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January 24, 2014

**MEMORANDUM**

**TO:** Commissioners  
**FROM:** Counsel Staff  
**SUBJECT:** Report on Developments in the Counsel's Office Since December 12, 2013

**Appellate Division Appeals**

Atlantic City B/E and EA, P.E.R.C. No. 2014-35, \_\_ NJPER \_\_ (¶\_\_ 2013).

The Board of Education has appealed from the Commission's decision declining to restrain arbitration of a grievance challenging an increment withholding.

Robbinsville Township B/E and Washington Township EA, P.E.R.C. No. 2014-030, \_\_ NJPER \_\_ (¶\_\_ 2013).

The Education Association has appealed the Commission's decision holding that the Board was not obligated to negotiate over furlough days.

**Other Court Cases**

Grievance Arbitration - - Court reverses arbitrator's timeliness ruling

County of Warren v. Policemen's Benevolent Association Local #331, 2014 N.J. Super. Unpub. LEXIS 137

The Appellate Division of the Superior Court, in an unpublished ruling, upholds a trial court decision vacating, on timeliness grounds, a grievance arbitration award. The grievance was filed 90 days after the employer's action that arguably triggered the claim, rather than within 10

days as set forth in the grievance procedure. The County first raised the timeliness defense in its brief filed after the arbitration hearing. The arbitrator noted that, as the employer could have raised the timeliness defense in response to the filing of the grievance, it had waived its right to that procedural defense.

Although the trial court cited precedent holding that whether a party has timely demanded arbitration is a procedural issue for the arbitrator and not the court, as well as noting that the CNA provided that the grievance procedure remain informal as appropriate, the trial court held that while the:

[A]rbitrator may have felt at liberty to relax the grievance filing period . . . such [contract] language did not give the arbitrator the power to override the procedural mandates of the contract and relax the filing period.

The trial court noted that, if viewed as a “continuing violation,” the grievance could have been timely, but observed that because the arbitrator did not rely on that theory, a court could not apply it. On appeal, the Appellate Division concurred with the trial court’s ruling that the arbitrator’s award was “not reasonably” debatable and that his timeliness ruling was not supported by the agreement, citing language in the recognition clause that time periods could be extended by mutual consent.

#### Layoff, Bumping, Tenure and Re-employment Rights

##### School Employees

Judith A. Dinapoli v. Board of Education of the Township of Verona, \_\_\_ N.J. Super. \_\_\_, 2014 N.J. Super LEXIS 11

The Appellate Division of the Superior Court, in a published, precedential decision, reverses a decision of the Commissioner of Education holding that an administrative employee, laid off during a reduction in force, should be given a secretarial/clerical position based on having earned tenure in that job category prior to a promotion.

DiNapoli, a Board employee since 1977, had worked in several positions, acquiring tenure as a school secretary, before becoming the Assistant Business Administrator, a certificated position, in 2009. In 2011, the position was abolished as part of a reduction in force. DiNapoli filed a petition of appeal with the Commissioner of Education asserting that, as she had acquired tenure as a school secretary, she was entitled to bump a non-tenured school secretary.

Ruling on a motion for summary judgment, an Administrative Law Judge held that DiNapoli’s acquisition of tenure gave her the right to displace a non-tenured employee holding a secretarial or clerical position. The Commissioner agrees with the ALJ’s analysis.

The Court analyzed the issue at length, but began by noting that statutes addressing tenure for teaching staff also provide that promoted teachers shall retain their tenure rights as teachers if they do not acquire tenure in the higher position, while there is no similar law covering tenured secretaries.

Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ. of Bridgewater-Raritan, 2014 N.J. Super. Unpub. LEXIS 34

Three teaching staff members whose contracts were not renewed at the end of the 2010-2011 school year filed appeals with the Commissioner of Education asserting they had acquired tenure. In an unreported decision, the Appellate Division of the Superior Court affirms the decision of the Commissioner, adopting the summary judgment recommendation of an Administrative Law Judge, that the teachers had not acquired tenure.

