



**STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

PO Box 429
TRENTON, NEW JERSEY 08625-0429

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

December 7, 2011

MEMORANDUM

TO: Commissioners
FROM: Counsel Staff
SUBJECT: Report on Developments in the Counsel's Office Since November 21, 2011

Commission Cases

Appeals have been filed in these cases from Commission decisions reviewing interest arbitration awards:

City of Camden and the International Association of Firefighters, Local 788,
P.E.R.C. No. 2012-018

County of Mercer and the Prosecutor's Detectives and Investigators, PBA Local 339
and Prosecutor's Superior Officers Association, P.E.R.C. No. 2012-015

Facing the sanction of dismissal, an attorney representing a Communications Workers of America shop steward, perfected an appeal of State of New Jersey Office of the Public Defender, P.E.R.C. No. 2011-66, 37 NJPER 133 (¶39 2011), by serving, as ordered by the Appellate Division of Superior Court, a copy of its notice of appeal and other filings on the Commission's Counsel's office. The Commission's March 3, 2011 decision dismissing the unfair practice charge, will now be reviewed by the court.

The Communications Workers of America is seeking leave to appeal and emergent relief from an interlocutory decision of a Commission designee. Town of West New York and CWA, I.R. No. 2012-011. The designee declined to grant the CWA's application for interim relief seeking an order that the Town honor a negotiated agreement to pay, effective July 1, 2011 a six per cent increase to employees represented by the CWA.

Other Cases

Retaliation for public employee free speech; applicability of implied covenant of good faith and fair dealing to public sector collective negotiations agreements.

Thomas, v. Newark Police Department, Superior Officers Association. et. al, 2011 U.S. Dist. LEXIS 130905 (D.N.J. 11/10/2011)

A federal district court grants in part and denies in part the motion of the City of Newark, the Newark Superior Officers Association, and individual officers to dismiss a ten count complaint brought by a Newark police officer who was immediately suspended (and later transferred with a shift change) following her testimony in a criminal trial involving the death of a Newark special police officer. The officer ultimately took a disability retirement. Her testimony was allegedly not helpful to the prosecution of the case and was reported (inaccurately according to the officer) by the Star Ledger. The trial resulted in a conviction of the defendant for manslaughter, but an acquittal for murder. The testifying officer was allegedly ostracized and harassed. The federal court holds that a public employee's testimony at a trial is constitutionally protected speech and allows the alleged violation of the officer's free speech rights to go to trial. The Court also holds:

Implicit in every contract is a covenant of good faith and fair dealing. Wilson v. Amerada Hess Corp., 168 N.J. 236, 244, 773 A.2d 1121 (2001). In New Jersey this implied covenant can be breached even if a party to the contract did not breach one of the express terms of the contract. Id. Additionally, an implied breach requires evidence of a bad motive. Id. at 249.

Here, if the Plaintiff is successful in showing that Defendants actions were retaliatory, even if those actions were consistent with the express terms of the contract, there is a genuine issue for trial as to the specific examples provided by the Plaintiff are evidence of bad motive and whether Defendants breached the implied covenant of good faith and fair dealing in the contract between the FOP and the City of Newark. Thus, summary judgment as to count ten of the Plaintiff's complaint is denied.

The court also allowed a claim for punitive damages, based on the alleged breach of the covenant of good faith and fair dealing, to go to trial.

Public employee pensions; equitable estoppel; reliance on statements of agency heads

In the Matter of Thomas J. O'Reilly, 2011 N.J. Super. Unpub. LEXIS ____ (App. Div. 12/07/2011)

O'Reilly was a high level employee of the Division of Criminal Justice. O'Reilly continued to work rather than retire because: Two different Attorneys General, assured him that

he would be eligible for the enhanced benefits under the Prosecutor's part of PERS; his name was included on a list of 30 employees that were deemed eligible for those retirement benefits; and the PERS board adopted regulations that would make O'Reilly eligible for those benefits. When he applied for retirement, the PERS board held that he was ineligible for Prosecutor's part benefits and O'Reilly appealed. In 2008, the Appellate Division of Superior Court held that reading the statute on its face, O'Reilly was not eligible. But, rejecting the argument that equitable estoppel could not be used against a public body, the court remanded the case to determine detrimental reliance and disparate treatment as compared to the other individuals on the 30-person list.

An administrative law judge held that O'Reilly was eligible for the benefits. However the PERS Board reversed and declared him ineligible. In this decision, the Appellate Division reverses the PERS board, holding that it improperly rejected the ALJ's findings of fact and based its decision on factors that went beyond the limited issues that the Court had directed should be explored on remand. The decision directs the PERS board to enroll O'Reilly in the Prosecutor's part as of the date of his October 1, 2006 retirement and make him whole for any differences in retirement benefits he has received and those that would have been paid under the Prosecutor's part.

Commissioner of Education; length of salary guides

Ramsey Board of Education and Ramsey Teachers Association, (Comm'r of Ed., 10/21/2011), reversing 2011 N.J. AGEN LEXIS 459 (ALJ, 08/25/2011)

The last collective negotiations agreement between the Board and Association had expired on June 30, 2007. Aided by, and following the recommendations of, a Commission-appointed fact-finder, the parties agreed upon two separate agreements: the first covering the school years 2007-2008 and 2008-2009; and the second covering 2009-2010 and 2010-2011. The two agreements were executed on July 1, 2009.

The Board relying on N.J.S.A. 18A:29-4.1 held that the terms of that statute limited it to adopting salary guides that were effective for no more than three years. Accordingly, it asserted that the salary guide for 2010-2011 was void and the Board was not obligated to pay salary increments to teaching staff during the 2011-2012 school year.

The Administrative Law Judge rejected the Board's argument. On appeal, the Commissioner of Education holds that given the statute, the adoption of a salary guide covering four years is null and void.