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May 23, 2012

MEMORANDUM

TO: Commissioners
FROM: Counsel Staff
SUBJECT: Report on Developments in the Counsel's Office Since April 26, 2012

Commission Cases

As a result of an agreement on the terms of a successor collective negotiations agreement, the Borough has requested that its appeal from Fort Lee and PBA Local No. 245, P.E.R.C. No. 2011-87, NJPER be withdrawn. All parties concur and we are awaiting the issuance of an order confirming the withdrawal from the Superior Court, Appellate Division.

The employer has appealed the interest arbitration award issued in Borough of Milltown and PBA Local 338 to the Appellate Division of the Superior Court. Because three Commission members were recused and the remaining four Commissioners split 2-2 on whether to affirm, modify or vacate the award, an unbreakable tie resulted, leaving the arbitrator's award intact.

Other Cases

Limitations on supplemental compensation to school administrators

New Jersey Association of School Administrators v. Schundler, ___ N.J. ___, 2012 N.J. LEXIS 511

The Supreme Court holds that two statutes relating to and limiting the payment, on retirement, of supplemental compensation based on unused accumulated sick leave, are not in conflict. N.J.S.A. 18A:30-3.5, enacted in 2007, prospectively caps such pay-outs at \$15,000.00 but also provides that someone already employed on the effective date of the law and/or who is covered

by a collective negotiations agreement in effect on that date “shall, upon retirement, be eligible to receive for any unused leave not more than the amount so accumulated or not more than \$15,000, whichever is greater.” The law also provides:

Supplemental compensation shall be payable only at the time of retirement from a State-administered or locally-administered retirement system based on the leave credited on the date of retirement.

In 2010, N.J.S.A. 18A:30-3.6 was enacted providing:

Notwithstanding any law, rule or regulation to the contrary, a board of education, or an agency or instrumentality thereof, shall not pay supplemental compensation . . . for accumulated unused sick leave in an amount in excess of \$ 15,000. Supplemental compensation shall be payable only at the time of retirement from a State-administered or locally-administered retirement system based on the leave credited on the date of retirement. This provision shall apply only to officers and employees who commence service with the board of education, or the agency or instrumentality thereof, on or after [May 21, 2010]. This section shall not be construed to affect the terms in any collective negotiations agreement with a relevant provision in force on that effective date.

Reversing the Superior Court, Appellate Division, the Court holds that the Legislature could limit terms and conditions of future contracts for public employees in a way that did not raise constitutional concerns; the tenure laws did not bar the Legislature’s later actions; the Legislature properly exercised its power when it directed the Commissioner to issue the regulations; and the regulations were consistent with their respective enabling statutes, advanced the Legislature’s goals, and protected benefits that employees had already accumulated. However, the Court noted that the statute allowed payment for accumulated sick leave only at the time of retirement and precluded such payments if an administrator died prior to retirement or otherwise separated from employment. The statute does not limit payments for unused vacation leave was not limited to retirement. Such payments could be made on separation or to an administrator’s estate.

Deferred Compensation to Volunteer Emergency Responders

North Haledon Fire Company No. 1, John Bleeker and Daniel Stevenson v. Borough of North Haledon et al., ___ N.J. Super. ___ 2012 N.J. Super LEXIS 76 (App. Div. 2012).

A statute (N.J.S.A. 40A:14-185) authorizes a public employer, that does not have a fire district, to establish, by ordinance and referendum, a Length of Service Award Program (LOSAP) for emergency services volunteers. North Haledon established deferred compensation accounts for members of the Fire Company. Eligibility for the program and the amount of the contributions are linked to a point system based upon the percentage of calls that a volunteer emergency responder answers during each year. The Borough withdrew some of its prior contributions to

the accounts of some responders, including Bleeker and Stevenson, because they had not answered a certain percentage of fire calls. The two volunteers and the Fire Company sued the . Affirming in part and reversing in part a trial court decision, the Appellate Division of the Superior Court holds: the Borough improperly withdrew the prior contributions because the ordinance establishing the program does not require that a certain percentage of responses be for fire calls; that the Fire Company had standing to sue; and that the order directing the restoration of the contributions did not apply to other volunteer responders who were not part of the lawsuit. The opinion has been approved for official publication.

Grievance Arbitration

Trenton Educational Secretaries Association v. Trenton Board of Education, 2012 NJ Super Unpub LEXIS 1034 (App. Div. 2012)

The Appellate Division of Superior Court reinstates an arbitration award that directed the Board to compensate secretaries who, over a 10-month period, performed work normally assigned only to secretaries holding the highest level title. The contract provided that secretaries assigned work of a higher title for more than 20 days, would be compensated at the higher rate. The opinion criticizes the lower court judge for declining to hear the case in a summary manner, as explicitly provided in a statute and court rule, and for misapplying the standard for reviewing public sector grievance arbitration awards. When the lower court ordered a plenary review, the Association filed a motion for leave to appeal the trial judge's refusal to proceed in a summary manner, but its motion was denied. The reviewing court also dissects the lower court's mistakes in the way it applied the limited standard of review of public sector grievance arbitration awards. The case is remanded for the entry of an order confirming the award.

