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April 22, 2013

MEMORANDUM

TO: Commissioners
FROM: Counsel Staff
SUBJECT: Report on Developments in the Counsel's Office Since March 15, 2013

Commission Cases

The Appellate Division of the Superior Court has issued Atlantic City Bd. of Ed. v. Atlantic City Ed. Ass'n, 2013 N.J. Super. Unpub LEXIS 787, aff'g P.E.R.C. No. 2012-31, 38 NJPER 257 (¶87 2011). The court affirms the Commission's conclusion that severable work load and compensation claims, flowing from a managerial decision to have all bilingual evaluations performed "in-house," were mandatorily negotiable and arbitrable. Jurisdictionally, the Court reiterated our limited role in scope of negotiations cases and discussed where and how other issues related to grievance arbitration are decided.

The Court held that the Commission stayed within the narrow limits of its scope of negotiations jurisdiction and properly identified, but declined to rule, on other issues that may be pertinent to the arbitration demand.

The Court held that:

- Whether the claim for increased compensation for alleged additional work was properly presented is for the arbitrator;
- The Commission properly deferred to the arbitrator, the impact of the employer's claim that employees were not directed to work additional hours;

- The Commission properly determined the issue presented to it was whether the request for additional compensation for additional work, if properly asserted, was negotiable.

New Appeals

An appeal has been filed by the union in Township of Teaneck and Teaneck FMBA, P.E.R.C. No. 2013-060. The Commission restrained arbitration of a grievance filed by the firefighters alleging that the Township violated the parties' contract when it refused to allow up to four firefighters per shift to take scheduled time off.

Appeals Withdrawn or Dismissed

The P.B.A's appeal from Borough of Ramsey and Ramsey PBA Local No. 155, P.E.R.C. No. 2013-6, 39 NJPER 96 (¶34 2012) has been dismissed. The PBA failed to file a brief in support of its appeal.

Cases related to Commission cases

The Commission's motion to intervene or appear as a friend of the court in Bergen County P.B.A. Local 134 v. Donovan, app. pending, A-1810-12T1 has been denied. In P.E.R.C. No. 2013-8, 34 NJPER 147 (¶45 2012), the Commission held that the County Executive should not have been excluded from negotiations between the Sheriff and the PBA, the representative of sheriff's officers. After the Commission's decision was issued, a trial court judge issued a contrary ruling holding that the County Executive had no role in collective negotiations with sheriff's officers. The case is now pending before the Appellate Division of the Superior Court.

Hardyston Township is appealing the decision of a Special Disciplinary Arbitrator appointed to review the firing of a non-civil service police officer (DA-2013-001). The arbitrator overturned the discharge and substituted a 10-day suspension. The officer has commenced a court action to enforce the award asserting the Township has failed to reinstate him. As with appeals from grievance arbitration awards, the Commission does not normally participate in such proceedings.

Other cases

Arbitrator's order to reimburse mid-contract increase in co-pays does not violate SHBP.

Borough of East Rutherford v. East Rutherford PBA Local 275, ___ N.J. ___, 61 A.3d 941, 2013 N.J. LEXIS 204.

The Supreme Court affirms the decision of the Appellate Division of the Superior Court which had reinstated an arbitration award in favor of PBA Local 275. A grievance asserted that the Borough violated the parties collective negotiations agreement when it increased, mid-contract, co-pays for doctors office visits after the co-pays were raised by the State Health Benefits Plan (SHBP). The arbitrator found that the Borough violated the CNA when employees were required to pay the increased co-pay, and she awarded the employees reimbursement for the amount of the increased co-pays. The trial court vacated the arbitrator's award, finding that it was contrary to N.J.S.A. 52:14-17.29(C), violated public policy, exceeded the arbitrator's authority, was procured by undue means, and was not reasonably debatable. The Appellate Division reversed, finding that the award was not contrary to existing law or public policy. The Supreme Court agreed with the Appellate Division and sustained the arbitration award, holding that it was reasonably debatable, was not procured by undue means, and was not contrary to law or public policy. Specifically, the Court found that the arbitrator interpreted and applied the plain language of the CNA that the prior existing co-pay obligation must be maintained, and reasonably characterized the former co-pay level as a past practice between the parties. The arbitrator recognized that she lacked authority to order reinstatement of the \$5 co-pay, but did not exceed her authority in developing a make-whole remedy directing the Borough to reimburse employees for the amount of co-pays in excess of \$5.

