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December 5, 2012

MEMORANDUM

TO: Commissioners
FROM: Counsel Staff
SUBJECT: Report on Developments in the Counsel's Office Since November 15, 2012

Commission Cases

On November 19, 2012, the Appellate Division of the Superior Court issued a form order denying the motion for leave to appeal filed by Intervener, Bergen County Sheriff. The Commission, in an interim ruling, P.E.R.C. No. 2012-008, had held that the Bergen County Executive had a right to participate in collective negotiations between the Bergen County Sheriff and his employees.

New Appeals

The Fraternal Order of Police, Superior Officers Association has appealed the Commission's decision in Rutgers, the State University, P.E.R.C. No. 2013-12 restraining arbitration of a grievance challenging the demotion of a police officer.

The Newark State Operated School District has sought leave to appeal from the joint decision of the Commissioner of Education and the Commission, in Newark State Operated School District, P.E.R.C. No. 2013-26 holding that the Commission has the predominant interest in a consolidated unfair practice case and request for a declaratory ruling and appointing Director of Unfair Practices Gayl Mazuco as a Special Administrative Law Judge to hear the cases.

Hardyston Township has filed multiple applications and requests for stays and emergent relief with the Appellate Division of the Superior Court seeking to block arbitration, pursuant to

N.J.S.A. 40A:14-209 of the termination of a Hardyston police officer. That law, and implementing rules adopted by the Commission, allow a non-civil service police officer, terminated for conduct that would not violate any criminal laws, to have the termination reviewed by an arbitrator under an expedited procedure. The employer filed a scope of negotiations petition which has been administratively dismissed.

Other Cases

Length of Collective Negotiations Agreements Covering School Employees, Retroactivity

Board of Education of the Borough of Ramsey v. Ramsey Teachers Association, 2012 N.J. Super. Unpub. LEXIS 2566

The Appellate Division of the Superior Court affirms the decision of the Commissioner of Education holding that the Board and the Association could not legally agree on a contract with salary guides covering four years, even though two years of the contract were retroactive. In 2007 the parties commenced negotiations for a successor to the contract that was set to expire June 30 of that year. The agreement expired and a Commission fact-finder was appointed to assist the parties. His report recommended that the contract cover the two years that had nearly passed since June 30, 2007 and two additional years. In extending the agreement to cover four years, the fact-finder reasoned that "some additional time away from the bargaining table may be in the interest of all concerned." Both parties ratified the agreement, but the Board later sought to void the last year of the agreement arguing it violated N.J.S.A. 18A:29-4.1 limiting salary guides to three years. The Administrative Law Judge rejected the Board's argument ruling:

In 2009, the Board and the Association had been negotiating for a successor agreement for close to two years. The clear intent behind the Board's April 2009 resolution was to retroactively agree upon salary adjustments for the years that had already passed, 2007-2008 and 2008-2009, and to also purchase labor peace for two years moving forward. Accordingly, the 2009 Board bound successor boards for only two years. Its actions were fully compliant with N.J.S.A. 18A:29-4.1, which allows a sitting board to establish staff salaries prospectively for up to three years.

The Commissioner of Education declined to adopt the ALJ's reasoning and voided the "fourth" year of the guide.

Discipline: civil service police.

In re Julio Rivera et. al. v. City of Newark., 2012 N.J. Super. Unpub. LEXIS 2584

An officer failed to report that he and other officers were taking a suspect to a location other than the one at which he was detained as part of an investigation. The officer was charged with

neglect of duty and violation of internal rules and procedures. Newark sought to impose a 15-day suspension. An Administrative Law Judge found that the officer had engaged in the conduct alleged in the charges. However, he recommended dismissal of the neglect of duty charge and concluded that the violation of the internal rules only warranted a reprimand. The Civil Service Commission adopted the ALJ's findings of fact, but sustained the neglect of duty charge and reinstated the 15-day suspension. The Superior Court, Appellate Division, affirms the CSC's action.

