
General Counsel's Supplemental Report

January 1, 2008 – April 11, 2008

Public Employment Relations Commission

Ira W. Mintz
General Counsel

Mary E. Hennessy-Shotter
Deputy General Counsel

Don Horowitz
Deputy General Counsel

Christine Lucarelli-Carneiro
Deputy General Counsel

Appeals from Commission Decisions

An Appellate Division panel has affirmed the Commission's decision in *Somerset Cty. Sheriff's Office and Somerset Cty. Sheriff's FOP Lodge No. 39*, P.E.R.C. No. 2007-33, 32 *NJPER* 372 (¶156 2006), aff'd 34 *NJPER* 21(¶8 App. Div. 2008). The Commission affirmed an interest arbitration award in which the arbitrator reasonably determined that the County's own pattern of settlement with its four other law enforcement units warranted a similar salary award for the fifth unit of law enforcement officers involved in this case. The law enforcement officers in all five units performed coordinated and integrated work. The Court concluded that the Commission made a rational policy judgment in finding that an employer's settlement

pattern with similar employee units is an important consideration in applying the statutory criteria and it accepted the determination of the arbitrator and the Commission that sheriff's officers performed work comparable to other law enforcement units.

We are awaiting decisions from the Appellate Division in the *Toms River Tp.*, *Middletown Tp.*, and *State of New Jersey* cases discussed in the Annual Report.

Other Cases

Interest Arbitration

The Township of Hopewell initiated a court proceeding contesting an interest arbitrator's application of *N.J.A.C.* 19:15-5.7(d) to exclude the public from an interest arbitration hearing absent the parties'

agreement to allow the public to attend. The arbitrator ruled that all members of the governing body could attend the proceeding, but not the public at large. Presiding Judge Shuster of the Chancery Division of the Mercer County Superior Court conducted a hearing on February 1 and issued a 23-page decision on February 4 denying the Township's request to either open the arbitration to the public or to stay the arbitration until the Court decided the merits of the suit. *In re Interest Arbitration Hearing between the Township of Hopewell and Hopewell PBA Local 342*, Dkt. No. C-14-08 (2/4/08). He concluded that the Court had jurisdiction to consider the Township's arguments under the Open Public Meetings Act, *N.J.S.A.* 10:4-6 et seq. ("OPMA"); no irreparable harm would occur if the public could not attend the arbitration; the Public Interest Arbitration Reform Act, *N.J.S.A.* 34:13A-14 et seq., rather than OPMA controlled the case; the public policy favoring prompt settlement of labor disputes justified privacy in interest arbitration hearings; and OPMA should not be used as a vehicle to eviscerate the Reform Act and the Commission's regulation. The arbitration proceedings have been completed.

New Jersey Supreme Court

In a 4-2 decision, the Supreme Court reversed a decision of the Port Authority Employment Relations Panel that had found an improper practice when the Authority leased its international terminal at JFK to a private entity and work that had been performed by Port Authority police officers was given to security personnel employed by the private entity. *In re Port Authority of New York and New Jersey*, __ N.J. __, 2008 N.J. LEXIS 313 (2008). The Court held that the Panel is an administrative agency and its decisions are subject to a deferential standard of review; but that no special deference was owed to the Panel's decision in this case. According to the Court, the Panel "did not follow the law" because its Panel Instruction limited its jurisdiction and specified that "the mission and management responsibilities of the Port Authority, including its organization, staffing, planning, operating and financial policies, shall not be subjects of negotiation with employee organizations." The Court also stated that even if the Panel had jurisdiction, the record did not support a finding that unit work was transferred; and even if the Panel had jurisdiction and work was transferred,

there was no obligation to bargain under the applicable legal standards because the Port Authority fundamentally altered its basic operations, the transaction involved a capital investment not amenable to bargaining, and the removal of the work did not have a significant impact on the police officers.

The Supreme Court has granted certification in four cases discussed in the Annual Report:

(1) *Borough of Glassboro v. FOP Lodge No. 108*, 395 N.J. Super. 644 (App. Div. 2007). A grievance arbitration award ordered the employer to promote a police officer who was denied a promotion to lieutenant. The grievant scored higher than the promoted officer in the first two phases of the promotion process, but fell behind in the rankings after the final phase, a subjective oral examination. The arbitrator found that the promotion denial was arbitrary because the employer had not explained how the last phase had caused the grievant to fall behind. The Court upheld this conclusion and rejected arguments that the award would contravene the public interest by making objective tests the only permissible standard; subjective tests may still be used so long as an employer

articulates the basis upon which it scores such tests.

(2) *Lourdes Medical Center of Burlington Cty. v. Board of Review*, 394 N.J. Super. 446 (App. Div. 2007). The Court considered whether nurses were entitled to receive unemployment compensation while on strike. N.J.S.A. 43:21-5(d) disqualifies striking workers from receiving benefits if "it is found that the unemployment is due to a stoppage of work which exists because of a labor dispute...." A Department of Labor regulation defines a "stoppage of work" as a "substantial curtailment of work which is due to a labor dispute" and "substantial curtailment" is defined as occurring "if not more than 80 percent of the normal production of goods or services is met." The Court upheld the validity of the regulation and its 80% rule, but remanded to the DOL's Board of Review to reconsider its determination that the hiring of replacement nurses meant that the hospital's work was not curtailed.

