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September 20, 2012

MEMORANDUM

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

Commission Cases

Court Decisions

The Appellate Division of the Superior Court affirms the Commission's ruling in Voorhees Tp. and Voorhees Police Offrs Assn, Voorhees Sgts Assn and Sr Offrs Assn of FOP Lodge 56 and FOP, NJ Labor Counsel, P.E.R.C. No. 2012-13, 37 NJPER __ (¶ 2011), aff'd 2012 N.J. Super. Unpub. LEXIS 2046. The Commission held that grievances challenging the Township's unilateral increases in prescription co-pays for already retired officers were legally arbitrable as the various police unions had an interest in insuring that the terms of current and past collective negotiations agreement were honored by the public employer. The unions' asserted that the co-pays must remain at the same levels that were in effect at the time of each employee's retirement date. Agreeing with the Commission's analysis the Court observed:

[T]he FOP is not seeking to negotiate on behalf of retired members of its bargaining units. It is merely seeking to enforce what it asserts are their rights under contracts negotiated and agreed to by the Township when the retirees were active members of their respective bargaining units.

New Appeals

Commission decisions in these cases have been appealed

Burlington County Prosecutor, P.E.R.C. No. 2012-61, 39 NJPER 20 (¶4 2012)
(interest arbitration)

Union County Sheriff's Office, P.E.R.C. No. 2013-004
(interest arbitration and scope of negotiations)

State of New Jersey (State Police), P.E.R.C. No. 2012-071
(representation: unit of State Police Captains)

Appeal Withdrawn

Township of West Caldwell, P.E.R.C. No. 2012-073
(interest arbitration/scope of negotiations)

Enforcement Actions

Camden County Sheriff, IA-2010-003 and IA 2010-004.

The Sheriff did not appeal an interest arbitration award covering rank and file and higher ranked Sheriff's officers and did not implement the award as required by the interest arbitration law. PBA Local 277 has filed an action in the Law Division of Superior Court seeking an enforcement order.

OTHER CASES

Reduction in Force by seniority; interpretation of administrative regulations

Cozzolino v. Board of Education of the Township of West Orange, 2012 N.J. Super. Unpub. LEXIS 2114

N.J.A.C. 6A:32-2.1 distinguishes between elementary and secondary education:

"Elementary" means kindergarten, grades one through six and grades seven and eight without departmental instruction.

* * *

"Secondary" means grades nine through 12 in all high schools, grades seven and eight in junior high schools, grades seven, eight and nine in middle schools and grades seven and eight in elementary schools having departmental instruction.

Cozzolino, a tenured physical education teacher assigned to an elementary school housing grades K to 5 was laid off for economic reasons. He asserted that he had greater seniority than a physical education teacher who worked at a school comprised exclusively of sixth grade students. That school had departmental instruction. Cozzolino argued that the other teacher's tenure was also in the "elementary" education category, and that he had seniority over the retained teacher for the physical education position at that school. The Board ruled that the sixth grade physical education teacher had tenure in a "secondary" school category. The Appellate Division of the Superior Court affirms the Department of Education's denial of the petition, following a recommendation of an Administrative Law Judge. The Court held that the categorization of the sixth grade teacher as coming within the "secondary" designation was not unreasonable observing:

The plain language of N.J.A.C. 6A:32-2.1 does not specifically categorize departmentalized sixth grade programs as either elementary or secondary, and is therefore capable of yielding different interpretations.

Discrimination: Alleged violation of statutory and/or constitutional rights.

Steven J. Winters v. North Hudson Regional Fire and Rescue, et al., _____ N.J. _____ 2012 NJ LEXIS 904

The Supreme Court finds that a fire officer, during a hearing before the Office of Administrative Law to determine whether his termination should be sustained, had an opportunity to present a defense that the disciplinary charges were made in retaliation for his whistle-blowing activities. It rules that, under the particular facts and procedural history of the dispute, the firefighter failed to present the defense and he is thereby collaterally estopped from pursuing civil actions alleging violations of the Comprehensive Employee Protection Act (CEPA) and other statutory and constitutional rights.

