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**MEMORANDUM**

**TO:** Commissioners

**FROM:** Counsel Staff

**SUBJECT:** Report on Developments in the Counsel's Office Since December 5, 2012

**Commission Cases**

As the counsel's office reported in December, 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.

However, the same parties were also litigating that issue before the Superior Court, Law Division, Bergen County in a lawsuit filed by the representative of the Sheriff's Officers (PBA Local 134) and the Bergen County Sheriff against the Bergen County Executive. On December 19, 2012, despite the Commission's decision finding that the Bergen County Executive had a right to participate in collective negotiations, and the order denying leave to appeal that ruling, Superior Court Judge Joseph S. Conte, issued an order directing the County Executive to implement the terms of the successor contract negotiated by the PBA and the Sheriff. Judge Conte's decision has been appealed to the Appellate Division of the Superior Court.

## New Appeals

The public employer has appealed Township of West Windsor, P.E.R.C. No. 2013-039, in which the Commission declined to restrain arbitration of a police union's grievance asserting that two officers had a contractual entitlement to tuition reimbursement.

The public employer has appealed City of Jersey City, P.E.R.C. No. 2013-038, in which the Commission declined to restrain arbitration of grievances filed by the representatives of five separate units of City employees asserting that the City had changed the health benefits of already retired employees. As set forth in its opinion, the Commission applied its decision 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, 38 NJPER 155 (¶44 2011), a case that has been affirmed on appeal [39 NJPER 69 (¶27 App. Div), 2012 N.J. Super. Unpub. LEXIS 2046].

## Other Cases

### Duty of Fair Representation

Townsend v. Amalgamated Transit Union Division 540, 2012 NJ Super Unpub LEXIS 2755

The Appellate Division of the Superior Court affirms a decision of a trial judge granting summary judgment to the ATU and dismissing Townsend's claim that the ATU violated its duty of fair representation in connection with Townsend's efforts to contest his termination as a bus driver for New Jersey Transit-Mercer. Townsend had suffered a work-related injury in January 2008 but did not file a worker's compensation claim until December. His claim was dismissed for inadequate proof. Townsend, an ATU representative and an NJT representative met and scheduled a hearing regarding Townsend's termination. Townsend did not appear at the hearing despite having received timely and adequate notice. He had also failed to respond to other correspondence regarding his exhaustion of additional unpaid leave days that are granted by NJT to an employee who had been injured.

Moving on to consider the applicable law, the judge reiterated that a breach of a union's duty of fair representation of its members occurs when a union's conduct is "arbitrary, discriminatory or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190, (1967). Plaintiff did not demonstrate that such a breach occurred. Even according plaintiff all favorable but legitimate inferences that could be drawn from the facts, it was clear that the union fulfilled its legal obligation to plaintiff. Therefore, the union was entitled to judgment as a matter of law. See R. 4:46-2(c).

## Discipline, Discharge, Discrimination

### Conviction for abuse of student vacated; undisclosed exculpatory evidence

State v. Askia Nash, \_\_\_ N.J. \_\_\_, 2013 N.J. LEXIS 79

The Supreme Court, based on undisclosed exculpatory evidence, grants post-conviction relief and orders a new trial for a Newark public school librarian who had been convicted of sexually assaulting one special education student (J.B.) and improperly touching another. He had been sentenced to 22 years in prison. The librarian's defense was that a school aide was present at all times. The school principal testified that there was only one library aide and that the aide was not with Nash at all times. However the principal failed to disclose that, because J.B. was a behavioral problem and frequently told lies, an aide accompanied J.B. at all times. After Nash was accused, the principal imposed a gag order on all staff, impairing the ability of Nash's attorneys to interview school personnel including two aides who were assigned to J.B. The Prosecutor was unaware at the time of trial that there were several categories of school aides.

### Tenure charges: dismissal based on derogatory statements about students on social media

Tenure Hearing of Jennifer O'Brien, State Operated School District of the City of Paterson, 2013 NJ Super Unpub LEXIS 28.

The Appellate Division of the Superior Court affirms the decision of the Commissioner of Education to sustain tenure charges and remove a tenured teacher from her job. The teacher, who had a previously unblemished record during ten years of employment with the District, posted derogatory comments about her first grade class on her Facebook page, suggesting that their in-class behavior portended a future as "criminals." The teacher argued that her comments were protected by her right to free speech. The Administrative Law Judge, the Acting Commissioner of Education and the Court rejects this claim. Its opinion states:

[E]ven if O'Brien's comments were on a matter of public concern, her right to express those comments was outweighed by the district's interest in the efficient operation of its schools. There is sufficient credible evidence in the record to support these findings. Therefore, O'Brien failed to establish that her Facebook postings were protected speech under the [Pickering v. Bd. of Ed., 391 U.S. 563 (1968)] balancing test.

