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# General Counsel's Annual Report – 2001

## Public Employment Relations Commission

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### **David Wallace**

David Wallace, the Commission's first General Counsel, died on December 14, 2001. David advised and represented the Commission at the time it implemented the 1974 amendments to the New Jersey Employer - Employee Relations Act, *N.J.S.A. 34:13A-1 et seq.* Those amendments conferred unfair practice and scope-of-negotiations jurisdiction upon the Commission, substantially expanding its jurisdiction and responsibilities. David worked tirelessly and wisely to draft regulations and develop a legal framework for Commission decisions and he embodied traditions of integrity, independence and excellence which this office and the PERC staff strive to continue. This report is dedicated to him.

### **Statistics**

The Commission received thirteen decisions from the Appellate Division. Except for one reversal and one partial reversal, all were affirmances. In addition, one appeal was dismissed; one motion for a stay in a contested transfer case was denied; one motion for a stay in a representation case was denied; and one agency order was enforced.

### **Appeals from Commission Decisions**

### **Scope-of-Negotiations Cases**

In *Council of New Jersey State College Locals, AFT, AFL-CIO and State of New Jersey*, 336 N.J. Super. 167 (App. Div. 2001), aff'g P.E.R.C. No. 2000-12, 25 NJPER 402 (¶30174 1999), the Court held mandatorily negotiable a proposal asking the employer to contribute monies to a union-administered health

fund for adjunct faculty. Applying the traditional preemption tests, the Court held that the proposal was not preempted by the State Health Benefits Program - - the question is not whether a statute or regulation authorizes a benefit; the question is whether a statute or regulation prohibits that benefit. The Court also held that the proposal was not rendered invalid by public policy concerns against shifting public money to a private entity without accountability. The Court concluded:

These part-time employees have a strong interest in having health insurance and in obtaining that insurance on an affordable group basis. The State can protect its budgetary interest in the negotiation process. 336 *N.J. Super.* at 112.

The State Health Benefits Program was also found not to be preemptive in *Hudson Cty. v. AFSCME Council 52, Locals 1697 and 2306*, 27 *NJPER* 212 (¶32073 App. Div. 2001), aff'g P.E.R.C. No. 2000-53, 26 *NJPER* 71 (¶31026 1999). The Commission and the Court declined to restrain binding arbitration of grievances asserting that the employer violated the parties' collective negotiations agreement when it changed certain prescription drug

benefits. The Court agreed with the Commission that the SHBP did not preempt enforcement of the alleged agreement to provide the benefits.

In *Somerset Cty. Sheriff v. PBA Local No. 177, Somerset Cty. Corrections Officers*, 27 *NJPER* 356 (¶32127 App. Div. 2001), aff'g P.E.R.C. No. 2000-20, 25 *NJPER* 419 (¶30182 1999), recon. den. P.E.R.C. No. 2000-38, 26 *NJPER* 16 (¶31003 1999), the Commission and the Court declined to restrain binding arbitration of grievances contesting the denial of the shift bids of female corrections officers. *N.J.S.A.* 30:8-12 entitled the employer to have at least one female officer on every shift, but the employer did not have a prerogative to deny shift bids so that it could have more than one female officer on a shift.

The negotiability of shift assignments was also considered in *Camden Cty. Sheriff and PBA Local No. 277*, 27 *NJPER* 357 (¶32128 App. Div. 2001), aff'g P.E.R.C. No. 2000-25, 25 *NJPER* 431 (¶30190 1999), clarified P.E.R.C. No. 2000-72, 26 *NJPER* 172 (¶31069 2000). The Commission held and the Court agreed that a shift bidding proposal was mandatorily negotiable to the extent it permitted employees to bid for shift assignments based on

their seniority and college credits where other qualifications are equal, but not to the extent that management had shown that certain positions required special skills, training, and qualifications.

*Camden Cty. Sheriff* also involved the negotiability of proposals allowing sheriff's officers to contest disciplinary determinations. The Commission and the Court agreed that the proposals were mandatorily negotiable to the extent they would allow officers to contest minor disciplinary determinations, but not to the extent they would allow officers to contest major disciplinary determinations.

In *City of Union and Union City Employees Ass'n*, 27 *NJPER* 362 (¶32131 App. Div. 2001), aff'g P.E.R.C. No. 2000-89, 26 *NJPER* 271 (¶31105 2000) the Court affirmed a Commission decision restraining arbitration of a grievance in which a Civil Service employee claimed that she had been constructively discharged. Civil Service employees must appeal discharges and other major disciplinary determinations to the Merit System Board ("MSB"). The Court also affirmed an MSB decision holding that the employee's appeal to the MSB was untimely.

In *State-Operated School Dist. of the City of Newark and City Ass'n of Supervisors and Administrators*, \_\_\_ *NJPER* \_\_\_ (¶\_\_\_\_\_ App. Div. 2001), aff'g in pt., rev'g in pt. P.E.R.C. No. 2000-51, 26 *NJPER* 66 (¶31024 1999) and P.E.R.C. No. 2001-10, 26 *NJPER* 368 (¶31149 2000), an Appellate Division panel reviewed several scope-of-negotiations rulings. The Court reversed the Commission's ruling that a school board and a majority representative could legally agree that employees would receive five days of paid family leave a year, subject to those days being deducted from an employee's accumulated sick leave days that were granted by contract rather than by *N.J.S.A.* 18A:30-2. The Court held that regardless of whether the sick leave days stemmed from the contract or the statute, school board employees can use sick leave days only for personal illness rather than family illness given the statutory definition of sick leave. Paid family leave will continue to be a mandatorily negotiable subject, but the parties will not be able to agree upon deductions from accumulated sick leave days to offset the expense of the benefit. The Court summarily affirmed the Commission's other rulings that contract

provisions concerning the filling of administrative positions were not mandatorily negotiable.

In *FMBA, Local No. 51 v. City of Gloucester City*, P.E.R.C. No. 2001-22, 27 *NJPER* 2 (¶32002 2000), aff'd \_\_ *NJPER* \_\_ (¶\_\_\_\_\_ App. Div. 2001), the Commission restrained binding arbitration of a grievance contesting the City's decision to abolish the position of Emergency Medical Technician and lay off three employees holding that title. After reciting the facts and articulating deferential standards of review, the Court summarily affirmed the Commission's ruling.