From 2002 through 2006 Winters, a fire captain, made numerous complains. Among the subjects were: inoperable radios that compromised fire department safety; a supervisor's alleged sexual harassment; a supervisor's interference with an investigation; and the "needless" death of a firefighter due to inadequate supervision and faulty equipment. Some of these claims were reported by the media, including the charge of sexual harassment which the Regional investigated and found to be without basis. Winters was disciplined for allowing the sexual harassment charges to be disclosed to the media and received a demotion and a 60-day suspension that were upheld by the Civil Service Commission. In 2006, Winters suffered an on the job injury and was placed on paid injury leave beginning in June and ending in October. While on leave and while receiving full pay from the Regional, Winters, following the recommendation of one of his physicians, went to work. He received a total of \$10,000 from two other public employers for working part-time positions. During his injury leave Winters went on television after the firefighter died, to discuss his views on the alleged deficiencies in the Regional's fire-fighting procedures and equipment. Shortly thereafter the Regional phoned

Winters' home, where he was supposed to be in accordance with the Regional's sick leave policy. When the Regional discovered that he was working while on sick leave it terminated him. Winters appealed unsuccessfully to the Civil Service Commission and the Appellate Division of the Superior Court.

Winters filed suit in the Superior Court asserting that the Regional violated CEPA, the Law Against Discrimination and his state and federal constitutional rights of speech and association. Both the trial court and the Appellate Division rejected the Regional's assertion that Winters had an opportunity to litigate his retaliation claims during the hearing conducted by the Office of Administrative Law concerning his termination and accordingly, Winters was collaterally estopped from pursuing those claims. The Supreme Court agrees and reverses holding Winters cannot pursue his lawsuit. Justice Albin dissents finding that several required elements of collateral estoppel were absent and that Winters should be able to pursue his retaliation claims.

Arthur Margeotes v. Office of the Passaic County Prosecutor, et al., 2012 N.J. Super. Unpub. LEXIS 1912.

The Appellate Division of Superior Court affirms the dismissal of a wrongful termination lawsuit filed by a former Assistant Prosecutor. Margeotes led the Government Corruption/White Collar Crime Unit, and later, beginning in 1999, the Insurance Fraud Unit/Auto Theft Task Force. Margeotes alleged that in the early to mid-90s, he objected to and refused to participate in several illegal activities or to countenance corruption in the Prosecutor's Office. After the Prosecutor failed to stop the complained about activities, Margeotes also notified the New Jersey Attorney General's Office and the United States Attorney's Office about his concerns. In addition, he surreptitiously recorded his co-workers and other attorneys without permission and turned some of the tapes over to a federal agent. After the Prosecutor resigned, his successor, on his first day in office dismissed Margeotes. He then filed suit alleging his dismissal violated the Conscientious Employee Protection Act (CEPA),

Litchult v. Borough of Waldwick, et al., 2012 N.J. Super. Unpub. LEXIS 2078

Two years before he retired as a police sergeant, Litchult had been accused of using excessive force while transporting a prisoner with another officer. Although nothing came of that charge, Litchult began submitting reports of improper conduct or unauthorized activities by other officers (e.g. an officer examining e-mails on the Borough Administrator's computer; an officer using department time and equipment to conduct a private real estate business). One of the officers had been instrumental in reporting the excessive force allegation. Three weeks before advising the Department of his intent to retire, Litchult filed an eight-count complaint alleging violations of CEPA, breach of (the collectively-negotiated) contract, slander/libel, intentional interference with business advantage, intentional and negligent infliction of emotional distress, violations of state and federal anti-discrimination laws. All but one count was summarily dismissed at trial, the CEPA complaint was dismissed after a jury trial. The trial

judge ruled that the waiver provisions of CEPA barred several counts, but also ruled that those allegations lacked merit in any event. The Appellate Division of Superior Court affirms the dismissal of the complaint. In discussing the dismissal of the first amendment claim, the appellate court observed:

