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August 1, 2013

MEMORANDUM

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

COMMISSION CASES

The Commission has received notices that appeals have been filed with the Appellate Division of Superior Court seeking review of these decisions.

Boro of Tenafly and PBA Local 276, P.E.R.C. No. 2013-087, 39 NJPER _ (¶_ 2013)
The PBA appeals from a decision affirming an interest arbitration award.

Township of Montclair and PBA Local No. 53, P.E.R.C. No. 2013-85, 39 NJPER _ (¶_ 2013).
The Township appeals from the Commission's dismissal of its scope of negotiations petition.

CASES RELATED TO COMMISSION CASES, PROCEDURES AND STATUTES

Primary jurisdiction over scope of negotiations disputes

In City of Jersey City and Jersey City PSOA, POBA, Jersey City Public Employees Local 246, IAFF Locals 1066 and 1064, P.E.R.C. No. 2013-38, 38 NJPER 387 (¶130 2012), app. pend., the Commission held that grievances filed by the majority representatives of both law enforcement and civilian employees that challenged changes in the health benefits of already retired employees could proceed to binding arbitration. Prior to filing its scope of negotiations

petition, the City had filed a lawsuit in the trial division of the Superior Court, seeking a declaratory ruling that the grievances were not arbitrable. The trial court judge granted the unions' motion to dismiss the City's suit holding that the Commission had primary jurisdiction under its authority to resolve scope of negotiations disputes. On July 25, 2013, the Appellate Division of the Superior Court in City of Jersey City v. Jersey City Police Officers Benevolent Association (POBA), et al., 2013 N.J. Super Unpub LEXIS 1863 affirmed the trial judge noting that:

- The Commission had primary jurisdiction and had issued a scope of negotiations ruling that was on appeal;
- A trial court could exercise jurisdiction where a similar claim is filed by an individual retiree, because only a majority representative can use binding arbitration to seek relief.

Deferral to arbitration; prosecution of grievance does not bar employee's civil rights action

Cosimano v. Twp. of Union, 2013 U.S. Dist. LEXIS 97355

Cosimano, a police detective was advised that she would be demoted to patrol officer. In order to keep her pension base at the higher Detective salary, she decided to retire rather than take the demotion. That left her seven months short of 25 years service as a police officer even though she had an additional year of public employment. The 25 years would have entitled her to paid retiree health benefits. Her union filed an unfair practice charge which the Commission deferred to arbitration. An arbitrator ruled that the other year of service did not count. The award was upheld on appeal. However, in this case, the court holds that Cosimano's lawsuit alleging that her demotion was discriminatory, was not barred by the arbitrator's ruling which focused solely on the collective negotiations agreement. The court notes, citing federal precedent, that because the union controls arbitration proceedings, an individual who alleges discrimination, does not have the opportunity to advance that claim during arbitration. It allows her to pursue her discrimination claims, with the caveat that the arbitrator's ruling concerning years of service cannot be challenged. But, the court notes, that proof of discrimination may affect her creditable service time.

OPRA, attorney's fees, public employer's obligation to provide copies of contracts

Gelber v. Heck, 2013 N.J. Super. Unpub. LEXIS 1545 (Law Div.)

In a Superior Court lawsuit filed pursuant to the Open Public Records Act, a trial court judge ordered that the City of Hackensack pay \$12,000 in attorneys fees based on its failure to provide to the OPRA requestor copies of collective negotiations agreements covering various units of City employees. In a subsequent ruling, the Court denies the requestor's motion for additional attorneys fees.

NOTE: N.J.S.A. 34:13A-8.2, has, since 1968, required public employers to file copies of CNAs with the Commission so that the Commission can maintain a file of such documents. However, effective January 1, 2011, a new section of the Act, N.J.S.A. 34:13A-16.8d.(2), added by the interest arbitration amendments, requires that all public employers file copies of CNAs with the Commission 15 days after they are executed. The Commission maintains an accessible database of CNAs on its web site.

Interest arbitration, bi-state agency, impact of changes in NJ interest arbitration statute.