**Representation Cases**

The Appellate Division affirmed the agency's denial of a request to intervene in representation elections. *Middletown Tp. and IUE Local 417 and OPEIU, Local 32*, P.E.R.C. No. 2000-47, 26 *NJPER* 59 (¶31020 2000), aff'd 27 *NJPER* 194 (¶32065 App. Div. 2001). IUE Local 417 filed petitions seeking to represent nine negotiations units of employees of various employers. OPEIU Local 32 sought to intervene, asserting that it had merged with the units' previous majority representative, the Public Employees Service Union, Local 702.

The agency denied intervention, finding that OPEIU Local 32 had taken none of the steps it could have taken to secure the official status enjoyed by PESU Local 702 before its dissolution. Specifically, OPEIU did not secure official recognition from the employers, petition for an amendment of the certifications issued to PESU Local 702, or submit contracts naming it as the majority representative. Nor did OPEIU notify employees that a merger was taking place or give them a chance to discuss or vote on the merger. The Court affirmed for the reasons stated by the Commission.

**Unfair Practice Cases**

An Appellate Division panel reversed the agency's decision in *Hillsborough Tp. v. Hillsborough PBA Local No. 205*, 27 *NJPER* 266 (¶32095 App. Div. 2001), rev'g P.E.R.C. No. 2000-82, 26 *NJPER* 207 (¶31085 2000). The Commission held that the Township violated 5.4a(1) and (3) by singling out the PBA president for discipline as a result of the letter he sent on the PBA's behalf criticizing a police officer for ticketing the mother of a PBA officer in a neighboring community. The Court found no evidence that the PBA members had asked the

president to refer to the “honor code” in the letter so it concluded that the president could be properly and non-discriminatorily disciplined for including those references. The opinion approved the legal principles articulated by the Commission, but disagreed with their application.

In *Jobeck v. Union Cty.*, P.E.R.C. No. 2001-4, 26 *NJPER* 359 (¶31143 2000), aff’d 28 *NJPER* 28 (¶33009 App. Div. 2001), the Commission concluded that the County had not discriminated against an employee because of her union activities. The Court found sufficient credible evidence to support that conclusion so it affirmed without further discussion.

In *Irvington Bd. of Ed. and Irvington Ed. Ass’n*, \_\_\_ *NJPER* \_\_\_ (¶\_\_\_\_\_ App. Div. 2001), aff’g H.E. No. 2001-11, 27 *NJPER* 105 (¶32041 2000), made final on January 5, 2001 pursuant to N.J.A.C. 19:14-8.1, the Court agreed with a Hearing Examiner that the Association did not prove that two memoranda written by a principal and criticizing a teacher’s conduct violated *N.J.S.A. 34:13A-5.4a(1)* or (3). Since timely exceptions were not filed, the Commission did not review the Hearing Examiner’s decision.

Judge Feinberg of the Mercer County Superior Court enforced an interim relief order in *City of E. Orange and CWA*, I.R. No. 2001-3, 26 *NJPER* 399 (¶31157 2000). The order required the City to pay increments during successor contract negotiations.

<b>Release of Arbitration Panels</b>
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The Appellate Division affirmed two letters of the Director of Arbitration in which he declined to release a grievance arbitration panel absent a prima facie showing that the parties to a collective negotiations agreement had agreed to use the Commission’s arbitration service. In *Stefanelli v. Essex Cty. Voc. Schools Bd. of Ed. and PERC*, 28 *NJPER* 27 (¶33008 App. Div. 2001), the Court agreed with the Director that the collective negotiations agreement did not clearly authorize an individual employee to demand arbitration; clear authorization for such a demand is required by *D’Arrigo v. N.J. State Bd. of Mediation*, 119 *N.J.* 74 (1990). The Director’s conclusion was not arbitrary or capricious. In *Middlesex Cty. Sheriff’s Officers, FOP Lodge and Eckel*, 27 *NJPER* 103 (¶32040 App. Div. 2001), the Director, again applying *D’Arrigo*, held that the contract

did not clearly authorize a demand by a minority organization. The Court agreed, adding that *N.J.S.A.* 34:13A-5.3 precludes a minority organization from presenting or processing grievances.

### **Contested Transfer Cases**

*N.J.S.A.* 34:13A-25 prohibits school boards from transferring employees between work sites for disciplinary reasons. Under *N.J.S.A.* 34:13A-27, the Commission decides whether a transfer was disciplinary. In *North Bergen Tp. Bd. of Ed. and North Bergen Fed. of Teachers*, P.E.R.C. No. 2002-12, 27 *NJPER* 370 (¶32135 2001), stay denied, P.E.R.C. No. 2002-31, 28 *NJPER* 55 (¶33018 2001), app. pending App. Div. Dkt. No. A-0972-01T2, the Commission held that a school board secretary had been illegally transferred and ordered her returned to her previous position. The employer's application to the Appellate Division to have that order stayed pending appeal was denied.

### **Commission Regulations**

The Commission readopted, with minor amendments, its regulations governing

mediation, fact-finding, grievance arbitration, and interest arbitration. *N.J.A.C.* 19:12 and *N.J.A.C.* 19:16. Grievance arbitrators no longer need to submit their awards to the Commission. *N.J.A.C.* 19:12-5.9. The interest arbitration regulations were amended to provide a procedure for filing a motion to dismiss, *N.J.A.C.* 19:16-5.2; to specify that an interest arbitrator shall entertain motions to quash subpoenas, *N.J.A.C.* 19:16-5.7; and to expand the time for filing a response from seven days after receipt of a petition to 14 days after receipt of the notice of filing, *N.J.A.C.* 19:16-5.5.

The Commission denied a request to amend *N.J.A.C.* 19:11-10.3 to require mail ballot elections in all representation cases except where the parties and the Director of Representation agree to an on-site election. After a pre-proposal proceeding, the Commission concluded that the Director of Representation should retain discretion to conduct on-site elections.

In response to the mail problems caused by the anthrax attacks, the Commission temporarily relaxed its regulations and permitted certain documents to be filed by electronic mail and facsimile rather than by mail. Where parties

were permitted to file documents requiring original signatures by fax, they were required to keep original documents on file in case a dispute arose over the authenticity of the documents. The temporary relaxation of the rules began in November 2001.