Civil Service: vacation leave, preemption

Valeria Headon v. Jersey City Board of Education, ___ N.J. ___, 2012 N.J. LEXIS 1143

Headen was a ten-month, full time food service worker for the Board, which was a civil service jurisdiction. Headen claimed that, in addition to the leave provisions of a collective negotiations agreement, she was entitled to additional leave under civil service law. The Supreme Court held that the Act's paid vacation leave provisions applied to career service, non-teaching staff employees of school districts that opted to be part of the civil service system, including 10-month employees such as Headen. The Court held that the Civil Service laws, and its implementing regulations, established a floor for the amount of leave to be provided to such employees. Relying, in part, on the preemption analysis used in negotiability disputes, the Court rules that, because the negotiated agreement provided her with more than the minimum leave set by statute, she did not have a valid claim to additional leave.

Tenure, hourly work schedules, staff reductions

Kourtesis, et al., v. Bergen County Special Services School District, 2012 N.J. Super. Unpub. LEXIS 2527

Kourtesis and 16 other litigants are tenured teachers and speech correction/language therapists employed on an hourly basis providing supplemental, auxiliary, or remedial educational and/or instructional services to eligible non-public school elementary and secondary school students pursuant a State-funded program (the 192-193 Program). Unlike traditional teachers, appellants generally begin working the second week of September of each school year after the specific needs of the non-public host schools are determined; are paid on an hourly basis and have varying work hours throughout the school year. Because three of the non-public schools serviced by the district closed and State aid fell by 13 per cent, the Board reduced hours rather than layoff any teachers. The teachers appealed to the department of education asserting that reductions in their work schedules for the 2010-2011 school year constituted a reduction in force in violation of their tenure and seniority rights, as well as a violation of the Open Public Meetings Act. An Administrative Law Judge recommended dismissal of their petitions and the Commissioner of Education adopted that recommendation. The Appellate Division of the Superior Court, noting that neither the agreement between the Board and the Bergen County Special Services 192-193 Association, nor the teachers' individual agreements, guaranteed a

minimum number of work hours or that assignments be based on seniority, upheld the Commissioner's ruling.

Retaliation for successfully pursuing claim for tenure; issue of public concern

Milano v. Bd. of Educ. Of Tp. Of Franklin, 2012 U.S. Dist. LEXIS 161942

Milano was hired by the Board and worked for several months as a pre-school teacher. Thereafter she performed the same job at the same location with the same salary and benefits for four years under the auspices of the Hunterdon County Educational Service Commission ("HCECSC"). She was then "rehired" by the Board. Milano inquired as to her tenure status. The Board said she did not have tenure because she had worked for the HCECSC and not the Board. However, Milano filed a petition and secured a determination from the Commissioner of Education that she had acquired tenure. In a federal district court suit, Milano alleged that following her successful administrative appeal, the Board retaliated against her by issuing negative evaluations, withholding salary increments, and improperly deducting withholding taxes from restitution of her out of pocket medical expenses. She alleged that the Board's actions violated federal civil rights law and her first amendment right to petition the government for a redress of grievances. In a previous decision (2012 U.S. Dist. LEXIS 71675), the district court dismissed her civil rights claim. In this decision the court dismisses her first amendment claim holding that a claim for tenure is a personal job issue rather than a matter of general public interest or importance, a required showing for maintaining a "petition clause" claim.

CEPA retaliation for supporting fellow employee's civil rights suit; issue of public concern

Fredericks v. Township of Weehawken, 2012 U.S. Dist. LEXIS 163396

Fredericks, the Township's tax collector, submitted an affidavit in a separate civil rights suit filed by a Township police officer. The affidavit asserts that the Mayor had ordered the assessment of illegally high taxes on certain Township residents. Weeks after submitting the certification, Fredericks was the victim of retaliation in the form of compensation-related threats, interference with educational opportunities, and restrictions on his ability to communicate, that taken together, was held sufficient to make out a hostile work environment claim under the Conscientious Employee Protection Act (CEPA). The U.S. District Court declines to dismiss the tax collector's suit holding that speech is a matter of public concern where it shows wrongdoing by a public official that would be relevant to voters evaluation of his performance in office. The Court also elaborates on several other procedural and substantive issues relating to the proofs necessary to establish causes of action under CEPA, federal civil rights laws and the exercise of free speech under the First Amendment.