All three teachers worked full-time for the complete 2008-2009, 2009-2010 and 2010-2011 school years. All had worked full-time in prior academic years, and two of them had received assurances from the Superintendent when they began employment with the district, that time teaching during those years as a replacement for a teacher on leave would count toward the accrual of tenure. The teachers said those assurances convinced them to stay in the district. Two of the teachers were not advised that, after their first school year with the Board, that during the next school year, they were still serving as replacements for teachers on leave. All received a letter at the beginning of the 2009-2010 school year from the Superintendent, contradicting her earlier assurances, and advising that, pursuant to N.J.S.A. 18A:16-1.1, time teaching as a replacement for a teacher on leave, did not count toward tenure accrual. The letters listed dates when the teachers would be eligible for tenure.

In affirming the Commissioner, the appeals court:

- Rejected an equitable estoppel argument, because of the significance of tenure acquisition;
- Held that the teachers statements that they were not told they were still assigned as replacement teachers in their second school year was insufficient in the absence of such a statement from the Board that they were now in regular teaching positions.
- Ruled that only the Board and not the Superintendent had authority to appoint teachers and determine their terms of employment.

Civil Service Employees

In re Messina, 2013 N.J. Super. Unpub. LEXIS 2951

After serving four years as a Trenton police Captain, Messina was demoted to Lieutenant in November 2010 as a result of a layoff. He was the only former Captain to be placed on a re-employment list. In January 2011, the City assigned a different Lieutenant to a temporary vacancy as an "Acting Captain." That assignment ended, when, on May 25, Messina was named acting Captain, serving in that post until mid-September. He served another stint as Acting Captain from October 2011, through March 8, 2012.

In February 2011 Messina appealed to the Civil Service Commission asserting:

- The January 2011 appointment of a different lieutenant to acting captain was illegal
- Given the nearly continuous "acting captain" appointments there was a need for a permanent Captain and he had the right to fill that position.

Though the CSC chastised the City for appointing someone other than Messina as Acting Captain, it declined to order that Messina be awarded the position on a permanent basis. It did order that Messina's personnel record be amended to show that he served as Acting Captain starting in January 2011, but declined to award him back pay. On appeal the Court declines to augment the CSC's remedy, refusing Messina's claims for a permanent appointment, back pay and legal fees.

In re Maniece and Gilliam, 2014 N.J. Super. Unpub. LEXIS 93

The Appellate Division of the Superior Court, in an unpublished ruling, upholds the Civil Service Commission's denial of an appeal by Gilliam, a Social Worker with permanent status employed by the Mercer County Board of Social Services. After a layoff, Gilliam was displaced when a supervisory employee, whose job was eliminated, exercised bumping rights to Gilliam's position. Gilliam asserted that the layoff was done in "bad faith" because provisional and non-permanent employees, with less seniority, retained their jobs or were allowed to move into other positions. Although an Administrative Law Judge found that Gilliam had proved that the layoffs were made in bad faith, the CSC reversed. It found that the layoffs were made in a specific department (the Medical Transportation Unit) where Gilliam worked, due to loss of funding and that the non-permanent employees did not work in that department or hold Social Worker positions.

Discipline, "Chain of Custody," "Residuum" rule

In re Angelini, 2013 N.J. Super. Unpub. LEXIS 3007

The Appellate Division of the Superior Court, in an unpublished ruling, upholds the Civil Service Commission's decision sustaining the removal of a Trenton police officer on charges that

he tested positive for methadone and failed to submit a list of his prescription and non-prescription medications. The officer appealed alleging that the City had violated "chain of custody" rules and that the drug sample should have been excluded. The Administrative Law Judge found that there was sufficient hearsay and competent evidence to satisfy the "residuum" rule providing that findings of fact in an administrative hearing cannot be based solely on hearsay evidence. The ALJ recommended that the officer's appeal be denied. The CSC adopted the recommendation and the appellate court, after a discussion of the chain of custody requirements, agrees that there was sufficient hearsay and competent evidence to satisfy the residuum rule.