### Other Court Cases

### Grievance Arbitration

#### 1. Decisions Confirming Awards

In *State of New Jersey v. Local 195, IFPTE*, 169 N.J. 505 (2001), our Supreme Court abolished the “no-work, no pay” doctrine in upholding an arbitration award requiring the employer to pay an employee for overtime opportunities he lost when the employer did not rotate overtime assignments. Justice Zazzali’s majority opinion found that the arbitrator’s interpretation of the contract was reasonably debatable; in that regard it endorsed the *Steelworkers’ Trilogy* from the private sector and especially its call for a flexible approach to an arbitrator’s remedial authority. *Id.* at 514, 520-521. The Court further concluded that no express statutory or regulatory authority was needed to permit a

monetary remedy for violating a contractual employment condition; section 5.3 of the Employer-Employee Relations Act provides such authority by requiring negotiations over terms and conditions of employment. *Id.* at 523-526. The Court also concluded that the “no-work, no-pay” doctrine is an anachronism given modern labor jurisprudence. *Id.* at 526-540. The Court stated, in part:

We further note that the stability of labor relations, “industrial peace” as it is termed in the private sector, depends largely on collective negotiations agreements. And the heart of any such agreement is the grievance and arbitration procedure. That is the mechanism for resolving violations of the collective negotiations agreement. Because employees do not have the right to strike in the public sector under our common law, and because most agreements in the private sector prohibit strikes over contract violations, arbitration rights and remedies must be effective if we are to preserve labor peace. Otherwise, the resultant agreements and incorporated arbitration remedies would become meaningless.

Just as good labor management relations depend on collective negotiations agreements that contain effective arbitration provisions (in lieu of the right to strike), in turn the usefulness of the arbitration provisions depends on effective remedies when the contract is violated if the contract is to provide stability. If we prohibit an arbitrator from awarding back pay, we eviscerate the contract. Back pay is the lifeblood of any arbitration procedure because without back pay there is only a right without a remedy. In the context of labor relations, the lack of a remedy presents a substantial threat to a peaceful and productive workplace. Such protections are necessary if the “quality and morale of public officers and employees [is to] improve.” *Id.* at 537-538.

Presaging *Local 195*, an Appellate Division panel confirmed an award of back pay for lost overtime opportunities in *PBA Local 292 v. Borough of North Haledon*, App. Div. Dkt. No. A-1889-99T1 (2/01/01). The arbitrator found that the employer violated the contract when it deprived regular police officers of overtime opportunities by using special police officers to fill in for absent officers on their

regular shifts. The Court rejected arguments that an emergency justified using the special police officers and that awarding monetary damages offended public policy.

An award of back pay was also upheld in *Catalyst Employees’ Ass’n v. Air Products and Chemicals, Inc.* \_\_\_ F. Supp.2d \_\_\_, 168 LRRM 2701 (D. N.J. 2001). The employer had argued that the arbitrator lacked authority to order back pay since the grievance sought only a promotion; but the Court found that the post-hearing briefs authorized an appropriate remedy for any violation and that back pay was the natural and usual remedy for an improper promotion denial.

In *East Brunswick Tp. Bd. of Ed. v. East Brunswick Ed. Ass’n*, App. Div. Dkt. No. A-2627-99T2 (2/23/01), an Appellate Division panel upheld an award mandating that the Board pay newly-hired teachers for attending summer workshops and seminars after they signed their contracts but before they began teaching. The award was a reasonably debatable interpretation of the contract and did not violate public policy. The Court rejected an argument that the newly hired teachers could not be considered “employees” under the contract because they



assertedly would not be considered “employees” under the Employer-Employee Relations Act, the education laws, the workers’ compensation law, or the common law.

In *Rahway Valley Sewerage Auth. v. Paper, Allied-Industrial, Chemical and Energy Workers Int. Union AFL-CIO, Local 2-149*, App. Div. Dkt. No. A-5266-99T3 (05/03/01), an Appellate Division panel upheld an award that overturned a reprimand because the employer waited too long to bring the disciplinary charges. The Court held that the arbitrator could find that the employer had violated the equitable doctrine of laches, even though the arbitrator could not establish a deadline for bringing charges.

In *City of Hoboken v. Hoboken Police Superior Officers Ass’n*, App. Div. Dkt. No. A-1184-99T5 (11/8/01), the Court confirmed an award of back pay and benefits to police officers who worked two additional days in 1997 and 1998. The arbitrator found that the contract permitted the City to require extra work days in 1995 and 1996, but not after the contract covering 1995 and 1996 expired. The Court found that the dispute was contractually

arbitrable and that the contractual language supported the arbitrator’s interpretation.

*Ocean Cty. v. OPEIU, Local 14 (now Local 32)*, App. Div. Dkt. No. A-4180-99T3 (5/24/01), reversed a trial court decision vacating an award. The arbitrator found that the county violated the contract when it did not pay non-essential employees who did not report to work on a snow day when the Governor had ordered all roads closed to non-essential travel. The award was reasonably debatable, even though another arbitrator had rejected a similar grievance involving another negotiations unit, and did not violate public policy.

*Mt. Olive Ed. Ass’n v. Mt. Olive Bd. of Ed.*, App. Div. Dkt. No. A-6282-99T5 (12/17/01), upheld an arbitration award sustaining a grievance over a school psychologist’s salary guide placement. The Court found that the issue presented was a simple matter of interpreting a contract provision and that there was no showing of any illegality or conflict with public policy. It also rejected a claim that the grievance was barred by contractual time limits. The Board waived that contention by not presenting it until it lost in arbitration.

In *Division 822, ATU v. New Jersey Transit Bus Operations, Inc.*, App. Div. Dkt. No. A-6912-99T5 (10/3/01), the Court affirmed an award denying a grievance claiming that employees were entitled to bid by seniority for "consecutive days off." The arbitrator reasonably relied upon the management rights clause.

In *National Ass'n of Letter Carriers v. United States Postal Service*, 272 F.3d 182, 168 LRRM 2902 (3d Cir. 2001), Judge Greenberg (formerly of the Appellate Division) wrote an opinion upholding an award finding just cause for a postal employee's discharge. The employee was terminated for filing a false workers' compensation claim, a charge the arbitrator sustained despite a ruling of the workers' compensation tribunal granting benefits. The Court found that the agency ruling was not preclusive and pointed out that if the union had prevailed in obtaining preclusive effect in this case, such effect would also have to be applied in cases where the agency denied benefits yet the employee still sought to arbitrate a termination.

In *Major League Baseball Players Ass'n v. Garvey*, \_\_\_ U.S. \_\_\_, 167 LRRM

2134 (2001), the Supreme Court reversed a decision vacating an award. The arbitration panel rejected Garvey's claim that he had been denied a new contract due to the owners' collusion. The Court of Appeals rejected the arbitrator's findings and conclusions as "inexplicable and border(ing) on the irrational." It ordered the district court to enter an order remanding the case to the arbitration panel with instructions to rule for Garvey. The United States Supreme Court, in turn, summarily reversed. Appellate courts are not to consider the merits or equities of a contractual claim. So long as an arbitrator is honestly applying the contract, a court must accept that application even if it is silly or improvident.