**Malicious Prosecution, Malicious abuse of process, public employer/managerial employees**

Melillo v. Elizabeth Bd. of Educ. et als, 2012 U.S. Dist. LEXIS 182018

The U.S. District Court denies a motion filed by the Board, its Superintendent of Schools and Human Resources Director to dismiss a multi-faceted federal lawsuit filed by a tenured head custodian who the Board sought to have prosecuted for alleged criminal conduct and filed tenure charges seeking his dismissal. Despite the custodian's exoneration and the dismissal of the tenure charges, the Board and the officials then contacted the Division of Youth and Family Services and alleged that the custodian had engaged in inappropriate sexual contact with students, an allegation that was also dismissed. The custodian sued the Superintendent and Human Resources director in their official capacities and individually. Concluding that the custodian has sufficiently alleged a malicious abuse of process claim (and other violations as well) the Court recites:

Plaintiff specifically alleges the following acts of Defendants: (1) they "protract[ed] the tenure litigation for false, pretextual, and spurious reasons in order to prolong and heighten the personal cost to Plaintiff"; (2) Plaintiff was assigned to "a rubber room" when his cross examination was scheduled to begin; (3) with respect to the criminal proceedings, Defendants blocked and opposed Plaintiff's admission into Pretrial Intervention; (4) Defendants "[a]ttempt[ed] to undo Plaintiff's expungement after he was found not guilty in the criminal matter," and (5) Defendants "fil[ed] a DYFS complaint after Plaintiff's acquittal of criminal charges." Plaintiff alleges that Defendant's coercive ulterior motives were to make the underlying litigation more costly to the Defendant and also prevent the Defendant from continuing his employment.

**Police Discipline: failure to meet burden of proof; duty to mitigate income loss**

Daniel Marcano and Christopher A. Frucci, City of Camden, 2013 NJ Super Unpub LEXIS 65.

The Appellate Division of the Superior Court upholds the decision of the Civil Service Commission dismissing disciplinary charges against two Camden police officers, who the City sought to terminate, they were reinstated with back pay. The Court also dismisses the appeal of one officer who contested his reduced back pay award, finding that he had failed to mitigate his damages. The officers, who were assigned to a non-emergency communications post, were accused of leaving their posts without permission and not working their full shifts. An Administrative Law Judge concluded the City had failed to sustain its burden of proof of showing that the officers had not worked their full shift and that their actions were consistent with the "de facto" flexible work rules that applied to their assignments. The Court's opinion recites the ability of an agency head to reach different legal conclusions that those of the ALJ but also notes that an agency head may only reject the ALJ's credibility findings after it determines

[F]rom a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." In doing so, "the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

**Police Discipline: improper disciplinary procedures, bias; rehearing of charges**

Daniel Creange, v. Borough of Bogota, et al., 2013 NJ Super Unpub LEXIS 119.

The Appellate Division of the Superior Court, affirms a trial court ruling that declined to vacate a second disciplinary hearing, held before an impartial adjudicator, after a jury found that the initial proceeding before elected officials, was biased and violated the police officer's rights. The Court holds that res judicata and collateral estoppel do not apply as the validity of the disciplinary procedures involve a different claim than whether the discipline was justified.

After an off-duty police officer, recovering from an injury, was assaulted in a bar he was directed to report to the police station where the suspects had been taken. On arrival he became agitated because he perceived that a sergeant was joking and having an amiable conversation with the suspects and began shouting and making threats. Disciplinary charges were filed and heard internally by five council members and the mayor. Creange was active in Democratic politics and a majority of the panel hearing the charges were Republicans. The panel found Creange guilty and decreed that he serve an eight week unpaid suspension. Creange appealed claiming the panel was biased against him and the proceeding violated his constitutional rights. Before that issue was adjudicated, the parties agreed to vacate the initial disciplinary determination and have the charges re-heard before an impartial hearing officer. A Superior Court jury found the proceeding was biased and awarded Creange \$15,000. A retired Superior Court judge presided over the second disciplinary proceeding. The charges were sustained, but the sanction was changed to counseling and a verbal reprimand. The officer again appealed asserting that principles of res judicata and/or collateral estoppel barred the second disciplinary proceeding.

**Whistleblowing: workplace complaints and matters of general public concern**

Farneski v. County of Hunterdon, 2013 U.S. Dist. LEXIS 3034

The U.S. District Court grants summary judgment in favor of the Hudson County prosecutor and several members of his staff and dismissed a multi-count lawsuit filed by a Lieutenant in the Prosecutor's office, alleging harassment, retaliation for whistle-blowing, civil rights, free speech and due process violations. The opinion, in a case with unusual and extreme factual allegations, attempts to distinguish between public employee complaints that raise issues of general public concern and those that involve general workplace grievances.

## Pensions and Benefits

### Pensions: Dual public employment; Prospective application of new legislation

Francis Chiarello v. Board of Trustees, Public Employees Retirement System, \_\_\_ N.J. Super. \_\_\_, 2012 NJ Super LEXIS 190.