(3) *State v. DeAngelo*, 396 N.J. Super. 123 (App. Div. 2007). The Appellate Division upheld a union organizer's conviction for violating a Lawrence Township ordinance. The ordinance prohibited the display of inflated signs to attract the attention

of pedestrians and motorists. The organizer violated the ordinance when he hoisted a 10-foot tall inflatable rat in front of Gold's Gym to publicize the union's dispute with Gold's. The Court rejected arguments that the ordinance was preempted by the National Labor Relations Act; violated the organizer's constitutional right of free speech; was void for vagueness; and was selectively enforced. Judge Sabatino dissented from the majority's conclusion that the ordinance did not violate the right to free speech.

(4) *In re Application of Taylor*, 393 *N.J. Super.* 213 (App. Div. 2007). The Appellate Division affirmed a trial court's denial of a Prosecutor's application for salary increases for employees covered by collective negotiations agreements. The Supreme Court heard argument on March 26, 2008.

Grievance Arbitration

The Appellate Division reversed a trial court decision upholding an arbitration panel's decision that a union was not contractually entitled to arbitrate the dismissal of a probationary employee. *ATU Local 880 v. New Jersey Transit Bus Operations, Inc.*, A-3122-06T3 (3/4/08). The responsibility for deciding whether the parties agreed to

arbitrate a particular dispute lies with the court.

The Appellate Division has ruled that *N.J.S.A.* 2A:23B-14a confers immunity on arbitrators and arbitral associations (like PERC) to the same extent as a judge acting in his or her judicial capacity. *Malik v. Ruttenberg*, 398 *N.J. Super.* 489 (2008). The Court dismissed a negligence suit filed by a party to the arbitration who claimed that an opposing attorney assaulted him and that the arbitrator and the AAA knew of the attorney's dangerous propensities.

The Appellate Division remanded a Chancery Court decision finding that an arbitrator erred in not honoring a school board's right to terminate an individual employment contract on three weeks' notice.

Ocean City Bd. of Ed. v. Ocean City Educational Supportive Staff Ass'n and Spencer, App. Div. Dkt. No. A-2838-06T2 (3/27/08). The appellate court ordered the lower court to reconsider its decision in light of the Supreme Court's decisions in *Northvale* and *Pascack Valley*.

The Appellate Division affirmed a decision of the Commission of Education revoking the teaching certificates of a non-tenured teacher whose mid-contract

termination was sustained in binding arbitration. *In re Revocation of the Teaching Certificates of Michael Nieves by the State Board of Examiners*, App. Div. Dkt. No. A-2627-06T3 (4/7/08).

Equitable Estoppel

The Appellate Division ruled that although equitable estoppel is rarely invoked against a government entity, it would remand the denial of a firefighter's enrollment to the PFRS Board for a determination of whether he could be enrolled under equitable principles. The Board had to balance the relevant public and private interests, look at the equities from the firefighter's point of view, consider whether the government acted properly towards him, and whether he acted in good faith and reasonably. *Glenn Sellers v. PFRS*, 399 *N.J. Super.* 51 (App. Div. 2008). See also *Dublanica v. Ridgefield Bd. of Ed.*, App. Div. Dkt. No. A-4332-06T1 (4/3/08) (directing school board to provide plaintiffs with long-term care insurance, family dental insurance, and family vision insurance).

Mailbox Policy

In a non-precedential decision, the Third Circuit Court of Appeals rejected a constitutional challenge to a school district's mailbox policy in *Policastro v. Kontogiannis*, 2008 *U.S. App. LEXIS* 1387 (3d Cir. 2008). The policy provided that mailboxes are the district's property and that any staff member wishing to use the mailboxes had to receive a principal's approval. A memorandum addressing contract negotiations was placed in the teachers' mailboxes the same day the teachers were to vote on whether to ratify a new contract. The memorandum, while plainly written, resulted in some commotion so the high school principal ordered all remaining copies removed from the mailboxes. The Court concluded that the mailbox policy had not been "applied" to the plaintiff since the removal was based on the disturbances rather than the policy and that the policy itself was not overbroad and had no chilling effect. The Court also concluded that the plaintiff's requests for declaratory and injunctive relief were moot so it dismissed the lawsuit.

Federal Litigation

In another non-precedential decision, the Third Circuit Court of Appeals held that an alleged discriminatory and retaliatory recommendation by a police chief that was accepted by a borough council was, without more, an inadequate basis to impose municipal liability for a First Amendment claim. *Walsifer v. Belmar*, 2008 U.S. App. LEXIS 1380 (3d Cir. 2008). The Court also held that an alleged violation of a stipulation of settlement providing for expungement of the police officer's disciplinary record cannot serve as the basis of a claim under 42 U.S.C. §1983 claim.

Statutory Developments

A new law authorizes school boards and majority representatives to negotiate agreements creating sick leave banks. *P.L.2007, c.223; N.J.S.A.18A:30-10 et seq.* Such banks would allow board employees to donate their unused sick leave days for use by other employees who need additional sick time. Banks must be administered by a committee of three members selected by the board and three members selected by the majority representative. The committee may

establish standards and procedures for operating a bank and no sick leave may be withdrawn from the bank unless authorized by the committee.

Both houses of the Legislature have passed a bill extending the State's existing temporary disability insurance (TDI) system to provide workers with family temporary disability leave benefits to care for members of the worker's family unable to care for themselves, including sick family members and newborn and newly adopted children. *Assembly Bill 873*. The bill provides up to six weeks of TDI benefits for a worker taking leave to participate in providing care certified to be necessary for a family member suffering a serious health condition, or taking leave to be with a child during the first 12 months after the child's birth or placement for adoption with the worker's family. The bill applies to all private and governmental employers subject to the "unemployment compensation law" including local governmental employees who choose to opt out of the regular TDI program.