## **2. Decisions Vacating Awards**

In *Hudson Cty. v. PBA Local 232*, App. Div. Dkt. No. A-1811-99T1 (2/7/01), the Court upheld the part of an award holding that the County violated the agreement when it increased the number of pay periods in 1998 from 26 to 27, causing a slight dip in bi-weekly paychecks. The arbitrator's interpretation of the contract was reasonably debatable. But the Court vacated the part of the award requiring the employer to pay each employee interest on the

difference between the paychecks. The annual salary was paid in full and the amount of the checks increased the next year when the number of pay periods went back to 26. The Court deemed any harm from the violation to be too negligible to be remedied.

*Port Authority Police Sergeants Benevolent Ass'n, Inc. v. Port Authority*, 340 N.J. Super. 453 (App. Div. 2001), vacated an award entitling a former police sergeant to back pay during a suspension. The sergeant was suspended without pay after a warrant was issued for his arrest for brandishing his weapon at a person who hit his car. The sergeant retired before the criminal charges were resolved and before departmental disciplinary charges were instituted, thus mooted any disciplinary charges. He then sought back pay from the date his suspension started until the date he retired. An arbitrator upheld the grievance and the trial court found the arbitrator's contractual interpretation to be reasonable. The Appellate Division panel reversed, holding that the contract did not entitle a suspended employee to back pay solely because the employee had been acquitted of criminal charges and reasoning that upholding such an award would subvert the

public interest. The Court worried that suspended officers would stay on suspension while disciplinary charges were pursued and then retire just before they were resolved, in the hope of a financial windfall if criminal charges were later dropped.

*City of East Orange v. East Orange Superior Officers' Ass'n, PBA Local 16*, App. Div. Dkt. No. A-4977-99T1 (8/28/01), affirmed a decision vacating an award. The arbitrator concluded that the employer violated the contract when it did not pay a sergeant at a lieutenant's pay rate for the period when he was the ranking officer in a bureau previously supervised by a lieutenant. The award was vacated based on a mistake of fact apparent on the face of the award - - the arbitrator's inconsistent declarations that: (1) there was a practice of paying out-of-title compensation to sergeants temporarily replacing lieutenants, and (2) sergeants had substituted several times for lieutenants without an increase in compensation.

In *City of Gloucester v. PBA Local 40 (Gloucester Unit)*, App. Div. Dkt. No. A-6907-99T5 (11/02/01), an Appellate Division panel affirmed an order vacating an award. The arbitrator held that employees retiring early in a

calendar year were entitled to be paid for all vacation and sick leave days for that year. The reviewing courts found that the award was not based on a reasonably debatable interpretation of contract provisions and that payment of unearned vacation and sick leave benefits offends public policy.

In *International Brotherhood of Teamsters, Local 560 v. Garfield Bd. of Ed.*, App. Div. Dkt. No. A-919-00T2 (12/20/01), an Appellate Division panel affirmed a trial court decision vacating an award. The arbitrator held that the employer violated a provision precluding it from using substitute custodians for more than 30 days without the union's consent. The arbitrator found that three custodians worked almost full time to replace sick or injured full-time custodians, including one custodian out for one year with a torn rotator cuff, even though they did not work 30 consecutive days at any point; he ordered that the custodians be awarded back pay after the 31<sup>st</sup> day of employment plus contractual benefits from the date of the award. The courts, however, held that the award was based on a mistake in law because *N.J.S.A. 18A:27-4.1* required the superintendent's recommendation before a full-

time appointment is made and because public policy required the arbitrator to consider the fiscal impact of employing additional full-time custodians if the employee who had been out had returned to work.

In *Pennsylvania Power Co. v. Local Union No. 272*, \_\_\_ F. 3d \_\_\_, 169 LRRM 2010 (3d Cir. 2001), the Third Circuit Court of Appeals vacated an award finding that the employer violated an anti-discrimination clause by providing early-retirement benefits to supervisors. The arbitrator exceeded his authority by reading the non-discrimination clause to apply to this type of supervisor/non-supervisor difference and by ordering the company to provide voluntary retirement program benefits to union member employees.

### **3. Contractual Arbitrability Cases**

The Court viewed contractual arbitrability broadly in *Jansen v. Solomon Smith Barney, Inc.*, 342 N.J. Super. 254 (App. Div. 2001), certif. den. 170 N.J. 205 (2001), a non-labor case applying labor law principles. An Appellate Division panel held that putative beneficiaries of a deceased father's retirement accounts had to arbitrate their claim against their father's financial advisors. The Court relied on the public policy

favoring arbitration, a policy developed in labor relations cases and applied in commercial law cases like this one. Among the principles cited are these: An arbitration agreement should be read liberally to find arbitrability if reasonably possible; any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration; and the arbitrability of a claim depends not upon the characterization of the claim, but upon the relationship of the claim to the subject matter of the arbitration clause.

In *Heher v. Smith, Stratton, Wise, Heher and Brennan*, 170 N.J. 213 (2001), the Supreme Court estopped a law firm from invoking a timely notice clause in an arbitration agreement because it had vigorously asserted in a previous court proceeding that the parties should be required to arbitrate the merits of their dispute over the effects of a restrictive covenant in a partnership agreement. The Court emphasized that arbitration is a preferred method of dispute resolution because it combines privacy and efficiency.

*Linden Bd. of Ed. v. International Brotherhood of Teamsters, Local 478*, App. Div. Dkt. No. A-3177-99T1 (6/7/01), rejected a claim that a grievance was not contractually

arbitrable. The grievance asserted that bus drivers were deprived of extra driving assignments and extra pay when their supervisor assigned himself extra runs rather than follow a rotation list. The Board sought a restraint of arbitration from the Chancery Division because the parties' arbitration clause provided:

Only matters relating to salary, insurance, employment procedures, sick leave, discipline and/or discharge may proceed to binding arbitration.

The trial court restrained arbitration, but the Appellate Division reversed. It reasoned that public policy favors liberal construction of arbitration clauses and that any issue of arbitrability must be conclusively determined by PERC. The Court may be confused on this latter point since the agency's jurisdiction over arbitrability questions is limited to scope-of-negotiations issues and courts usually resolve substantive questions of contractual arbitrability.

