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June 20, 2013

MEMORANDUM

TO: Commissioners

FROM: Counsel Staff

SUBJECT: Report on Developments in the Counsel's Office Since May 22, 2013

Commission Cases

In the Matter of Burlington County Prosecutor's Office, 2013 N.J. Super. Unpub. LEXIS 1387¹

The Appellate Division of the Superior Court remands an interest arbitration award covering all prosecutors's detectives and investigators employed by Burlington County. The Court opines that the arbitrator inappropriately relied on the County's ability to pay instead of focusing on the financial impact on the County (or governing unit), its residents and its taxpayers. The Court finds that the arbitrator did not adequately address salary increases in comparable areas of private employment, although he discussed the salaries and salary increases of similar detectives and investigators in other counties. The Court also opines that the arbitrator inappropriately relied on the County's ability to pay instead of focusing on the financial impact on the County as required by subsection 16(g)(6).

Although it prevailed before the Court, the County has filed a motion for reconsideration seeking to vacate the entire award and have a new interest arbitration proceeding commenced

¹ P.E.R.C. No. 2012-61, 39 NJPER 20 (¶4 2012) remanded part of the award to the arbitrator to clarify seniority language. The supplemental award on that issue was not appealed. The appeal was taken from portions of the initial award that were affirmed by the Commission.

before a different arbitrator.

In the Matter of Monmouth County Layoffs, 2013 N.J. Super. Unpub. LEXIS 1367

The Appellate Division of the Superior Court affirms the dismissal of unfair practice charges that had challenged layoffs of County Corrections officers in accordance with a plan that had been approved by the Civil Service Commission. The decision also upholds that action of the CSC.

New Appeal

PBA Local 79, the representative of police employed by Midland Park Borough, has filed an appeal with the Appellate Division of the Superior Court, from the administrative dismissal of its attempt to appeal an interest arbitration award (IA-2013-003). The law requires that an appeal must be filed, within 7 calendar days, as an original, as opposed to facsimile, document and be accompanied by the filing fee and proof of service. The PBA did not meet these requirements.

Other Cases

Preemption; Discipline; statutory and contractual protections for County College Faculty

Board of Trustees of Ocean County College v. Faculty Association of Ocean County College, 2013 N.J. Super. Unpub. LEXIS 1262

The Appellate Division of the Superior Court affirms a trial court ruling refusing to vacate an arbitration award setting aside a reprimand issued to a faculty member who allegedly ordered a book without authorization. The Court notes that the College wrote to the Commission asserting that the grievance was not arbitrable, but that it failed to seek a stay of the arbitration. The College asserted that arbitration was preempted by a general statute concerning the governance of public colleges, N.J.S.A. 18A:3B-6 and that the College alone had jurisdiction to decide disciplinary grievances. The trial court rejected that assertion and found the award met the “reasonably debatable” standard. The appellate court termed the College’s preemption argument “frivolous.” The Court’s opinion notes:

The Act was clearly intended to free the public colleges from the Department of Higher Education's control over their operational decisions, including personnel issues. However, nothing in the Act's history suggests that it was intended to preclude public colleges from complying with other pre-existing State laws concerning labor relations, or from reaching agreements with their faculty associations concerning the arbitration of minor disciplinary grievances.

We agree with the Association that the right to arbitration follows from the [contract], as well as from three statutes that predated the Act and remain in

effect. First, N.J.S.A. 34:13A-5.3 requires public employers to negotiate written grievance and disciplinary review procedures, which may include arbitration of disputes. Second, N.J.S.A. 34:13A-29 requires the use of binding arbitration "as the terminal step [of the negotiated grievance procedures] with respect to disputes concerning imposition of reprimands" and other minor discipline. Third, N.J.S.A. 18A:64A-13 gives county college professors "all the rights and privileges" of public school teachers. Inferentially, that includes the right of collective negotiation and the right to bargain for arbitration of disputes over minor discipline. As noted above, we find no basis to conclude that the Act was intended to affect the continued applicability of any of these statutes.

Though unpublished, the decision is significant because it applies the protections for school employees, contained in N.J.S.A. 34:13A-22 through 29, to county college employees.

Discharge of probationary police officer; "Jersey Shore" Part 2

Joshua Thomas v. Borough of Monmouth Beach, 2013 N.J. Super. Unpub. LEXIS 1407

The May 2013 counsel report summarized a federal court decision in Joshua Thomas, v. Borough of Monmouth Beach, et al 2013 U.S. Dist. LEXIS 58798 involving the termination of a probationary police officer who was involved in a physical altercation with a member of the cast of "Jersey Shore" that was shown in an episode of the reality TV show. In this state court decision, issued by the Appellate Division of the Superior Court, the Court rejects the discharged officer's claim that he had completed his probationary period and had a right to contest his termination in Superior Court. The opinion holds that although the officer had completed police academy training when he was hired, that fact does not shorten his probationary period. It also rejects Thomas' claim that he was protected by the Veteran's Tenure Act. The New Jersey court's opinion does not recite the case's connection to "Jersey Shore."

Constitutional challenge to Pension & Health Care Reform Act

NJEA, et. al. v. State of New Jersey et. al., 2013 N.J. Super. Unpub. LEXIS 1459

Several public sector unions filed a lawsuit asserting that portions of L. 2011, c. 78, were unconstitutional because they impaired the obligations of contracts in violation of the United States and New Jersey Constitutions. The lawsuit focuses on the provisions of the law that made several reforms, including:

- 1) increasing pension contributions by current employees;
- 2) establishing pension committees with the discretionary authority to, among other things, modify members' contribution rates, set the formula for calculation of final compensation, and set the age at which a member may be eligible for early

retirement; and

3) requiring employees with less than twenty years of creditable service on the effective date of Chapter 78 to make significant contributions to the cost of their health insurance coverage once they retire.²

In a lengthy opinion, Mercer County Assignment Judge Mary C. Jacobson grants the State's motion to dismiss all of the claims on either procedural or substantive grounds. She concludes:

- The Contracts Clause and Substantive Due Process claims are barred by sovereign immunity.
- The state constitutional claims challenging Chapter 78's increased pension contribution rates, are dismissed.
- A state law [N.J.S.A. 43:3C-9.5(b)] does not create a contractual right to a fixed pension contribution.
- No showing was made that the Legislature lacked a rational basis in passing Chapter 78.
- The challenge to the delegation of authority to pension committees by Chapter 78, is dismissed as premature.
- The unions did not show they had standing to challenge increased contributions for medical benefits once employees retire.
- The alleged violations of the New Jersey Civil Rights Act are dismissed.

² In 2011, a federal district court, applying Eleventh amendment "sovereign immunity" dismissed a lawsuit by the unions that had alleged that Chapter 78 violated the Contracts Clause and the Substantive Due Process rights provided by the United States Constitution by:

- 1) temporarily suspending cost of living adjustments for retirees,
- 2) increasing active employees' pension contributions,
- 3) increasing the amount that active employees with less than twenty years of service must pay toward their health benefits in retirement, and
- 4) creating pension committees.