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February 20, 2014

MEMORANDUM

TO: Commissioners
FROM: Counsel Staff
SUBJECT: Report on Developments in the Counsel's Office Since January 24, 2014

Appellate Division Appeals

County of Atlantic and FOP Lodge No. 34, P.E.R.C. No. 2014-40, __ NJPER __ (¶__ 2013). The FOP and PBA Local No. 77, appeal from the Commission's decision dismissing their unfair practice charges alleging that the County violated the Act by failing to pay salary increments following contract expiration.

Rutgers, The State University of NJ and Union of Rutgers Administrators, AFT, Loc. 1766, AFL-CIO, P.E.R.C. No. 2014-41, __ NJPER __ (¶__ 2013). AFT Local 1766 appeals from the Commission's decision restraining arbitration of its grievance alleging that Rutgers violated the parties collective negotiations agreement by assigning work normally performed by employees it represents to other Rutgers employees.

Other Court Actions

The Commission has initiated a summary proceeding in the Superior Court, Law Division, Mercer County, to enforce its decision in City of Newark and FOP Lodge 12, P.E.R.C. No. 2013-73. The Order requires the City to turn over documents and information sought by the FOP in connection with grievance processing. The City did not appeal the Order and has not complied with it despite repeated requests from the General Counsel.

Cases related to Commission decisions, statutes and jurisdiction

Preemption: maintenance of working conditions during negotiations does not extend life of expired agreement.

Teamsters Local 97 v. State, ___ N.J. Super. ___ 2014 N.J. Super. LEXIS 18

In a published (i.e. precedential) ruling, the Appellate Division of the Superior Court, affirms the 2011 decision by Superior Court Judge Sonia Feinberg (now retired) rejecting state and federal constitutional challenges made by unions representing state and local employees, to laws that altered pension contributions, employee assessments for health benefit premiums and other laws affecting public employee benefits.

With respect to issues involving the New Jersey Employer-Employee Relations Act, the Court holds:

- a. Changes in health benefit laws preempt negotiations and interest arbitration over conflicting proposals;
- b. Grievance arbitrations be resolved consistent with the new laws,
- c. Where the laws become effective during the pendency of an interest arbitration proceeding, the arbitrator has the authority to receive additional briefs from the parties on the impact of the new laws.

The Court also addresses and rejects the argument, sometimes made to the Commission, that even though terms and conditions of employment must remain in effect after contract expiration until a new agreement is reached, the contract ends on the expiration date and new laws enacted during the term of that agreement will begin to apply.

Chapter 2 does not require public employees to make the 1.5% contribution until after existing CNAs expire. Contrary to plaintiffs' arguments, N.J.S.A. 34:13A-21 and N.J.S.A. 34:13A-5.3 create statutory, not contractual, prohibitions against a party changing the terms and conditions of employment during the pendency of interest arbitration proceedings or during the negotiation of a new CNA. As we have previously explained, the statutes apply to the parties to the expired CNA, not to the Legislature. And because the Legislature created the prohibitions against such changes, the Legislature can modify them by statute. Further, even if the terms of an expired CNA are deemed to be implied in fact until new terms are negotiated, public employees have neither a contractual right nor a reasonable expectation that terms implied in fact under such circumstances will survive superseding terms imposed by preemptory legislation.

Court declines to allow post-arbitration negotiability challenge to award.

Paterson Police PBA Local 1, et al. v City of Paterson, 2014 N.J. Super. Unpub. LEXIS 182

The Appellate Division of the Superior Court affirms a trial court decision confirming a grievance arbitration award. Paterson allows officers to select shift assignments by seniority. Following a layoff and resultant “bumping” some officers, including a sergeant and lieutenant had their shifts and/or assignments changed including moving from night to day, thereby losing a shift differential. The arbitrator found that the positions desired by the two officers after the layoffs and retrenchments were filled by officers with less seniority and concluded that those reassignments violated the contract. Because the new posts resulted in a loss of hours, back pay was awarded. Both the trial court and the appeals court found the award to be reasonably debatable. The City belatedly raised a negotiability defense prompting this comment from the appellate court.

It is undisputed that the City failed to file a (pre-arbitration) scope-of-negotiations petition with PERC, stating that negotiations as to enforcement of Section 7.1.2 of the CNA were not appropriate. Section 7.1.2 is a collectively negotiated provision that, as the arbitrator aptly determined, can be enforced through grievance arbitration. "Absent a pre-arbitration scope petition asserting that negotiations are not permitted on a subject, the parties are deemed to have agreed to arbitrate all unresolved issues." [Teaneck Tp. and FMBA Loc. No. 42, 353 N.J. Super. 289, 299 (App. Div. 2002)] [(citing N.J.A.C. 19:16-5.5(b) and ©]. "A party cannot go through the negotiations process and then argue it was not required to engage in that process because the subject was not mandatorily negotiable."

Award granting payment for excess vacation leave affirmed; Commission ruling given prospective effect.

