



STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PO Box 429
TRENTON, NEW JERSEY 08625-0429

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

October 24, 2013

MEMORANDUM

TO: Commissioners
FROM: Counsel Staff
SUBJECT: Report on Developments in the Counsel's Office Since September 19, 2013

Commission Cases

Denise Cole, Individually and as a Member of the CWA, AFL-CIO v. State of New Jersey, Office of the Public Defender, 2013 N.J. Super. Unpub. LEXIS 2469

The Appellate Division of the Superior Court affirms the Commission's decision [P.E.R.C. No. 2011-66, 37 NJPER 133 (¶39 2011)], adopting the recommendation of a Hearing Examiner to dismiss unfair practice charges filed by the CWA on behalf of Cole, an investigator employed by the Public Defender's office. Cole, a CWA shop steward, received minor disciplinary sanctions (one day and five day suspensions) stemming from two separate incidents. The Court found that the Commission correctly adopted the Hearing Examiner's findings and legal conclusions. Reviewing the Hearing Examiner's application of In re Bridgewater Tp., 95 N.J. 235 (1984), the Court agrees with the Hearing Examiner and the Commission that:

- there was no nexus between the one-day suspension and Cole's prior protected activity;
- although part of Cole's conduct (sending an e-mail to management regarding temporary employees) preceding the five day suspension was protected, the employer proved that the discipline was the result of Cole's improper interactions with her supervisor in the workplace.

An article about the case appeared in the October 14, 2013 issue of the New Jersey Law Journal.

New Appeals

An appeal has been filed by the Charging Party in State of N.J. (Juvenile Justice), CWA Local 1040 and CWA District 1, and Judy Thorpe, P.E.R.C. No. 2013-29, 39 NJPER 205 (¶66 2012), recon. den. P.E.R.C. No. 2014-9, 40 NJPER __ (¶_ 2013), app. pending.

OTHER CASES

City equitably estopped from termination of retirement incentive benefits after employees retired

Nicholas Belfiore, et al. v. City of Hoboken and Vincent Andreula v. City of Hoboken, et al., 2013 N.J. Super. Unpub. LEXIS 2520

In 2008, in the wake of economic setbacks, Hoboken approved the creation of a Voluntary Severance Incentive Program (VSIP) for certain city employees. The stated goal of the program was to "ensure that government is operated at a level that taxpayers can afford" by monetarily incentivizing the retirement of highly paid municipal workers. Under the VSIP, a city employee could resign from his or her current position, and in return would receive a severance payment, distributed in installments, based on length of service and ranging between 10% and 100% of the employee's base salary. Eligible employees had until the end of 2008 to enroll. Retirement dates were staggered between two phases. Phase one employees retired before October 2008; plaintiffs, who were all members of the phase two group, were scheduled to retire between October 2008 and December 31, 2008.

The Phase one retirees received their severance packages. But, a Department of Community Affairs fiscal monitor appointed in October 2008 directed Hoboken to end the program opining that it was in conflict with pension statutes. The Appellate Division rules, using principles of equitable estoppel (even though that doctrine is rarely invoked against a public body) that Hoboken must make the promised payments to the phase two employees.

At its core, this case is about a local government's anticipatory repudiation of a contractual promise to some, but not all, of its workers. . . [T]he city made life-changing promises to numerous employees. During the months that followed -- while plaintiffs were signing and receiving copies of their Severance Packages, and planning for their post-Hoboken lives -- the city's fiscal machinery still remained idle. Yet, early adopters of the VSIP -- the phase one group -- were able to retire and reap the entire benefit of their bargains. To deny plaintiffs the same agreed-upon severance payments, as recognized by the trial judge, is fundamentally unfair.

* * *

We emphasize that the record is devoid of evidence of fraud, favoritism, or bad faith. The VSIP was not created to intentionally foist more workers into an already beleaguered pension system at the expense of statewide taxpayers. Rather, Hoboken's elected officials were simply ill advised about the VSIP's potential -- here realized -- to trigger an unfunded liability to ensure that the city shouldered the proper responsibility for its actions. All of the workers who relied upon Hoboken's fiscal maneuver cannot be faulted for closing their careers, and far from reaping a windfall, all they sought is what they bargained for, nothing more and nothing less.

LAYOFF, DEMOTION, DISCIPLINE AND DISCHARGE CASES

Demotional rights; primary jurisdiction of Civil Service Commission

Douglas Romary, et al. v. City of Paterson, et al., 2013 N.J. Super. Unpub. LEXIS 2459

The Appellate Division of the Superior Court agrees with a trial court ruling that a dispute over the proper method of determining demotional rights, where more than one affected employee was promoted at the same time, should be resolved in the first instance by the Civil Service Commission. Because of economic layoffs recently promoted Paterson police sergeants and lieutenants had to be reduced to their former ranks. The Plaintiffs alleged that ties should be broken based on the scores achieved on the promotional examinations. The appeals court holds that the primary jurisdiction of Civil Service Commission must be used to resolve the dispute even though plaintiffs allege that tie breaking method used by CSC (seniority in the department) violated merit and fitness clause of the state constitution.