In *Linden*, the Court also reversed a ruling permitting the union to file an unfair practice charge even though the dispute had arisen more than six months earlier. The union asserted that it had elected not to file a charge because the superintendent had sent it a letter acknowledging

that “both sides will take this issue to arbitration.” The statute of limitations in *N.J.S.A. 34:13A-5.4(c)* was not tolled because the superintendent’s statement did not “prevent” the union from filing a charge.

#### **4. Arbitration of Statutory Claims**

In *Garfinkel v. Morristown Obstetrics & Gynecology Associates*, 168 *N.J.* 124 (2001), our Supreme Court established standards for determining when an arbitration clause will be construed to compel arbitration of statutory anti-discrimination claims. To compel an employee to arbitrate anti-discrimination claims rather than sue in court, a contractual waiver must be clear and unequivocal. In *Garfinkel*, the contractual language was not clear and equivocal so a doctor was not compelled to arbitrate his LAD claim. The Court also held that the employee’s common-law claims and LAD claims should all be tried in one judicial action instead of bifurcating the dispute between court and arbitration.

*Garfinkel* was applied in *Grasser v. United Healthcare Corp.*, 343 *N.J. Super.* 241 (App. Div. 2001), holding that a discharged employee need not arbitrate his LAD claim. The Court declined to find a knowing waiver of

the right to sue based on the plaintiff’s having signed a form acknowledging that he had received the employer’s handbook and stating that he agreed to be bound by the arbitration procedures in the employer’s “Employment Arbitration Policy” in that handbook. The language in the acknowledgment form was not specific enough to constitute a waiver. While the language in the handbook might have met that standard, the employee had not signed the handbook itself.

In *Leodori v. Cigma Corp.*, App. Div. Dkt. No. A-5369-99T3 (12/27/01), the Court held that an in-house lawyer was not required to arbitrate his CEPA claims. The employer had not established a knowing and voluntary waiver of the employee’s right to a jury trial.

In *Caracappa v. Berrie*, App. Div. Dkt. No. A-1397-00T2 (12/17/01), a company had a policy of requiring new employees to execute agreements to arbitrate all employment-related claims. However, the company could not produce an agreement signed by the plaintiff. A hearing was necessary to determine whether plaintiff had signed such an agreement; the existence of the policy did not suffice by itself to preclude a lawsuit.

In two cases decided before *Garfinkel*, employees were contractually obligated to arbitrate statutory claims. In *Littman v. Morgan Stanley Dean Witter*, 337 N.J. Super. 134 (App. Div. 2001), an NASD agreement signed by a financial advisor barred his court suit challenging his termination on CEPA grounds. The Court also held that a CEPA claim was not an “employment discrimination claim” excluded from the arbitration clause. And in *Caruso v. Ravenswood Developer, Inc.*, 337 N.J. Super. 499 (App. Div. 2001), an arbitration agreement covered statutory consumer fraud and RICO claims.

In *Gras v. Associates First Capital Corp.*, 346 N.J. Super. 42 (App. Div. 2001), an Appellate Division panel upheld an agreement requiring that claims under the Consumer Fraud Act be arbitrated. That Act did not create a private cause of action and plaintiffs could vindicate their statutory rights in arbitration even if that agreement precluded a class action.

In *Riding v. Towne Mills Craft Center, Inc.*, 166 N.J. 222 (2001), a plaintiff prevailed on an LAD claim litigated through New Jersey’s non-binding voluntary arbitration pilot program. That program requires a party

wishing to reject an award to request a trial de novo within 30 days of the award; the employer did not do so. The plaintiff then moved to confirm the award and sought attorneys’ fees. The Court held that the plaintiff had not waived that claim by not presenting it earlier; a fee-shifting claim must be resolved by a trial court unless the parties expressly agree to arbitrate it.

Consistent with state court cases compelling arbitration of statutory claims, the United States Supreme Court has held that the Federal Arbitration Act permits federal court actions to compel arbitration of employment discrimination disputes if an employer and employee have agreed to arbitration. *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105, 85 FEP Cases 266 (2001). The FAA applies to employment contracts outside the transportation industry.

<b>The Right to Organize</b>
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Article I, Paragraph 19 of the New Jersey Constitution confers collective bargaining rights on all private sector employees. In *Musicians’ Guild of Essex Cty., Local 16, American Fed. of Musicians v. Colonial Symphony Orchestra*, Dkt.No. ESC-C-1Y-01

(4/26/01), Chancery Judge Kenneth Levy enforced that right by appointing the State Board of Mediation to determine whether the plaintiff union would represent the defendant's musicians. Judge Levy found that the musicians were employees rather than independent contractors. The National Labor Relations Board did not have jurisdiction so the employees' constitutional right could be enforced in state court.

In *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 167 LRRM2164 (2001), the United States Supreme Court construed the statutory definition of "supervisor" more broadly than the NLRB had in determining the supervisory status of nurses at a residential care facility. While the Court agreed with the NLRB that the employer had the burden of proving that the nurses were supervisors excluded from the Act's coverage, it rejected the NLRB's interpretation of the definitional requirement that an employee use "independent judgment" to be considered a supervisor. The NLRB had interpreted that phrase to exclude "ordinary professional or technical judgment in directing less-skilled

employees to deliver services in accordance with employer-specified standards."

### **Employee Status**

In *Auletta v. Bergen Center for Child Development*, 338 N.J. Super. 464 (App. Div. 2001), a school psychologist was held to be an employee of a special education school for workers' compensation purposes. In determining that the psychologist was not an independent contractor, the Court applied the "relative nature of the work" test and concluded that his work was an integral part of the school's business and that he was economically dependent on this employment. The Court did not need to apply the "right to control" test.

### **Overtime Compensation**

*Allen v. Fauver*, 167 N.J. 69 (2001), dismissed a claim by State corrections officers for incidental overtime wages under New Jersey's Wage and Hour Law and the federal Fair Labor Standards Act. The Wage and Hour law's definition of "employer" did not include the State and the State had not waived its sovereign immunity and consented to be sued under the FLSA. Justices Long and Stein would have found



a waiver of sovereign immunity based on New Jersey's Contractual Liability Act and a collective negotiations agreement providing for overtime compensation for incidental overtime assignments in accordance with the FLSA.

