



STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PO Box 429  
TRENTON, NEW JERSEY 08625-0429

[www.state.nj.us/perc](http://www.state.nj.us/perc)

ADMINISTRATION/LEGAL  
(609) 292-9830  
CONCILIATION/ARBITRATION  
(609) 292-9898  
UNFAIR PRACTICE/REPRESENTATION  
(609) 292-6780

*For Courier Delivery*  
495 WEST STATE STREET  
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089  
EMAIL: [mail@perc.state.nj.us](mailto:mail@perc.state.nj.us)

May 22, 2013

**MEMORANDUM**

**TO:** Commissioners  
**FROM:** Counsel Staff  
**SUBJECT:** Report on Developments in the Counsel's Office Since April 22, 2013

**Commission Cases**

The Atlantic City Board of Education is seeking Supreme Court review of 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).

**Other cases**

**Discharge of probationary police officer; incident broadcast on "Jersey Shore"**

Joshua Thomas, v. Borough of Monmouth Beach, et al 2013 U.S. Dist. LEXIS 58798

A federal judge dismisses a lawsuit filed by a probationary police officer who was terminated following an August 2009 altercation between the officer and Ronald Ortiz Magro, a regular cast member of the MTV series "Jersey Shore."<sup>1</sup> The incident was broadcast in January 2010 in an episode of the series. The opinion recites that the officer's attempt to have a state court review his termination under N.J.S.A. 40A:14-147 was rejected because of his probationary status and that his state claim is on appeal.

---

<sup>1</sup>In an apparently separate incident, Magro was arrested after he knocked a person unconscious while walking home with cast members "Snookie" and "Sweetheart," the latter his off and on partner.

## **Resuming public employment after retirement**

Cologna v PFRS, \_\_\_\_ N.J. Super. \_\_\_\_, 2013 N.J. Super. LEXIS 63

In a published opinion, the Appellate Division of the Superior Court construes a recently amended statute [N.J.S.A. 43:16A-3(5)] allowing, in certain circumstances, a retired police or fire officer to, within 5 years, resume active employment. The Court holds that the five-year extended time frame applies only to officers who lose public employment as the result of an employer's layoff or reduction in force, or through leave of absence in accordance with the statute. Because Cologna voluntarily resigned from his former employment as a police officer and was not fired, laid off, or granted leave of absence, it affirms the decision of the PFRS Board of Trustees precluding reinstatement of his membership more than two years later. Cologna took a job as a fire fighter but sought to continue membership in the PFRS account he had established as a police officer.

## **Promotions**

### **Promotion and salary increase in anticipation of retirement**

Bruce Gitto v. City of Atlantic City, et al., 2013 N.J. Super. Unpub. LEXIS 1013

Gitto, a lifeguard, was initially promoted by the City to give him a “bump” in salary for his last year of employment prior to retirement. Gitto’s promotion was rescinded after the AFSCME local representing the lifeguards filed a grievance asserting that Gitto’s promotion (and that of another employee) were made without a posting of the promotional opportunities. After his promotion was rescinded Gitto asked AFSCME to file a grievance to support his promotion, but the union declined asserting that the grievance sought to have Gitto’s pension unlawfully increased. The Appellate Division of the Superior Court affirms a trial court ruling granting summary judgment dismissing Gitto’s multi-count lawsuit. In its opinion the Court notes that Gitto had settled his claims against AFSCME. It also observes that Gitto that jurisdiction over alleged violations of a collective negotiations agreement are to be handled through the grievance procedure and that AFSCME had a right not to pursue Gitto’s grievance because it believed that seeking the bump in the last year of employment would amount to pension fraud.

### **Denial of promotion constitutes retaliation for activity protected under CEPA**

Kevin Reilly v. Village of Ridgewood 2013 N.J. Super. Unpub. LEXIS 993

The Appellate Division of the Superior Court rejects Ridgewood’s appeal and affirms a trial judge’s rulings on post-verdict motions in a CEPA case. A jury determined that Ridgewood retaliated against Reilly, a fire fighter who had made complaints about the procedures used by the department in firefighting procedures and the methods used in responding to HAZMAT incidents which Reilly alleged violated OSHA. The retaliation took a variety of forms including

harassment by superiors and passing over Reilly for promotion three times between 2007 and 2011. Evidence established that Reilly (No. 2 in 2007 and No 1 in 2010 and 2011) was the most qualified among the candidates for promotion. The Court denies Ridgewood's motions to set aside the verdict or for a new trial. However, it reduces the jury's award of 3.5 million dollars for emotional damage to \$500,000, and reduces the hourly rate for attorneys fees awarded.

#### Bypassing candidates under Rule of Three

William Bland v. City of East Orange, et al., 2013 N.J. Super. Unpub. LEXIS 1211

The Appellate Division of the Superior Court grants summary judgment dismissing a multi-count lawsuit by police sergeant who passed a Civil Service examination for lieutenant but was skipped over. Candidates ranked below him on the list were promoted. The opinion states that East Orange's letter to the CSC gave no specific reason as to why Bland was passed over. Although the Court cites In re Foglio, 207 N.J. 38 (2011) it does not discuss the holding of that case which requires that an appointing authority may not rely on a "boilerplate" explanation (e.g. appointments were made in accordance with the needs of the department) to comply with the requirement that it give a statement of reasons to a candidate who was bypassed under the "Rule of Three."

#### Tenure charges; primary administrative jurisdiction

Dominic Costanzo v. Lebanon Borough Board of Education, 2013 N.J. Super. Unpub. LEXIS

The Board filed tenure charges with the Department of Education seeking removal of its Costanzo, the superintendent of schools who was tenured as a principal and in other supervisory administrative positions. Costanzo filed a lawsuit alleging that the Board violated the covenant of good faith and fair dealing in his three-year employment contract as superintendent. The Appellate Division of the Superior Court affirms the trial court's dismissal of Costanzo's lawsuit on the grounds that the Department of Education has primary jurisdiction over the dispute, including the claims and defenses made by Costanzo in his lawsuit. The Court's comments on primary jurisdiction would apply to cases that should be heard by the Commission. It observes:

"Primary jurisdiction is defined as the circumstance in which a 'court declines original jurisdiction and refers to the appropriate body those issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.'" "Where one aspect of a single, integrated dispute is pending before an administrative agency and another aspect of the same dispute is pending before a court, logic commends that the entire matter be dealt with, at least initially, by the entity with plenary authority over the subject matter field involved."