Grievance arbitration; review of arbitrator's reduction of disciplinary sanction

New Jersey Turnpike Authority v. Local 194, et al., 2013 N.J. Super. Unpub. LEXIS 2474

The Appellate Division of the Superior Court upholds a grievance arbitration award overturning the discharge of a toll machine technician, who, while driving an Authority van off-duty damaged it while under the influence of alcohol. The arbitrator ruled that the employee should be provided with a second/last chance at maintaining his employment and that his current separation from employment since October 2, 2010, [up to February 2, 2012, the date of the arbitration award] constitutes a substantial disciplinary penalty in relation to his proven misconduct.

Both the trial and appellate courts relied on statutes and case law emphasizing that arbitration is a favored method of resolving public sector employment disputes and that grievance arbitration awards must be upheld if "reasonably debatable."

Review of ALJ recommendation; agency head's selective review of evidence warrants reversal

In the Matter of the Tenure Hearing of Francis Lawrence, Brookdale Community College, 2013 N.J. Super. Unpub. LEXIS 2494

The Appellate Division of the Superior Court reverses the Brookdale Community College's discharge of its Athletic Director, finding that BCC did not conduct an independent evaluation of all relevant evidence and legal arguments presented in support of and in opposition to proposed administrative agency action, thus making the agency's decision arbitrary and capricious and require a remand for reconsideration.

Tenure charges were brought against the College's AD stemming from the shoddy procedures used to account for revenue, expenses and stipends associated with a high school basketball tournament annually hosted by the College. An administrative law judge sustained some charges and dismissed others but concluded that the AD's actions amounted to unbecoming conduct. However, the ALJ found several mitigating factors including that the College was aware of the poor accounting practices present for decades in running the event and failed to properly instruct its employees of the proper procedures. The ALJ found "[t]he mitigating factors outweigh[ed] the aggravating factors." The most significant mitigating factors were the AD's "lack of intent, the tacit approval by [BCC] of these practices in the past, and the disciplinary record of the [AD.]" The ALJ the removal and suspended him for one year, giving credit for time he had already been suspended.

Discharge of civil service employee; alleged political retaliation; untimely appeal to CSC

Ernest Coursey v. City of Atlantic City, et al., 2013 N.J. Super. Unpub. LEXIS 2535

In the Matter of Ernest Coursey, Jr., Atlantic City, 2013 N.J. Super. Unpub. LEXIS 2527

In separate decisions the Appellate Division of the Superior Court rules on appeals from a Superior Court lawsuit and from a Civil Service Commission (CSC) ruling stemming from the discharge of a former City Councilman who also had held permanent and provisional positions.

Coursey had achieved permanent status as a City employee. He took a leave of absence from that position after being elected to City Council, but failed to periodically renew his leave requests. In 2002, he resigned from Council to become a confidential aide to the Mayor. Three years later he occupied successive provisional titles until he was discharged by the new Mayor.

In the first decision, the appeals court reverses a trial court's dismissal of Coursey's lawsuit alleging politically retaliation and other claims. The Court directs that Coursey be allowed to try his claims on the merits. The appeals court upholds the CSC's refusal to reinstate Coursey in his original permanent title. Coursey did not file a timely appeal with the CSC, but instead tried to have the Union that represents the permanent title file a grievance on his behalf.

Challenge to discharge; grievance procedure bars employee's breach of contract suit

Ross v. Arena, 2013 U.S. Dist. LEXIS 147117

A part-time writing instructor employed for 12 years in the academic rank of lecturer by Rutgers-Newark was terminated for poor performance and other job issues. The lecturer was a member of the collective negotiations unit of Part-Time Lecturer Faculty, represented by the American Association of University Professors (AAUP). The AAUP pursued a grievance through the first three steps of the grievance procedure but exercised its discretion not to pursue arbitration.

The employee filed a lawsuit against the Dean of the program and Rutgers. The federal court, citing the grievance procedures "shall be utilized" language of N.J.S.A. 34:13A-5.3, grants summary judgment to the defendants holding (1) the presence of a grievance/arbitration procedure satisfies procedural due process; and (2) the employee may not maintain a breach of contract action because only the AAUP and Rutgers are parties to the CNA.

No exception where OPRA request for accident report preceded Internal Affairs probe

Ganzweig v. Twp. of Lakewood and Del Mastro, 2013 N.J. Super. Unpub. LEXIS 2537,

An OPRA case was made for police records involving a pedestrian traffic incident that was later the subject of an internal affairs investigation. The Court holds that although the incident was later the subject of an internal affairs probe does not place it in an OPRA exception.