



**STATE OF NEW JERSEY
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June 20, 2012

MEMORANDUM

TO: Commissioners
FROM: Counsel Staff
SUBJECT: Report on Developments in the Counsel's Office Since May 31, 2012

Commission Cases

County Of Hunterdon v. Fraternal Order Of Police Lodge No. 94 and Fraternal Order Of Police Lodge No. 29, 2012 N.J. Super. Unpub. LEXIS 1240

The Appellate Division of Superior Court, in agreement with decisions of the Commission in P.E.R.C. No. 2011-75, and P.E.R.C. No. 2011-80, affirms interest arbitration awards. The County challenged the awards on the grounds that the arbitrator should not have awarded salary provisions containing step increments. The increment systems had been discontinued in 2003.

The opinion (copy attached) notes:

The arbitrator did not exceed his authority in awarding an incremental salary guide. The County acknowledges that whether an incremental salary guide should be adopted is a mandatorily negotiable issue and that FOP 29 and FOP 94 presented the guide as an issue for negotiation. . . . The decision by parties to prior agreements to eliminate an incremental salary guide does not preclude one or both parties to an agreement to seek reinstatement of such a feature in a subsequent agreement. Finally, the incremental salary schedule does not prevent the County from

seeking to modify the number of steps or the increments associated with each in the course of future negotiations for future agreements.

The employer has appealed the interest arbitration award issued in Township of West Caldwell, to the Appellate Division of the Superior Court. The sole issue raised was a claim that an out of title pay provision was outside the scope of negotiations. The Commission, in P.E.R.C. No. 2012-54, held that the disputed issue was mandatorily negotiable and affirmed the award.

New Jersey Transit is seeking leave of the Superior Court, Appellate Division, to appeal from I.R. No. 2012-017, denying its request for an interim restraint of arbitration filed by the Amalgamated Transit Union Division 822, seeking to have a retroactive raise paid to workers who were out with injuries at the time the raise took effect.

Other Cases

Impact of criminal record on eligibility for public employment

In The Matter Of Martin Carluccio, Safety Specialist Trainee, DMV (S0599j), Motor Vehicle Commission, ____ N.J. Super. ____ (App. Div. 2012).

In a decision that has been approved for publication, the Appellate Division of Superior Court overturns the decision of the Civil Service Commission upholding the action of the Motor Vehicle Commission removing Carluccio's name from a list of eligible candidates for the position of safety specialist trainee in the DMV, based on the applicant's criminal conviction. Carluccio, supported by the Division of State Human Resource Management, had supplied all required responses to the DMV's inquiry, certificates and other evidence attesting to his rehabilitation, as well as recommendations from persons in the law enforcement community. His name was removed because the CSC reasoned that had he been employed in the position at the time he was convicted, he would have been removed from his job. The Court holds that the law does not allow a person to be disqualified based solely on a criminal conviction and remanded the case for further proceedings.

In The Matter Of Andrew Blair, 2012 N.J. Super. Unpub. LEXIS 1295

The Appellate Division of Superior Court overturns the decision of the Civil Service Commission removing Blair from his position with the Department of Human Services based upon his disorderly persons conviction. Blair had no prior convictions and was sentenced to one year of probation. The Court holds that under the rehabilitation provisions of the "Codey Bill," N.J.S.A. 30:4-3.4 to 3.9., Blair is entitled to a hearing to address the issue of rehabilitation and is not barred from pursuing such an application.

Open Public Records: Attorneys Fees

Elizabeth Education Association v. Elizabeth Board Of Education, 2012 N.J. Super. Unpub. LEXIS 1245

The Appellate Division of Superior Court affirms a trial court order, that included an award of attorney's fees, holding that the Board of Education violated the Open Public Records Act (OPRA) when it denied the Association's request for:

Names of teachers who were re-employed for the 2010-2011 school year, their certifications issued by the New Jersey Board of Examiners and their employment histories in the district. The employment histories shall include their assignments and their dates of absences indicating whether paid or unpaid.

Both courts held that the records sought met OPRA's requirements for specificity and that compiling the information would not be unduly burdensome on the Board.

Layoffs and Reductions in Force

Joanne C. Burger v. Board Of Education Of The Borough Of Maywood, Bergen County, 2012 N.J. Super. Unpub. LEXIS 1244

The Appellate Division of Superior Court affirms the decision of the Commissioner of Education holding that a tenured 10-month secretary, whose hours were reduced by 40%, did not have the right to bump a full-time 12-month administrative assistant, whose position was confidential, because their positions were different.

In The Matter Of The Department Of Community Affairs Layoff, 2012 N.J. Super. Unpub. LEXIS

The Appellate Division of Superior Court affirms the decision of the Civil Service Commission holding that layoffs in the Department of Community Affairs could be made by seniority in "the licensed discipline" rather than strictly by seniority in the job title without regard to license. The International Federation of Professional and Technical Engineers, Local 195 had appealed the CSC's approval of DCA's layoff plan.

Grievance Arbitration—Substantive arbitrability—explicit exclusions from arbitration

Holmdel Township Board Of Education Vs. Holmdel Township Education Association, 2012 N.J. Super. Unpub. LEXIS

The Appellate Division of Superior Court affirms a trial court decision staying arbitration of a grievance contesting the non-reappointment of an uncertificated technical support employee who was not eligible for tenure. The Court noted that the employee was not terminated during either the 2010-2011 school year or the contract year, and he was compensated through June 30, 2011, pursuant to his contract. The court held that the language provided termination for just cause related to dismissals during the term of the agreement. It ruled that the parties had not agreed to arbitrate non-renewals of such employees as the contract provided:

Employees will be provided the right to grieve under the "just cause" provision for any disciplinary action taken by the District against the employee. This grievance/just cause contractual application shall not apply to any nonrenewals for any members.

Discipline

Ellis Haroldson v. Borough Of Cliffside Park, 2012 N.J. Super. Unpub. LEXIS 1246

The Appellate Division of Superior Court affirms a trial court decision affirming the six-month suspension of a non-civil service police officer for improper conduct based upon calls made by the officer to collect a debt involving the officer's outside business. In doing so the officer referred to his status as a police officer to pressure the alleged debtors. The Court rejects the appeal of the Township who had sought to terminate the officer, as well as the officer's cross-appeal alleging that the charges against him were untimely and were not supported by sufficient evidence.

Sgt. Gary Emenecker v. City Of Camden And Camden Police Chief John Scott Thompson, 2012 N.J. Super. Unpub. LEXIS 1211

The Appellate Division of Superior Court affirms a trial court decision denying Emenecker's application for counsel fees, available to police under N.J.S.A. 40A:14-155 who successfully contest disciplinary charges. While Emenecker was on duty a subordinate, not in his line of command was discovered asleep while on duty in Emenecker's vicinity. Emenecker was first given an oral reprimand by a superior officer, but the City served him with a Notice of Disciplinary action and fined him the equivalent of five day's pay. Emenecker successfully overturned the fine in trial court, but the original oral reprimand remained. Both courts ruled that overturning the fine did not meet the prerequisite for receiving attorney's fees under the statute.

Irreparable Harm: Loss of benefits and compensation

Northwest Bergen County Utilities Authority v. Kathleen A. Donovan, et. al., 2012 N.J. Super. Unpub. LEXIS

In a dispute involving the attempt of the Bergen County Executive to dismiss members of the Utilities Authority, the Appellate Division of Superior Court affirms a trial court decision holding that terminating the health benefits of public employees constitutes “irreparable harm” for injunctive relief purposes while cutting or terminating employee compensation does not because monetary relief at the end of a case can adequately cure that harm.