### **Leaves of Absence**

In *New Jersey State FMBA v. North Hudson Reg. Fire & Rescue*, 340 N.J. Super. 577 (App. Div. 2001), certif. denied 170 N.J. 88 (2001), the Court invalidated a statute entitling duly authorized representatives of various labor organizations to take paid leaves of absence to attend union conventions. The statute was held to be unconstitutional because it constituted special legislation and unduly delegated legislative authority to the unions to determine the number of representatives. The opinion suggested that the issue of convention leave “might be dealt with by collective negotiations, subject to the inherent managerial prerogative of the public employer.” *Id.* at 594.

In *Falusi v. Bd. of Review*, App. Div. Dkt. No. A-2570-00T2 (12/31/01), the Court considered claims under the federal and state family leave acts. The Court held that the federal statute covers both personal sickness

and childbirth while the New Jersey statute does not cover personal illness.

### **Pensions and Retiree Health Benefits**

In *Barron v. State Health Benefits Commission*, 343 N.J. Super. 583 (App. Div. 2001), the Court held that a retired high school and college teacher could aggregate his membership in three pension systems - - PERS, ABP, and TPAF - - to determine whether he had worked the 25 years needed to receive SHBP medical coverage upon retirement. The SHBP had denied coverage. The Court could not “conceive of any reasonable legislative purpose that would be served by providing free medical coverage to a public employee who retires with twenty-five or more years of service credit in a single retirement system but denying that benefit to an employee who retires with twenty-five years aggregate service in several systems, but less than that number of years in any single system.” *Id.* At 587. Ordinarily public employees transferring from one retirement system to another also transfer their service credit; ABP participants, however, cannot transfer their credits.

In *Monmouth Cty. Corrections Officers Ass'n, Inc., PBA Local 314 v. Monmouth Cty.*, App. Div. Dkt. No. A-0104-00T2 (11/13/01), the County did not violate *N.J.S.A. 40A:10-23* when it paid the costs of retiree health benefits for four employees pursuant to their individual employment contracts but did not pay those costs for employees in negotiations units. *N.J.S.A. 40A:10-23* requires that payments be made “under uniform conditions as the governing body of the local unit shall prescribe”; but the Court held that this statute does not apply to employees who are uniquely qualified or specially situated. The Court stated that the County’s “ability to hire and retain highly qualified and specialized employees would be hamstrung by the interpretation of the statute advanced by plaintiff.”

*FOP, Garden State Lodge #3 v. Board of Trustees of the Police and Firemen's Retirement System*, App. Div. A-0174-00T3 (6/01/01), upheld a determination of the PFRS trustees denying pension credit for "senior status" pay for officers with 22 years of experience. A negotiated agreement called for such payments, in exchange for the elimination

of longevity payments and certain vacation benefits for officers in the "senior" category. The Court held that PFRS regulations exclude such salary increases from being credited for pension purposes and that the PFRS was not estopped from denying credit by a 1997 ruling approving credit.

In *Hughes v. PFRS Bd. of Trustees*, App. Div. Dkt. No. A-4753-99T5 (12/27/01), the Court estopped the PFRS from denying a widow’s pension on the ground that her husband died within 30 days of retirement and was thus considered an “active” employee under the statute. The PFRS had told the widow that the retirement was effective and the widow had authorized the withdrawal of life support given that information. New legislation has prospectively eliminated the 30-day period.

<b>Employment Contracts</b>
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In *Troy v. Rutgers*, 168 *N.J.* 354 (2001), our Supreme Court held that faculty members could seek to enforce individual employment contracts allegedly entitling them to full year appointments rather than academic year appointments. The reduction of work year, and thus pay, was mandatorily negotiable, despite a

claim that the employees' services were not needed during the summer. Further, the alleged individual agreements were not inconsistent with the collective negotiations agreement which would have taken precedence if there had been a conflict. The faculty members were also permitted to litigate their contractual claims in court rather than advisory arbitration.

In *Miskowitz v. Union Cty. Utilities Auth.*, 336 *N.J. Super.* 183 (App. Div. 2001), the Authority lawfully terminated the five-year employment contracts of an assistant comptroller and a deputy executive director. While the contracts appeared to prohibit abolishing the employees' positions, the Authority acted in good faith in responding to an unprecedented fiscal crisis prompted by federal decisions invalidating New Jersey's solid waste flow orders. The Court declined to endorse a broader principle that public employers may abrogate fixed term contracts to save money or promote efficiency.

#### **Exempt Firemen's Tenure Statute**

In *Roe v. Borough of Upper Saddle River*, 336 *N.J. Super.* 566 (App. Div. 2001), the Court held that the Exempt Firemen's

Tenure Act, *N.J.S.A.* 40A:14-65, did not protect a fire subcode official and a plumbing subcode official against having their positions abolished when their employer entered an Interlocal Services Agreement with another town for construction code services. The Court rejected a claim, based on *N.J.S.A.* 40A:14-65, that a position could not be abolished except "in time of widespread economic depression or mandatory retrenchment." The tenure act provisions apply only when the employer's sole purpose is to remove the exempt fireman. This employer acted in good faith in entering the Interlocal Services Agreement.

The opposite result was reached in another case decided the same day by another panel, *Viviani v. Borough of Bogota*, 336 *N.J. Super.* 578 (App. Div. 2001), certif. granted 167 *N.J.* 572 (2001). That case applied *N.J.S.A.* 40A:14-65 to block an employer from abolishing positions held by exempt firemen because it was not a "time of widespread economic depression or mandatory retrenchment." The Court held it immaterial that the employer was acting in good faith for valid cost reduction reasons. The Court also held that this statute was constitutional.

**Other Tenure Cases**

*N.J.S.A.* 40A:9-43 establishes a three year term of office for a County Counsel and *N.J.S.A.* 40A:9-25 protects a County Counsel against an unjust discharge. Nevertheless, *Coyle v. Warren Cty. Freeholders Bd.*, 340 *N.J. Super.* 277 (App. Div. 2001), held that the Rules of Professional Conduct govern the attorney-client relationship; require a lawyer to withdraw from representation when discharged; and override the cited statutes. The panel recognized that its decision conflicted with *Pillsbury v. Monmouth Cty.*, 140 *N.J. Super.* 410 (App. Div. 1976), so it stayed its order pending Supreme Court review.