An employee of the South Jersey Transportation Authority, who is also the elected mayor of a municipality, applied for an ordinary disability retirement from the SJTA. Subsequent to the date he filed his retirement application, a new law went into effect providing that persons with more than one position in the Public Employees' Retirement System, must resign from their second PERS position when they retire from the first position. The applicant asserted that he could maintain his position as mayor because the law existing at the time he submitted his application governed. The PERS Board held that while the law could not affect persons who had already retired, it covered the applicant. The Superior Court, Appellate Division, in a published opinion, reverses, holding that, generally, laws affecting substantive rights may only be applied prospectively and that due process and fundamental fairness required that the application be governed by the law in effect at the time it was submitted. Because the PERS Board's decision was based solely on the "dual office holding," the court vacated that ruling, but remanded to allow the PERS Board to consider whether the applicant's disability affected his ability to continue in his elected position as mayor.

### Sick leave verification and use of statutory family leave

Police Benevolent Association Local No. 249 v. County of Burlington, 2013 NJ Super Unpub LEXIS 106

County Correction officers who are suspected of sick leave abuse are placed on a list and are required to submit a doctor's note to verify proper use of sick leave. An officer, who was already on the list, sought and received approval to intermittently use statutory family leave [IFL] to care for his sick child who had a chronic illness. On occasions when he used family leave, the County still required that the officer supply verification. When he failed to do so his pay was docked. An arbitrator denied the PBA's grievance, holding that the employer had a right to demand verification because the officer was on the list. A trial court judge granted the PBA's application to set aside the arbitration award holding:

[T]he [County]'s required doctor's note policy as applied here diminished [the officer's] rights under the [Federal Family Medical Leave Act] because he has been approved for intermittent family leave and was using intermittent family leave on the days that are in issue here. It is unlawful for any employer to interfere with, restrain, or deny the exercise of, the attempt to exercise any FMLA right. The FMLA allows an employee to take IFL because of [the employee's] own serious health condition or the health condition of

a family member. To obtain IFL, the employee must obtain a medical certification as to his own serious health condition or that of his family member. There is not any requirement under the IFL that every time the serious health condition causes that person to be out a medical note or certification is necessary to prove that use of the IFL day was appropriate. Plainly not every use of an IFL day would require a doctor or hospital visit.

The Appellate Division of the Superior Court affirms, holding that the lower court did not violate the “reasonably debatable” standard of review for public sector grievance arbitration awards. Instead, the trial court properly held that the award had to be set aside because it was contrary to the public policy of the FMLA.

### **Administrative Proceedings: Procedural Issues**

#### **Recall rights after layoff: abandonment of case based on incorrect data; reopening**

Ashe v. The State Operated School District of the City of Paterson, 2012 NJ Super Unpub LEXIS 2807

Ashe, a tenured Spanish teacher, was one of nearly 100 tenured faculty members who were laid off as a result of a May 2010 reduction in force. Petitions filed with the Department of Education asserted that the District erred in determining the seniority rights of many teachers. While the case was pending before an Administrative Law Judge, the list was revised several times until August 1, 2011 when the District and the Education Association agreed that the list was correct. A fund of \$500,00 was set aside to pay those teachers whose rights had been violated because an incorrect list was used to identify teachers to be RIF'd. Shortly thereafter, Ashe withdrew her petition as it pertained to re-employment rights for the 2010-2011 school year, but without prejudice to re-employment claims for future years. However, a further examination of the list showed that it was based on incorrect information regarding Spanish teachers that the Paterson Education Association had failed to provide in advance of the August 1 list. The Appellate Division of the Superior Court affirms the Commissioner of Education's refusal to allow the teacher to reinstate her recall rights claim for 2010-2011. The opinion discusses circumstances in which an administrative agency can reconsider or reopen cases that were previously decided.

#### **Administrative Hearings/Fairness; Notice of obligation to submit evidence**

Milford Borough Board of Education v. Christopher D. Cerf, Commissioner of Education of the State of New Jersey, 2012 NJ Super Unpub LEXIS 2700

An education statute allows a school district to adopt a resolution proposing and/or limiting the sending of some of its pupils to another district. The resolution must be submitted to and approved by the Commissioner of Education. The New Milford Board adopted such a

resolution. Its Superintendent's letter to the Commissioner stated the district's willingness to provide "any additional information . . . required." No pertinent administrative regulation contained language mandating the submission of supporting evidence. The Commissioner did not respond to the Superintendent's invitation and denied the Board's resolution because it was "not accompanied by any credible evidence that supports the assertion that allowing unrestricted student participation in the [choice program] would have a negative impact on the students, operations, programs or fiscal condition of your district."

The Superior Court, Appellate Division reverses that ruling as arbitrary because the Board was not notified of any obligation to submit evidence. The Court holds that the Commissioner's action was contrary to principles of administrative fairness.

Given the letter Milford's superintendent wrote during the year the Board's resolution was pending before the Commissioner for approval — a letter that stated the district's willingness to provide "any additional information . . . required" — a denial based on failure to supply supporting information bespeaks arbitrariness. Arbitrariness of this sort is in conflict with the general principle that "[p]ersons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong from its hindsight conception of what the public interest requires in the particular situation." Boller Beverages, Inc. v. Davis, 38 N.J. 138, 152 (1962). The premise of reasonable official action is that those subject to it "know in advance all the rules of the game, so to speak, and may act with reasonable assurance."