A public employee's speech is protected by the First Amendment if it implicates matters of public concern. Pickering v. Board of Education, 391 U.S. 563, 571-72 (1968). A public employee's speech involves a matter of public concern if it can

"be [of] political, social, or other concern to the community." [Green v. Phila. Housing Auth., 105 F.3d 882, 885 (3d Cir. 1997)]. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." [Connick v. Myers, 461 U.S. 138, 147-48, (1983)]. When "an employee [comments] upon matters only of personal interest, that public employee speaks not as a citizen upon matters of public policy." [Ibid.].

[Carlino v. Gloucester City High Sch., 57 F. Supp. 2d 1, 31 (D.N.J. 1999), aff'd, 44 Fed. Appx. 599 (3d Cir. 2002).]

However, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Garcetti v. Ceballos, 547 U.S. 410, 421 (2006). The decision finds that as a police officer, it was plaintiff's duty to report a fellow officer's unethical or illegal conduct. Thus, it was not speech protected by the First Amendment.

Heffernan v. City of Paterson, 2012 U.S. App. LEXIS 14539.

At his mother's request and while off-duty, Heffernan, a Paterson police officer, obtained a yard sign, to be placed on his mother's property, supporting a mayoral candidate who was a friend of the family, but was running against the incumbent Mayor. The Chief of Police learned of the incident, stripped Heffernan of his Detective position, his assignment to the Chief's office and reassigned him to less favorable posts. In a federal court trial Heffernan raised violations of his First Amendment rights of speech and association. The judge only permitted the latter claim to be tried and the jury ruled for Heffernan awarding compensatory and punitive damages. Several months later the trial judge retroactively recused himself citing a conflict of interest. A new judge granted summary judgment dismissing the free speech claim. The Court of Appeals reverses, holding that the new trial court judge committed numerous procedural and evidentiary errors and remands the case for additional proceedings.

Fouche v. NJ Transit, 2012 U.S. App. LEXIS 14524, 470 Fed. Appx. 96

The U.S. Court of Appeals for the Third Circuit affirms the dismissal of a lawsuit filed by a New Jersey Transit bus driver asserting that NJT had a duty to accommodate his religious objection against driving on Sundays. Fouche had just been promoted to full-time status. While he was a part-time driver NJT had been able to avoid giving him Sunday assignments. However, NJT showed that honoring his request would cause a hardship by transferring other drivers to Sunday work and would violate the seniority provisions of its collective negotiations agreement with the union representing the drivers. The Court observed that Fouche was aware that, because NJT operated seven days a week, full-time drivers could be assigned Sunday runs. It affirmed the summary judgment ruling of the federal district court that NJT did not violate state or federal civil rights law when it discharged Fouche for refusing to drive on Sundays.

May v. Borough of Pine Hill, 2012 U.S. Dist. LEXIS 112107

Following her termination, the former Borough tax collector filed a federal lawsuit against the Borough and its mayor alleging sexual harassment and retaliation for complaints protected by the Conscientious Employee Protection Act (CEPA). A federal district court judge denies the defendants' motion for summary judgment and holds that the claims may proceed to trial.

Discipline: Employee Misconduct

In the Matter of Denise Capizzi, Township of Berkeley, Department of Public Safety
In the Matter of Robert Andrews, Berkeley Township, 2012 N.J. Super. Unpub. LEXIS 1913.

The Appellate Division of Superior Court affirms the decision of the Civil Service Commission upholding discipline in consolidated cases with some common facts. The CSC upheld the dismissal of disciplinary charges against Andrews, a police lieutenant, but terminated Capizzi, a civilian police dispatcher. Testimony before the ALJ included allegations that Andrews and Capizzi were involved in improper sexual activity in Capizzi's work area.