Justice Patterson wrote a dissenting opinion. She reasoned that the terms of the parties 2005-2009 agreement were subordinate to the 2007 amendments to the SHBP which mandated that the co-pay for covered employees be increased to \$10.00.

Sheriff's officers, salary guide placement; ability to arbitrate bars lawsuit.

Hudson County PBA Local 334, Jason D. English, Anthony T. Viso v. County of Hudson, 2013 N.J. Super. Unpub. LEXIS 623.

The Law Division of the Superior Court dismisses application of two Hudson County sheriff's officers and their union, PBA Local 334, for a preliminary injunction compelling Hudson County to return both officers to Step 5 of the salary scale after being reduced to Step 2, and for back pay. The County filed a motion to dismiss, asserting the dispute is subject to binding arbitration per the parties' CNA. The plaintiffs argued that the Court has jurisdiction because the case involves a question of law as to the interpretation of N.J.S.A. 40A:9-117, which establishes a Sheriff's ability to fix the salaries of his personnel. Citing the NJ Employer-Employee Relations Act, the Court notes its role is to determine whether a dispute is subject to arbitration and to be guided by the presumption in favor of public sector arbitration to public employees. The Court recited that when a dispute is covered by the grievance arbitration clause of a CNA, courts have dismissed the case for failure to exhaust administrative remedies. The Court found that the applicable conflict in this case is not statutory, because the parties confined their respective authorities to the terms of the CNA. In dismissing the case, the Court held that the CNA provides for resolution of salary disputes by arbitration.

Employee discipline and discharge: presumption in favor of arbitration

Somerset County Park Commission v. Teamsters Local Union No. 469, 2013 N.J. Super. Unpub. LEXIS 591.

The Appellate Division of the Superior Court affirms a trial court judge's decision referring a labor dispute to arbitration. Local 469 had demanded arbitration of grievances stemming from the Park Commission's discharge of two non-probationary employees. The Park Commission sought declaratory relief in court, arguing that the arbitrator does not have jurisdiction because the CNA does not call for arbitration in situations of employee discipline or termination. The trial court judge found that the CNA and governing law require the question of arbitrability to be addressed, in the first instance, by the arbitrator rather than the court. The Court noted the statutory presumption in favor of arbitration (N.J.S.A. 34:13A-5.3), and found that the trial judge properly applied Amalgamated Transit Union, Local 880 v. New Jersey Transit Bus Operations, Inc., 200 N.J. 105 (2009) in deferring the interpretation of the CNA to the arbitrator.

Arbitration of police officer discipline for off-duty conduct; award upholding discharge affirmed.

Fraternal Order of Police Penn-Jersey Lodge 30 v. Delaware River Port Authority, 2013 N.J. Super. Unpub. LEXIS 727.

The Appellate Division of the Superior Court affirms a trial court's decision sustaining an arbitration award that upheld the employer's (DRPA) decision to terminate a police officer due to his involvement in an off-duty bar fight in which he injured a civilian. Lodge 30 argued that the arbitrator fundamentally erred and deprived the officer of a fair hearing by excluding a dental expert's hearsay report offering an opinion regarding the wounds the officer inflicted on the civilian, and that the arbitrator's finding regarding the officer's taunting after the fight is not supported by the record. The Court found that the arbitrator did not abuse his discretion in refusing to accept a hearsay report. The Court found that the arbitrator did not make a mistake in fact and thus there were no "undue means" where the record included testimony of a police officer regarding the grievant's taunting. It noted that "undue means" of procuring an arbitration award does not apply to credibility determinations.

