled to deference, commenting:

When the Commission picks and chooses some of the tasks performed by the employee but ignores or mischaracterizes others, the classification decision takes on attributes of an arbitrary and unreasonable action

Police officer holding elective office; conflict of interest

Richard Adair v. City of Wildwood, et al., 2013 N.J. Super. Unpub. LEXIS 2206

In City of Wildwood v. DeMarzo, 412 N.J. Super. 105 (App. Div. 2010), the court held that DeMarzo, a police officer, who had been elected as a City Commissioner, could not remain in both positions as they were incompatible. The Court allowed the officer to choose which post he would give up. For unrelated reasons, Wildwood's Mayor and the other Commissioner had been recalled and DeMarzo and two political allies had been elected commissioners. DeMarzo became the Mayor. Wildwood drew up a layoff plan, which included laying off five police officers. On March 9, 2010, DeMarzo wrote to another Commissioner, requesting that he be placed on a "voluntary layoff" program. The Civil Service Commission approved the plan and DeMarzo continued as Mayor. Adair, a Wildwood resident and City police lieutenant filed suit. He alleged that, while still holding both offices, DeMarzo had continued to be involved in police, personnel, and collective bargaining matters, and claimed that the layoff plan would not cure DeMarzo's underlying conflict of interest. The trial judge found:

- DeMarzo's voluntary layoff did not comply with the Appellate Division's decision because the common law barred a leave of absence for a police officer serving a term of elective office;
- DeMarzo's plan did not comply with the order because his layoff was not scheduled until three months after the twenty-day deadline.

The trial court restrained DeMarzo from taking any actions as mayor or police officer until he had chosen one of the two positions. It ordered him to provide written notice of his choice within the day, or else he would be considered to have vacated his position as a police officer.

DeMarzo later wrote a letter to the Municipal Administrator, stating, "I am choosing to retain my elected office as Commissioner and to continue to serve the people of Wildwood as Mayor."

The Appellate Division of the Superior Court affirmed the trial court's decision and order noting:

[B]y volunteering to be laid off, DeMarzo arranged to be put on a "special reemployment" list. [and] retain his previous title in the

same municipality, take precedence over all other reemployment lists, and remain on the special re-employment list indefinitely. The voluntary layoff allowed DeMarzo to have priority over other officers seeking re-employment for an unlimited duration. Moreover, as the most senior member of the police force on the special re-employment list, DeMarzo would be the first person eligible for any available position. See N.J.A.C. 4A:8-2.2(a), -2.3(c)(1), -2.3(c)(3), -2.4(b). Such an arrangement continues the incompatibility that led to our order in the first instance. Whether on an unpaid leave of absence or as first-in-line on the special re-employment list, DeMarzo's persistent involvement with the police force continued to deprive the citizens of Wildwood of "an independent City Commissioner capable of managing the municipality's business unfettered by personal conflicts."

Grievance arbitration: setting aside award on late claim

Borough of Rutherford v. Rutherford PBA Local 300, 2013 N.J. Super. Unpub. LEXIS 2116

The Appellate Division of the Superior Court affirms a trial court decision setting aside, on procedural grounds, a portion of an arbitration award holding that an officer was not required to directly pay the cost of obtaining a doctor's note needed to comply with the employer's sick leave verification policy. As originally filed and processed, the grievance challenged only the Borough's adoption of the policy. The arbitrator held that the employer did not violate the contract by doing so. However, she ruled in favor of the Association on a claim for reimbursement filed by a specific officer. Finding that the officer's claim was not part of the grievance or arbitration hearing, the Court vacated that part of the award but declined the employer's request that it rule on how employee's should be reimbursed for the cost of doctor's notes.