



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

April 16, 2014

MEMORANDUM

TO: Commissioners
FROM: Counsel Staff
SUBJECT: Report on Developments in the Counsel's Office Since March 27, 2014

Commission Cases

City of Newark and Fraternal Order of Police Lodge No. 12, P.E.R.C. No. 2013-73, 39 NJPER 481 (¶152 2013), enforced, Superior Court Docket No. MER-L-200-14

The Hon. Paul Innes, P.J. Ch., has granted the Commission's application to enforce its unfair practice order directing the City to give the FOP sick leave records it deems necessary to administer the parties' collective negotiations agreement and process grievances.

State of New Jersey and New Jersey Law Enforcement Supervisors Association, P.E.R.C. No. 2014-60

The Association has appealed from the Commission's decision affirming an interest arbitration.

Cases Related to Commission Cases

Dwayne C. Connelly v. Borough of Eatontown, 2014 N.J. Super. Unpub. LEXIS 779

The Appellate Division of the Superior Court affirms a lower court's dismissal of state and federal claims by a disciplined employee who alleged that the mention of a positive drug test during a public meeting violated his right to privacy and state and federal laws. The employee also alleged that the Borough's action was taken to retaliate against him based on his position as

a union shop steward. An unfair practice charge filed by Connelly with the Commission was settled.

Connelly, who was also union shop steward was disciplined. In sustaining the sanction a written report referred to the employer's progressive discipline policy and noted that the employee had several minor transgressions and one major one, a positive drug test for cocaine that had occurred 8-9 years previously. Prior to a hearing before Borough Council, a Rice notice was sent to the employee advising him that the review of his discipline would not be in public unless the employee asked that it be held during the public portion of the meeting. Having received no reply from the employee, at the meeting the Borough attorney said a disciplinary matter would be heard in executive session. However, at that point the employee stated that he wanted his discipline to be discussed in public session. During the discussion the employee's positive drug test was mentioned. It was also referenced in a news story written about the meeting.

OTHER CASES

Employee's tort claim is independent of collective bargaining agreement

Robert Kenny v. Susan M. Denbo and Rider University, 2014 N.J. Super. Unpub. LEXIS 713

The Appellate Division of the Superior Court reverses a trial court decision dismissing a defamation claim filed by an adjunct professor alleging that he was defamed by a faculty member and a department chair of Rider University. The adjunct alleges he was falsely accused of Appropriating another faculty member's course syllabus to use in his courses. The lower court ruled that the defamation claim was preempted by the National Labor Relations Act, because it was intertwined with the collective bargaining agreement (CBA) between the University's professors and the University, which provided that ownership of copyrightable intellectual property vests in the professor who creates it. The appeals court holds:

Plaintiff's defamation claim is not dependent on construction of the CBA. As the allegations in the first amended complaint suggest, plaintiff alleges Professor Denbo and the Department Chair consented to his use of the syllabuses, he consulted those documents to prepare his own syllabus, and despite Professor Denbo's allegations, he did not attempt to distribute her course materials and resources to the students. As a result, his defamation claim is not substantially dependent on interpreting the CBA.

Can municipalities face federal civil rights liability for actions of private EMS corporation?

Eggert v. Bethea, 2014 U.S. Dist. LEXIS 43255 (D.N.J.)

A not for profit, all volunteer, Emergency Medical Service corporation, created and operated by a board whose members were appointed by four municipalities, was sued by a former Board member, and former Mayor of one of the participating municipalities. Eggert, the plaintiff, asserted that the corporation and the board of trustees violated the federal civil rights act and his First and Fourteenth amendment rights by removing him from the Board following an incident that he asserts involved his exercise of federal constitutional guarantees.

The U.S. District Court declined to rule on whether the corporation, as a private entity could be liable for alleged violations of federal constitutional rights, although noting that the degree of control exercised by public officials made such liability arguable. Instead, he dismissed the case after analyzing Eggert's constitutional claims finding that the facts would not sustain violations of First and Fourteenth Amendment rights. The Court declines to rule on Eggert's remaining claim alleging violations of New Jersey law.

Public Employee Protected Speech; Threshold for maintaining retaliation claim.

Burns v. City of Bayonne, 2014 U.S. Dist. LEXIS 43819

A lawsuit filed by a discharged Bayonne police Sergeant, who was later expelled from the PBA is, except for one count, dismissed by the U.S. District Court. The court's opinion discusses and applies precedents that draw the line between whether a public employee's speech raises issues of public concern and is thereby protected, or whether it pertains mainly to personal workplace-related issues and thus does not merit First Amendment protection.

Burns alleged that he had long been harassed by peers and superiors in the police department and subject to unwarranted discipline. In 2006, while in a convenience store, the store manager asked Burns to escort a customer, who appeared to be intoxicated, from the premises. Burns did so. The intoxicated customer was a nephew of a Bayonne police captain. The next day the nephew filed a complaint alleging Burns had assaulted him. The Captain demanded that Burns apologize to his nephew. Burns was ultimately discharged. The court dismissed the complaint except to allow Burns to amend to assert facts that would show a casual connection establishing that his discharge was retaliatory.