Freehold Regional High School District Board of Education v. Freehold Regional High School Custodial and Maintenance Association, 2012 NJ Super Unpub LEXIS 906 (App. Div. 2012)

The Appellate Division of Superior Court affirms a trial judge's decision restraining arbitration of a grievance challenging the non-renewal of the contracts of several custodial employees. In its grievance the Association asserted that the Board was conducting a reduction in force and should have laid off custodians in order of seniority. In response to the Association's inquiry, the Board stated that the custodians who were non-renewed had the worst attendance records among custodial employees. Reviewing the amendment to N.J.S.A. 34:13A-5.3, providing that doubts about the contractual arbitrability of a grievance should be resolved in favor of arbitration, the Court nevertheless concludes that the parties' did not agree to arbitrate the Association's claim noting: (1) the contract only allowed arbitration of grievances alleging violations of the express terms of the agreement; (2) other recent court cases allowing arbitration of the terminations of custodians occurred mid-contract and did not involve non-renewal decision; and (3) no provision in the agreement specifically provided that these custodians had contractual or statutory tenure.

New Jersey Transit Corporation v. New Jersey Transit Police Superior Officers Fraternal Order of Police, Lodge 37 2012 N.J. Super. Unpub. LEXIS 848 (App. Div 2012)

The Appellate Division of Superior Court affirms a trial judge's decision confirming a supplemental arbitration award calculating back pay and benefits due to an NJT police sergeant whose discharge (based on physical injuries) was overturned. The original arbitration award, affirmed on appeal, directed the officer be paid the difference between the salary he earned from NJT from July 14, 2003, to the date of payment, namely, his full sergeant's salary, less substitute earnings. The arbitrator retained jurisdiction for the sole purpose of resolving disputes regarding the implementation or computation of the remedy. The court holds that in its second appeal, NJT belatedly challenged the original arbitrator's award, by asserting that it violates public policy because it allocates payments to the sergeant after his voluntary resignation. Calling the argument "an ill-disguised effort to relitigate issues long ago decided," the Court holds that the issue has been decided and that res judicata bars NJT's challenge.

Township of Montclair v. Montclair PBA Local No. 53, 2012 NJ Super Unpub LEXIS _____ (App. Div. 2012)

The Appellate Division of Superior Court, relying on a procedural ground, vacates and remands for reconsideration an arbitration award sustaining a grievance filed by the PBA. The Law Division of Superior Court had confirmed the award. Before 2010, the Township had called in available, off-duty patrol officers on an overtime basis, to fill vacancies to maintain minimum staffing levels in the patrol division. In 2010 the Township started filling those patrol division vacancies with supervisory officers. The PBA's grievance asserted that the Township's action violated the past practices clause of the parties' collective negotiations agreement. The arbitrator articulated a different issue than had been argued by the PBA and the Township and concluded that because supervisors are not part of the bargaining unit, "assignment of bargaining unit work to supervisors violates the [CNA]." The Appellate court accepts the employer's argument that the award should be vacated because the analysis used by the arbitrator was not framed or briefed during the arbitration proceeding. The Court holds that this was procedural unfairness and warranted a rehearing so the parties could address the arbitrator's analysis.¹

Pensionable salary-Teaching staff-Days worked beyond normal work year

Morris Hills Regional District Education Association v. Board of Trustees of the Teachers' Pension and Annuity Fund, 2012 N.J. Super. Unpub. LEXIS 1090 (App. Div 2012)

The parties' collective negotiations agreement provides that Counselors, Child Study Team members, Student Assistance Coordinators (SAC), and English as a Second Language (ESL)

¹ Generally, assigning non-unit supervisors to overtime opportunities that would otherwise have been available to members of a collective negotiations unit is an arbitrable issue. See State v. Int'l Fedn. of Prof'l & Tech. Eng'rs, Local 195, 169 N.J. 505 (2001)

teachers may have to work up to five days more than the 183 days worked by other teaching staff. Reversing the decision of the TPAF Board of Trustees, the Appellate Division of the Superior Court holds that the *per diem* payments for such work constitute pensionable compensation within the definition contained in N.J.S.A. 18A:66-2(d). The Court holds that the implementing rule adopted by the TPAF, N.J.A.C. 17:4-4.1, impermissibly narrows the statutory definition of pensionable compensation. The Court also found that the work performed, outside the normal confines of the school year, was integral and directly connected to the normal duties of the positions performed during the school term and was not a stipend for temporary work.

Whistleblower law public employees

Hallanan v. Township of Fairfield Board of Education, 2012 N.J. Super. Unpub. LEXIS 969 (App. Div 2012)

The Appellate Division of Superior Court holds that a former school district official can have a jury decide a claim that she was fired, in violation of New Jersey's "whistle-blower" law, for questioning if proper procedures were followed in hiring a school superintendent. The Court reversed a lower court decision granting summary judgment for the defendants and remanded the case for trial. The court held the record reflected that Hallanan, the district's affirmative action officer, had a reasonable belief that the board had not complied with its own guidelines and State rules in its selection of the superintendent of schools without open competitive bidding.

Temporary employee status

Berrios v. Department of Community Affairs, 2012 N.J. Super. Unpub. LEXIS 840 (App. Div. 2012)

Berrios was hired as a temporary employee to inspect housing. After three years in that position and status, an attorney representing Berrios and another three-year temporary employee wrote to the Department asserting that his clients should have been made permanent after one year and were entitled to mileage reimbursement incurred while doing their work. The Department responded that permanent status cannot be achieved purely on time of service. Berrios had not applied to take either of two examinations for a permanent position that were conducted while he was a temporary employee. The DCA said it would take the mileage reimbursement claim under advisement. Berrios filed a lawsuit in the Superior Court, Law Division which dismissed it based on the State's arguments that administrative remedies had not been exhausted and only the Appellate Division could review the action of a state agency.

On appeal, the court reverses the dismissal of the lawsuit on the ground that the DCA did not fully resolve the employee's claims, and as a result there was no final administrative agency action. It transfers the case back to the DCA.