FOP v. Del. River Port Auth., 2013 U.S. Dist. LEXIS 100482

As both Pennsylvania and New Jersey have statutes requiring the use of interest arbitration to resolve negotiations impasses for police, in 1999, New Jersey state courts ordered the DRPA to submit to interest arbitration. Fraternal Order of Police, Penn-Jersey Lodge 30 v. Delaware River Port Auth., 323 N.J. Super. 444, (App. Div. 1999), certif. denied, 162 N.J. 663, (1999), cert. denied, 530 U.S. 1275, (2000). In this case the federal court rejects the DRPA's argument that because of differences between the terms of the PA and NJ interest arbitration laws, the bi-state agency is not required to participate in interest arbitration. The court also leaves to the arbitrator the initial determination as to whether the health care and salary cap provisions contained in changes to New Jersey's interest arbitration law are applicable.

OTHER CASES

Employee discipline, termination

Ruroede v. Borough of Hasbrouck Heights, ___ N.J. ___, 2013 N.J. LEXIS 598

A trial court and the Appellate Division of the Superior Court set aside the termination of a police officer finding that the officer was denied due process because instead of live testimony from witnesses, the Borough used hearsay statements from the internal affairs investigation and testimony from the officer who prepared the internal investigation report. The Appellate Division found that insufficient, non-hearsay evidence had been submitted at the hearing.

The Supreme Court reverses and holds that the officer's termination did not violate due process. It rules that the trial court should have determined whether sufficient, competent evidence supported the charges. It finds the evidence was competent, and sufficient to support the ultimate facts necessary to sustain the borough's charges that plaintiff engaged in inappropriate conduct unbecoming a police officer, warranting his termination. The hearing officer's failure to call a witness to the altercation, and the officer's choice to proceed pro se, did not violate his due process rights.

Pending grievance arbitration should not delay employee's individual civil rights case

Barco v. N.J. Div. of Youth & Family Servs., 2013 U.S. Dist. LEXIS 91722

A federal district court refuses to stay the federal civil rights and “whistleblower” lawsuit of a terminated public employee pending arbitration of her discharge. The court rules that it does not appear that the arbitration will have any significant bearing on the Court's analysis of Plaintiff's statutory claims holding that the lawsuit does not concern the interpretation of the collective negotiations agreement, but rather the meaning of a federal statute.

Police officer, indemnification, off-duty shooting

Godley, et al. v. City of Newark, et al. and Lamarr v. City of Newark, et al. 2013 N.J. Super. Unpub. LEXIS 1912

The Appellate Division of the Superior Court holds that the City of Newark, the police department and the housing authority are not liable for damages and attorneys fees awarded by a federal court to a man who was shot by an off-duty police officer. The appellate tribunal upholds a jury verdict finding that the officer “was not acting in his official capacity,” thus making the indemnification clause in the collective negotiations agreement between the City and the Fraternal Order of Police, inapplicable to the incident.

While off-duty, Newark police officer Lamarr visited an ex-girlfriend (Vasquez) during her shift as a security guard at a Newark housing project. A male friend of the security guard (Godley) initiated a heated verbal confrontation with the police officer that eventually resulted in the police officer shooting and seriously wounding Godley. The officer was acquitted of criminal charges, but served a 28 day disciplinary suspension.

Godley filed a federal court suit for damages. Godley and the officer entered into an agreement that Godley would not seek damages from the officer but would use the indemnification clause to seek damages from the City, the police department, and the housing authority.¹ The federal court dismissed the claims against the City. A jury awarded over two million dollars in damages and 250,000 in attorneys fees.

¹The clause reads:

“Whenever any civil action is brought against any employee covered by this Agreement for any act or omission arising out of and in the course of his/her employment, the City shall defray all costs of defending such action, if any, and shall pay any adverse judgment, save harmless, and protect such person from any financial loss resulting therefrom.”

That language was found mandatorily negotiable and enforceable in City of Newark and Police Superior Officers Ass'n, P.E.R.C. No. 2003-68, 29 NJPER 121 (¶38 2003), aff'd 31 NJPER 9 (¶6 App. Div. 2005).

Godley and his law firm, and Lamarr separately sued in the Superior Court to collect the damages from the public bodies and for a ruling that the officer was not personally liable. The jury was asked to determine whether the officer had acted "exclusively in his official capacity." After the jury found that the officer was not acting in his official capacity, Godley and his attorneys and Lamarr, filed separate appeals that were consolidated. The City cross-appealed in the event the appellate court overturned the jury's finding.