In *Merlino v. Borough of Midland Park*, 338 *N.J. Super.* 436 (App. Div. 2001), a municipal construction official was entitled to tenure under *N.J.S.A.* 52:27D-126B. That statute provides for an initial four year term for a construction official and for tenure to accrue if an official is appointed to a second consecutive term or begins a fifth consecutive year of service. At the end of the plaintiff's first term, he and the employer agreed on a way to defer the tenure decision; the official would resign and then be appointed, ten days later, to a new four-

year period. At the end of that second period, the employer decided not to reappoint him, but he claimed he was now tenured. The Appellate Division agreed, holding that the statutory tenure terms preempt any different understanding. The Court relied on cases construing education tenure laws.

In *Atlantic City Ed. Ass'n v. Atlantic City Bd. of Ed.*, App. Div. Dkt. No. A-4015-99T2 (6/26/01), a school board violated the tenure laws by abolishing the position of head custodian and then transferring some head custodians to other custodial positions at lower salaries while terminating other head custodians with more seniority than other custodians it retained. Because tenure statutes covered the general classification of janitorial services, the Board could not reduce the head custodians' salaries or lay them off out of seniority.

**Terminations**

In *Gonzalez v. State-Operated School Dist. of the City of Newark*, 345 *N.J. Super.* 175 (App. Div. 2001), the Court held that administrators who were terminated after the state-operated school district was created were not entitled to back pay under *N.J.S.A.* 18A:7A-

44. This statute did not protect these at-will employees because they were terminated before a reorganization abolished their positions.

In *Bello v. Lyndhurst Bd. of Ed.*, 344 N.J. Super. 187 (App. Div. 2001), judgment was granted to a school board accused of having terminated a secretary in retaliation for her political activity; there was insufficient evidence to support a finding that hostility towards her political activity was a substantial or motivating factor in her termination. N.J.S.A. 18A:27-4.1 entitles a terminated employee to appeal to the Board and make an informal appearance, but does not create a private cause of action to contest the merits of a termination in court.

In *Baldassare v. State of New Jersey*, 250 F.3d 188 (3d Cir. 2001), the Third Circuit Court of Appeals held that Baldassare, the former Acting Chief of Investigators, could sue the Bergen County Prosecutor and assert that his dismissal violated his First Amendment rights. Baldassare claimed that he was dismissed for his role in an internal investigation that resulted in criminal and administrative charges being brought against two employees for buying previously leased county vehicles

below market price. The lower court held that Baldassare's role in the investigation was not constitutionally protected, but the Third Circuit reversed that ruling. The case was remanded for trial on the merits of Baldassare's allegations and the respondents' competing assertions that Baldassare was discharged for poor performance and insubordination.

In *Mita v. Chubb Computer Services, Inc.*, 337 N.J. Super. 517 (App. Div. 2001), an employer was granted summary judgment in a wrongful termination action. Changes in an employee manual had not altered the employee's at-will status. Further, the employer could amend its handbook to specify a formal procedure for changing that status.

In *re William Carroll*, App. Div. Dkt. No. A-1003-99T3 (4/24/01), affirmed a Merit System Board decision dismissing charges that had led to a sheriff's officer discharge. The officer refused to answer questions during an internal affairs investigation after he had been granted immunity from criminal prosecution, but the employer violated Attorney General guidelines by not informing the officer of his right to counsel or union representation. The

guidelines were not “rules” requiring rulemaking under the Administrative Procedure Act.

### Disciplinary Issues

In determining whether there was good cause to remove a Civil Service employee, the federal Merit Systems Protection Board may consider previous incidents of minor discipline even though those incidents are still being reviewed through negotiated grievance procedures. *Postal Service v. Gregory*, \_\_\_ U.S. \_\_\_, 122 S. Ct. 431 (2001). The MSPB will rely on a disciplinary action under appeal if certain procedural rights have been honored and if the action was not clearly erroneous.

*Szewczuk v. New Jersey Turnpike Auth.*, App. Div. Dkt. No. A-6691-99T3 (10/17/01), dismissed a probationary employee’s lawsuit asserting a wrongful termination. The plaintiff, a toll collector, was notified on May 19, 1992 that he would be terminated effective May 24, 1992, the last day of his six month probationary period, because of his “inability to satisfactorily complete the probation period.” The Court rejected plaintiff’s claim that he was terminated before the end of the probation period and that he had a

contractual right to work the full probation period despite poor performance. It held that at-will public sector employees cannot claim implied contract rights under *Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284 (1985); and that a fixed term for a probationary public employee offends public policy. The Court noted that the Authority’s collective negotiations agreement did not cover probationary employees.

In *Pepe v. Springfield Tp.*, 337 N.J. Super. 94 (App. Div. 2001), the Court considered whether disciplinary charges against a firefighter provided “plain notice” of the offense of which he was found guilty. The Court held that this requirement was satisfied in the case of a firefighter who was charged with participating in making a false fire alarm, but who was found guilty of knowing that other firefighters were making such an alarm and not acting to stop them.

In *re Caldwell*, App. Div. Dkt. No. A-1034-98T3 (3/13/01), affirmed an MSB decision reducing a custodian’s termination to a six-month suspension. The custodian was indicted for a narcotics law violation and ultimately accepted for a pre-trial intervention program, which she completed. The employer terminated her for

conduct unbecoming a public employee, but the MSB applied progressive discipline concepts in holding that the termination should be reduced to a six-month suspension given the employee's unblemished work history. The employee was reinstated in a position with no student contact. The Court upheld that ruling. However, it also held that the suspension could not start until after the pre-trial intervention program so it reduced the back-pay award.

In *Price v. New Jersey Dept. of Corrections*, App. Div. Dkt. No. A-3218-99T3 (11/14/01), the Court agreed with the MSB that a central transportation unit employee was properly discharged based on the loss of his license - - a job requirement - - due to a DWI suspension. A collective negotiations agreement requirement that disciplinary charges be brought within 30 days of the employer's reasonably becoming aware of the offense began to run when the employee actually lost his license rather than a month earlier when the employee informed the employer that he had pled guilty.

In *Ames v. Haddonfield Borough*, App. Div. Dkt. No. A-5388-99T5 (6/19/01), a police officer was allowed to file an untimely appeal under *N.J.S.A. 40A:14-150* contesting

a demotion. The officer's lawyer was at fault and the employer had timely notice of the intent to appeal and suffered no prejudice. On the merits, the employer demoted the officer on a record that was unclear as to what evidence was considered and apparently did not give the officer an opportunity to appear and be heard.