Discipline, Civil Service, Settlement, waiver of right to appeal.

In the Matter of Arthur Rice, County of Union, 2013 N.J. Super. Unpub. LEXIS

After his one-year working test period, Rice, a corrections officer, was terminated. He appealed to the Civil Service Commission. Rice, who was represented by counsel, and the County entered a settlement agreement providing that if Rice was deemed fit for duty he would return to work and serve an additional one-year working test period. The agreement provided that, if Rice was brought up on new disciplinary charges, he could contest them before a

departmental hearing officer, but he waived the right to appeal any adverse action to the CSC. After he returned to work, Rice was brought up on disciplinary charges. They were sustained following a departmental hearing, and he was terminated. The Appellate Division of the Superior Court affirms the CSC's refusal to hear Rice's appeal. It holds that the settlement agreement was an enforceable contract, that Rice knowingly signed and that the terms of the agreement were not ambiguous.

Denial of unemployment compensation for discharged public employee overturned.

Silver v. Bd of Review, Depart of Labor and County of Middlesex, 2013 N.J. Super. LEXIS 42.

Silver, a teacher at a county youth detention facility, was discharged for failing to properly collect pens after a class. The pens could not be released from the classroom as they could be used as weapons. It was not uncommon for students to steal or attempt to steal pens. Silver committed the same infraction six previous times over the years, and had been warned of termination if it happened again. After being terminated, she was disqualified for unemployment benefits based on a finding that her discharge was for “severe misconduct” under the 2010 amendment to N.J.S.A. 43:21-5(b). The disqualification was upheld at the Appeal Tribunal and by the Board of Review (Board). The Appellate Division of the Superior Court reverses the decision of the Board, finding that it ignored its own regulation defining misconduct, N.J.A.C. 12:17-10.2(a), and instead applied an erroneous view of case law. The Court held that the legal error rendered the Board’s decision arbitrary and contrary to the applicable statutory and regulatory provisions. The Court noted that the Department of Labor “has not yet adopted new regulations to distinguish simple conduct from severe misconduct.”

Hiring of new police officer; bypassing top ranked candidate using “Rule of Three.”

In the Matter of Brian Cobb, Police Officer, Ridgewood, 2013 N.J. Super. Unpub. LEXIS, 667.

The Appellate Division of the Superior Court affirms the decision of the Civil Service Commission upholding the Village of Ridgewood’s decision to bypass Cobb for appointment from the certified Police Officer eligible list. The Commission concluded that Cobb failed to meet his burden to prove Ridgewood’s decision to bypass him was improper. Ridgewood sought to hire two officers, and Cobb was ranked number one on the eligible list. After the top eligibles were interviewed, the third and fourth-ranked eligibles were appointed to the officer positions by the Ridgewood Manager, who determined that they were more qualified and better suited than Cobb for employment as a police officer. The Manager also noted that Cobb was deemed less experienced and that his interview answers regarding previous “off the books” work did not demonstrate the character an attributes sought in a Ridgewood officer. Cobb alleged that the hired officers had personal or business relationships with the appointing authority and police chief, and that Ridgewood violated the “Rule of Three.” The Court noted that the “Rule of Three” (N.J.S.A. 11A:4-8) governs the discretion of the appointing authority by requiring selection from the three highest scoring candidates, and that candidates on that list can be

bypassed for any legitimate reason based on merit. It found that the Commission's decision was supported by substantial credible evidence. The Court found that Cobb failed to demonstrate any conflicts of interest that required disqualification of the other candidates under Local Government Ethics Law (N.J.S.A. 40A:9-22.1 - 22.5), and that the Commission reasonably concluded that Ridgewood properly exercised its discretion under the Rule of Three to bypass Cobb and appoint other candidates that it considered better qualified.