In the Matter of the Tenure Hearing of Donald Dudley, School District of the Township of Neptune, 2012 N.J. Super. Unpub. LEXIS 1941.

The Appellate Division of Superior Court upholds the decision of the Commissioner of Education to terminate a tenured custodian even though the Administrative Law Judge concluded that a six month suspension was warranted because the custodian had not been subjected to progressive discipline for his record of offenses over a period of time that ultimately lead to the filing of tenure charges against him.

In re Hesse, 2012 N.J. Super. Unpub. LEXIS 2004

Hesse, an officer of the Department of Human Services (DHS), while armed and charged with the responsibility to monitor a patient from Ancora Psychiatric Hospital at an off-site hospital facility, fell asleep. After he was initially counseled, he was charged with several rule violations and a 30-day suspension was imposed. Hesse appealed and an Administrative Law Judge recommended reducing the penalty to a 15-days suspension. The Civil Service Commission adopted the recommendation but Hesse appealed arguing that the counseling and the suspension constituted double punishment for the same offense. The Appellate Division of the Superior Court rejects this contention and affirms the suspension.

In the Matter of Vanessa Warren, Department of Corrections, 2012 N.J. Super. Unpub. LEXIS 1848

The Appellate Division of the Superior Court reverses the Civil Service Commission's decision terminating a Corrections Officer with 17 years of previously unblemished service. The Administrative Law Judge had recommended a six month suspension. The Court, noting that the "ALJ had ample basis in the record to conclude that appellant's actions did not create a 'serious' breach of security,"remands the case to the CSC.

We do not make light of appellant's mistakes. Corrections officers are understandably held to a higher standard than other public employees. We are also fully cognizant of the potential security ramifications of these types of mistakes. Based on our review of the record, however, we are convinced the penalty of removal is "disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." Accordingly, we are constrained to remand this matter to the Commission for further review and consideration of an appropriate penalty based on all the facts and circumstances.

Arzola v. Civil Service Commission and Department of Corrections, 2012 N.J. Super. Unpub. LEXIS 2008

Arzola, a corrections officer and candidate for promotion to sergeant was accused of changing answers on his promotional exam during a session where candidates were permitted to review their answer sheets. He was (1) disqualified from the promotional list and (2) discharged based on his alleged misconduct. The Appellate Division of the Superior Court reverses Arzola's discharge and reinstates him finding that the officer was prejudiced by the failure to bring charges against him within 45 days as required by the contract between the Department of Corrections and PBA Local 105, the representative of corrections officers. The Court holds that the Administrative Law Judge should have consider the limitations period. The charges were filed 89 days after the officer's alleged offense. Potentially exculpatory evidence was lost adversely affecting the officer's ability to confront and cross-examine witnesses. But, the Court finds that Arzola did not show that his removal from the promotional list was arbitrary and capricious.

Public Employee Organizations—member benefits and internal disputes

Zisa v. N.J. State PBA-LPP, 2012 N.J. Super. Unpub. LEXIS 1999

Prior to becoming Chief of the Hackensack Police Department, Zisa had been a dues-paying PBA member. After 25 years, a member is no longer required to pay dues, but remains a member in good standing. Dues payments fund a Legal Protection Plan (LPP) for PBA members providing for the cost of legal defense and related expenses in certain criminal, civil and administrative proceedings. However the PBA asserted that when a member is no longer obligated to pay dues, a separate charge to remain in the LPP plan must be remitted, even though the PBA does not send the member a notice to that effect.

Zisa was indicted for official misconduct and requested, but was denied, assistance from the LPP. A trial court ruled that Zisa was a member of the PBA and was entitled to LPP coverage. The PBA appealed asserting that the court lacked jurisdiction to intervene in the affairs of a private organization and that Zisa had failed to comply with an organization bylaw requiring an internal appeal before a member can file suit against the PBA. The Appellate Division of Superior Court agreed with the PBA's argument and ruled that the court lacked jurisdiction over the dispute.