International Association of Firefighters, Local 1076 and Local 1078 v. City of Hoboken, 2014 N.J. Super. Unpub. LEXIS 190

A grievance arbitration award involving claims for payment on retirement of excess accumulated vacation leave to a Hoboken firefighter is upheld by the Appellate Division of the Superior Court. In a decision issued in 2010, the Commission held that a successor contract could not provide for the accumulation of vacation leave in excess of the two-year maximum allowed by civil service regulations. City of Hoboken, P.E.R.C. No. 2010-67, 36 NJPER 67 (¶31 2010). Subsequently, a firefighter sought payment on retirement for his accumulated unused vacation leave that exceeded a two-year allotment. The City, citing the Commission decision, limited the payout and the IAFF filed a grievance. The arbitrator held that the Commission’s

decision should be applied prospectively and that any leave accumulated prior to the ruling was compensable as the employees had relied on the prior contract language. The arbitrator also found that, over the years, the City had encouraged firefighters to defer the use of leave, assuring them they would be compensated on retirement. Both the trial court and the appeals court ruled that the arbitrator's ruling was not inconsistent with the Commission's decision which only held that future contracts could not violate the statutory limit on vacation accumulation.

Other Cases

Acquisition of tenure

Stephanie Platia v. Board of Education of the Township of Hamilton, ___ N.J. Super. ___, 2014 N.J. Super LEXIS 17

The Appellate Division of the Superior Court, in a published (i.e. precedential) decision reverses the decision of the Commissioner of Education and holds that a township board of education erred by determining that a teacher employed as a special education teacher for more than three academic years in a four-year period failed to obtain tenure based on her employment for one of those academic years being as a Long Term Substitute. A statute permits time served as a long-term substitute not to count towards tenure, but the Court holds that a board of education has the burden of showing that the exception applies. In this case the Board told the teacher that time as a Long Term substitute was "non-tenorial" and that she was replacing a specific individual. However, that person did work for the Board during the year in question. The court held that because the exception did not apply the teacher obtained tenure as of right. It also held that statutory terms and conditions of employment take precedence over any side agreement in contravention of the Tenure Act and that the statutory right to tenure may not be forfeited or waived.

Discipline and Discrimination

Union steward's safety complaints protected by CEPA despite connection with his job duties

Robert Dukin v. Mount Olive Township Board of Education, et al., 2014 N.J. Super. Unpub. LEXIS 163

The Appellate Division of the Superior Court reverses a lower court order dismissing, on motion for summary judgment, the "whistle-blower" claim of an auto-mechanic who had been employed by the Board. The appeals court holds that the employee, who also was a union shop steward, demonstrated a nexus between the adverse employment action of non-renewal of his annual contract and his complaints about both the safety of a school bus and the working conditions in the garage.

Discharge date, not result of civil service appeal, starts clock on statutes of limitations

Collins v. City of Newark, et al., 2014 N.J. Super. Unpub. LEXIS 244

Collins, a Newark police officer was terminated based on two charges in February, 2008. He filed a timely appeal with civil service. An Administrative Law Judge recommended that one charge be dismissed. The ALJ sustained the second charge but recommended that the penalty be reduced to a suspension. On July 24, 2009, the Civil Service Commission ruled that the officer should be terminated. The Appellate Division of the Superior Court upheld that decision.

On June 29, 2010, the officer filed a multi-count lawsuit in Superior Court alleging violations of the CEPA (whistle-blower) statute as well as state and federal civil rights laws. His claims were dismissed as untimely.

In this case, the Appellate Division of the Superior Court, rejects Collins' assertion that the event which started the limitations periods was the ruling by the Civil Service Commission. If that date applied, than his lawsuit would have been timely. However, the Court holds that the limitations period starts to run from the date of his discharge.

Court sustains Civil Service Commission's rejection of ALJ factual findings.

In the Matter of Nafaeesa Miller 2014 N.J. Super. Unpub. LEXIS 251

Despite the findings of an ALJ that a time clock had not been shown to be accurate, the Civil Service Commission overturned his recommendation to dismiss disciplinary charges, based on tardiness, lodged against a corrections officer who had a significant number of prior similar infractions. The Commission re-imposed 10-day and 20-day suspensions. The Appellate Division of the Superior Court rejects the employee's arguments that the Commission's action violated the Administrative Procedure Act's limits on an agency head's ability to reject the findings of an ALJ that are based on credibility determinations.

Suspension for refusal to honor negotiated agreement on furlough days sustained.

Sergeant George Foss v Township of Pennsauken, et al., 2014 N.J. Super. Unpub. LEXIS 253

The Appellate Division of the Superior Court affirms the decision of a trial court which upheld the four-day suspension of a police officer who reported for duty on days he was scheduled to be furloughed.

In May 2010, Pennsauken and the Fraternal Order of Police agreed that, to avoid layoffs, each officer represented by the FOP would be furloughed for four days without pay during the balance of the year. Foss disagreed with that arrangement. He was assigned to be furloughed for one day in September, October, November and December. On the first day that he was

scheduled to be on furlough, Foss showed up at the police station ready to work. Because the parties had not anticipated such a situation, Foss was allowed to work. Between that day and Foss' next scheduled furlough date, the chief issued two memoranda. The first stated that any officer reporting in on his/her furlough date would not be paid. The second stated that an officer reporting for duty on a furlough date may be subject to disciplinary action.

On his next scheduled furlough date, Foss again reported and the Chief, though off-duty, was summoned and came to the station. Foss told him he was not intending to be insubordinate, but that he simply disagreed with the furloughs. The Chief told Foss that he would not be paid and would not be assigned any duties. Foss was brought up on charges and a departmental hearing officer recommended a four day suspension which the Town imposed..

Notes: The Superior Court hearing was presided over by Judge Faustino J. Fernandez-Vina, recently elevated to the State Supreme Court. In addition, because the suspension was for four days, it could have been challenged through grievance arbitration.