Successorship doctrine; refusal to hire union officers and activists

Grane Health Care v. NLRB, 2013 U.S. App. LEXIS 6897

The "successorship" doctrine determines whether a majority representative of employees of a company, is entitled to continue to represent those same employees when a new entity buys the enterprise. Most often these cases involve private businesses, but sometimes the existing enterprise is a public entity and the successor is private, or vice-versa.¹ The U.S. Court of Appeals for the Third Circuit, joining other Courts of Appeals, holds that the successorship doctrine applies to public-to-private transitions of ownership. The purchasing employer bought a nursing care facility from a state entity, declined to hire four of the five union officers who applied and another union activist. It refused to recognize or bargain with the union. On appeal, the court found that substantial evidence supported the NLRB's ruling that the employer and a transitional entity were a single employer. It applied the successorship doctrine and found that the employer had a duty to bargain with the union. The Court affirms the ruling, deferring to NLRB credibility determinations, that the employer violated the NLRA by not hiring the five employees due to their union activities.

Appellate Review of Administrative Agency credibility determinations

Michael P. Johnson v. Hamilton Township, 2013 N.J. Super. Unpub. LEXIS 728.

¹In Cherry Hill Bd. Of Ed., I.R. No. 2009-1, 34 NJPER 152 (¶65 2008) the Board had, four years previously, subcontracted certain work to a private company, Aramark and renewed its contract with Aramark on a year-to-year basis. While the employees worked for Aramark, O.P.E.I.U, Local 153 was certified by the NLRB as the majority representative. Thereafter, the Board terminated its contract with Aramark and decided to have the work again performed in house. The Board began to interview job applicants. Local 153 asserted that under the successorship doctrine it had the right to represent the Board employees. The Commission designee denied interim relief finding that it was unlikely that the Commission would find that a narrowly defined unit sought by Local 153 appropriate, where a broad-based unit had a long history of representing the other Board employees, including the titles represented by Local 153, before the Board had subcontracted the jobs to Aramark..

The Appellate Division of the Superior Court affirms the order of the workers' compensation court awarding temporary disability benefits to Johnson. The Township argued that the court erred in crediting Johnson's treating physician, finding causation, ruling him unready for light duty, and allowing benefits despite his misstatements. The Court noted its standard of review: "The factual findings of the compensation court are entitled to substantial deference."; the appellate court "must limit its inquiry solely to whether the findings could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of one who heard the witnesses to judge their credibility and with due regard to his expertise."; and if "an appellate court finds sufficient credible evidence in the record to support the agency's conclusions, that court must uphold those findings, even if the court believes that it would have reached a different result."

Non-renewal of contract is an "adverse employment action."

Leola Golembeski v. Moorestown Township Public Schools & Moorestown Township Board of Education, 2013 U.S. Dist. LEXIS 34564.

Golembeski was an Auditorially Impaired Paraprofessional at the middle school and later the high school from 2004-2007. Although her contract explicitly stated that her employment terminated at the end of each school year, she had not been required to reapply between school years. In the 2006-07 school year, Golembeski was transferred to one of the Township's elementary schools to work with a different deaf student. She realized she was not equipped to handle the additional special needs (Down's syndrome) of that student, and was granted a transfer to an aide position at a different elementary school. Finally, in 2007 she was transferred to an upper elementary school as a "deaf classroom environment" aide until the end of the 2006-07 school year. Her contract was not renewed for the 2007-08 school year, but she eventually accepted a different aide position in the district with lower pay. She did not receive any position in the district for the 2008-09 school year. In denying the Township's motion for summary judgment against Golembeski's Americans with Disabilities Act claims, the Court determined that she presented sufficient evidence to support an inference (prima facie case) that she suffered an adverse employment action because of her disability. The Court found that although Golembeski was an annually contracted employee, the non-renewal of her contract for the 2007-08 school year constituted an employment action. It noted the Third Circuit's holding in Wilkerson v. New Media Tech. Charter Sch. Inc., 522 F.3d 315, 320 (3d Cir. 2008) that "the failure to renew an employment arrangement, whether at-will or for a limited period of time, is an employment action."