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September 15, 2011

MEMORANDUM

TO: Commissioners

FROM: Counsel Staff

SUBJECT: Report on Developments in the Counsel's Office Since August 11, 2011

Commission Cases

On August 8, 2011, the Appellate Division of Superior Court denied a motion for reconsideration of its June 27 decision, affirming Flemington-Raritan Bd. of Ed. and Flemington-Raritan Ed. Ass'n, P.E.R.C. No. 2011-28, 36 NJPER 363 (¶141 2011), aff'd 2011 N.J. Super. Unpub. LEXIS 1671, 37 NJPER __ (¶__ 2011). A copy of the Court's order denying reconsideration, including its supplemental comments, is attached. The Board has filed a notice that it is seeking review by the Supreme Court and has filed an application for an extension of time to file a Petition for Certification.

The employer has appealed Fort Lee and PBA Local No. 245, P.E.R.C. No. 2011-87, 2011 NJ PERC LEXIS 109, 37 NJPER __ (¶__ 2011). The Commission's decision grants the motion of the PBA to dismiss the Borough's challenge to four additional rulings made by the interest arbitrator after the parties could not agree on wording on those issues. Initial and supplemental interest arbitration awards stemming from the parties' negotiations impasse had been affirmed by the Commission and the Appellate Division of Superior Court. Fort Lee and PBA Local No. 245, P.E.R.C. No. 2009-64, 35 NJPER 149 (¶55 2009), appeal of decision on remand P.E.R.C. No. 2010-17, 35 NJPER 352 (¶1182011 2009) aff'd N.J. Super. Unpub. LEXIS 931, 37 NJPER _ (¶_ 2011).

Other Cases

Pensionable Compensation

East Windsor Reg'l Sch. Dist. v. TPAF, 2011 N.J. Super. Unpub. LEXIS 2135 (App. Div. Aug. 8, 2011) reverses the final administrative decision of the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) which had denied pension credit for stipended compensation teachers received for serving as content specialists and program coordinators. The TPAF determined that a "stipend" is not "contractual salary." The Appellate Division held that the first part of the statutory definition of "compensation" in N.J.S.A. 18A:66-2(d)(1), which is "contractual salary, for services as a teacher...which is in accordance with established salary policies of the member's employer for all employees in the same position," had been satisfied. The Appellate Division further held that the stipend met both requirements of the pertinent regulation, N.J.A.C. 17:3-4.1(j). The stipend is paid through regular payroll checks and the duties are "integral to the effective functioning of the school curriculum." The Court reversed the denial of pension credits and directed the TPAF to adjust the members' records accordingly.

Open Public Records Act

Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, ___ N.J. ___ 2011 N.J. LEXIS 925 (8/23/2011). The Supreme Court, disagreeing with the reasoning of the Appellate Division [413 N.J. Super. 423 (App. Div. 2010)] and a trial court, holds that the New Jersey State League of Municipalities is covered by the Open Public Records Act, N.J.S.A. 47:1A-1 to 47:1A-13. The New Jersey Council on Affordable Housing (COAH) had proposed rules regarding affordable housing opposed by the League. The Fair Share Housing Center (Fair Share) sought access under OPRA to the League's non-privileged documents regarding the proposed rules. The League did not provide the documents claiming that it was not subject to OPRA. The Supreme Court, reviewing OPRA's definition of "public agency" held that it includes an "instrumentality . . . created by a . . . combination of political subdivisions." N.J.S.A. 47:1A-1.1. That plain language places the League squarely within the term "' public agency.'" The Court directed that the League reconsider Fair Share's requested for records. It noted that if the League and Fair Share could not resolve the request, "the trial court must decide whether, under OPRA, the requested documents are subject to disclosure or subject to an exemption. At any hearing, the League, '[t]he public agency[,] shall have the burden of proving that the denial of access is authorized by law.' N.J.S.A. 47:1A-6".

Forfeiture—offenses unrelated to a public employee's official duties

In the Matter of Suzanne Hess, ___ N.J. Super. ___ 2011 N.J. Super. LEXIS 171 (App. Div. Aug. 30, 2011) reverses the ruling of the Board of Trustees of the Public Employees' Retirement System (PERS) denying a former public employee's application for deferred retirement benefits pursuant to N.J.S.A. § 43:15A-38. The former employee pled guilty to two counts of third-degree assault by auto after she seriously injured two persons while driving her

personal vehicle while intoxicated and was terminated by her public employer. PERS determined it was without authority to grant Hess deferred retirement benefits because she had been involuntarily terminated from her public employment under N.J.S.A. § 2C:51-2(a) based on her conviction of a third-degree crime. The Appellate Division determined that the Board erred in ruling that Hess's deferred retirement benefits were forfeited as a result of her conviction of two counts of assault by auto. It concluded that where the removal from employment for cause was based on charges of misconduct or delinquency not related to the employee's official duties, the public employee was entitled to his or her vested deferred retirement allowance. The Appellate Division reversed and remanded to the matter PERS for further consideration of Hess's eligibility for deferred retirement benefits.

Discrimination and Retaliation

Brooks v. State of New Jersey, 2011 N.J. Super. Unpub LEXIS 2377 (App. Div. Sept. 8, 2011) affirms in part and reverses in part the trial court's grant of summary judgment to the Motor Vehicle Commission (MVC) on a discharged public employee's claims arising under the New Jersey Law Against Discrimination and the federal Family Medical Leave Act (FMLA). The Appellate Division concluded that there were genuine issues of material fact which precluded dismissal of Brooks' claims for retaliatory demotion and termination under the FMLA and the LAD and discriminatory demotion and termination under the LAD. The Court reversed the dismissal of Brooks' claims of retaliatory demotion and discharge under the FMLA and LAD, as well as her claims of discriminatory demotion and discharge under the LAD and remanded back to the trial court. The dismissal of her claim for interference with her FMLA rights was affirmed.

Simisak v. County of Mercer, et al., 2011 N.J. Super. Unpub. LEXIS 2354 (App. Div. Sept. 1, 2011) affirms the trial court's grant of summary judgment in favor of the County of Mercer (County) dismissing a discharged public employee's statutory (Law Against Discrimination, state Family Leave Act, federal Family and Medical Leave Act), and tort claims. The Appellate Division held that the NJFLA and FMLA claims were barred by the two-year statute of limitations and that the FLA did not apply to leave based on Simisak's own health conditions; it only permits an employee with a sick partner to take a leave of up to twelve weeks during a twenty-four month period. Additionally, the particular facts in the case did not support violations of the LAD, or any of the tort claims.

Matejik v. State of New Jersey; State of New Jersey Department of Treasury, Division of Administration Human Resources, et al., 2011 N.J. Super. Unpub. LEXIS 2228 (App. Div. Aug. 17, 2011) affirms in part, reverses in part and remands for further proceedings the trial court's grant of summary judgment in favor of the New Jersey Department of Treasury (Department) on a public employee's (Matejik) claims arising under the New Jersey Law Against Discrimination (LAD) and the federal Family and Medical Leave Act (FMLA). and a denial of her motion for partial summary judgment. The Court concluded that the Department was entitled to summary judgment on Matejik's claim of retaliation under the FMLA as the record could not permit a jury

to reasonably conclude that her evaluation or her employer's delay in reinstating her was done in retaliation for Matejik's use of FMLA leave. In addition, the Appellate Division determined that the Department was not entitled to summary judgment on Matejik's LAD claim, that her employer discriminated against her based on its perception that she had a disabling mental condition.