In *re McRae*, App. Div. Dkt. No. A-4885-99T1 (6/12/01), held that a Civil Service employee could not appeal a five-day suspension to the MSB. The employee argued that he should have the right to appeal the minor disciplinary determination because it was consolidated with a 20 day suspension for a departmental hearing. But under Civil Service law, a five day suspension is a minor disciplinary action that is not appealable as of right to the MSB unless it results in an employee having been suspended for more than 15 days in a year. The Court stressed that the five-day suspension preceded the 20-day suspension and stated that the consolidated hearing "represents an accommodation to the parties, not a basis for departing from the statutory scheme of rights of appeal."

### **Training**

*Aparin v. Gloucester Cty.*, 345 *N.J. Super.* 24 (App. Div. 2001), aff'g 345 *N.J. Super.* 41 (Law Div. 2000), held that civil service law and DOP specifications entitled county park rangers to training approved by the Police Training Commission. The Court distinguished *Monmouth Cty.*, P.E.R.C. No. 88-10, 13 *NJPER* 647 (¶18244 1987), aff'd *NJPER Supp2d.* 192 (¶170 App. Div. 1988), holding that park rangers were not park police officers for purposes of being in a negotiations unit separate from non-police employees.

### **Drug Testing**

*In re Lalama*, 343 *N.J. Super.* 560 (App. Div. 2001), reversed an MSB determination that there was not a sufficient chain of custody for a urine sample collected in a firefighter's drug test. A party seeking to introduce drug test results in an administrative proceeding need show only a "reasonable probability" that the sample's integrity has been maintained; no particular form of evidence is required to establish the links in a chain of custody.

### **Forfeiture of Public Employment**

In *McCann v. Clerk of City of Jersey City*, 167 *N.J.* 311 (2001), a mayoral candidate was disqualified from serving as mayor by his convictions of wire fraud, mail fraud, and tax offenses. While the forfeiture statute did not apply because his convictions were based on private conduct, the Faulkner Act did apply because his crimes involved moral turpitude.

### **Indemnification**

In *McCurrie v. Town of Kearny*, 344 *N.J. Super.* 470 (App. Div. 2001), a municipal clerk/administrator agreed with the Town to resign six months before his term expired in exchange for \$27,500 plus accrued vacation time. Since the agreement was for his personal benefit, the clerk/administrator could not receive counsel fees. The agreement was properly adopted by resolution, rather than ordinance, since the payment was not a form of "salary."

In *Hess v. Town of West New York*, App. Div. Dkt. No. A-5294-99T2 (10/11/01), a police officer was not entitled to recover counsel fees after being found not guilty of federal criminal charges accusing him of bribery, extortion, and criminal conspiracy. The officer



did not submit any facts showing that the charges arose out of or were directly related to the exercise of police powers in furtherance of official duties, as required by *N.J.S.A. 40A:14-155*.

### **Bi-State Agencies**

In *Delaware River Port Auth. v. FOP*, 135 *F.Supp.2d* 596, 166 *LRRM* 2854 (E.D. Pa. 2001), the federal district court held that the DRPA was not obligated to bargain with a union representing police superior officers. The Court rejected New Jersey Supreme Court cases imposing labor relations obligations on the DRPA because the Pennsylvania and New Jersey labor relations statutes complement and parallel each other. *See, e.g., International Union of Operating Engineers Local 68 v. Delaware River and Bay Auth.*, 147 *N.J.* 433 (1997), *cert. den.*, 522 *U.S.* 861 (1997). No labor relations duties can be imposed on DRPA unless both the Pennsylvania and New Jersey legislatures expressly make their labor relations legislation applicable to DRPA.

In *New York and New Jersey Port Authority and Port Authority Employment Relations Panel*, App. Div. Dkt. No. A-

005688-00T2 (10/5/01). Appellate Division Judges Petrella and Steinberg held that an appeal from the decision of the Authority's Labor Relations Panel could be filed in the trial division of the New Jersey Superior Court, even though all the events of that case occurred in New York and that Panel's decision was its final administrative action. The Court issued form orders denying the Panel's motion to dismiss the action filed in New Jersey and granting the Authority's motion to remand the case to the trial division.

In *Williams v. Port Authority of New York and New Jersey*, 345 *N.J. Super.* 549 (App. Div. 2001), the opinion by Judge Pressler recognized that New Jersey courts and agencies cannot exercise subject matter jurisdiction over a Port Authority employee's claim simply because the Authority is a bi-state agency - - a more substantial tie is needed. In *Williams*, the Court found such a tie and held that the New Jersey Division of Workers' Compensation properly exercised jurisdiction over a workers' compensation claim alleging that an employee had been subjected to toxic substances while working in New Jersey for four months in 1973 and in New York for the next twenty years.

### **Appointment Powers**

No police department position can be created without an ordinance being adopted pursuant to *N.J.S.A. 40A:14-118*. *Reuter v. Borough of Fort Lee*, 167 *N.J.* 38 (2001), *aff'g* 328 *N.J. Super.* 547 (App. Div. 2000). This ruling applies prospectively given the widespread practice of establishing police positions by resolution.

*Murphy v. Luongo*, 338 *N.J. Super.* 260 (App. Div. 2001), held that a mayor could appoint an interim police chief without the Council's approval. The Council, however, would have to approve a permanent appointment.

### **CEPA Claims**

In *McLelland v. Moore*, 343 *N.J. Super.* 589 (App. Div. 2001), the Court articulated and applied the standards for permitting trial of a CEPA claim. An employee must furnish enough proof and legal basis to determine that a statute, rule, or public policy would have been violated if a jury were to find that the alleged conduct occurred. The trial court should have dismissed a police officer's retaliation claim because he had not shown an

objectively reasonable belief that the deputy police chief had illegally obtained a gun permit.

### **Prevailing Wage Act Claims**

In *Bankston v. Newark Housing Auth.*, 342 *N.J. Super.* 465 (App. Div. 2001), a public housing tenant worked in a pre-apprentice title in the Housing Authority's on-the-job training program. She claimed she was entitled to higher compensation under the Prevailing Wage Act, *N.J.S.A. 34:11-56.25 et seq.*, and under the collective negotiations agreement covering Authority employees. The Court rejected both claims. The Prevailing Wage Act covers only contractors' employees, not employees of public agencies. The collective negotiations agreement did not cover the pre-apprentice title.

*Troise v. Extel Communications*, 345 *N.J. Super.* 231 (App. Div. 2001), held that a six-year statute of limitations applied to lawsuits filed by employees under the Prevailing Wage Act. That law allows two years for an administrative protest, but does not specify a deadline for a lawsuit.

## Statutes of Limitations

In *Alderiso v. Medical Center of Ocean Cty.*, 167 N.J. 191 (2001), and *Holmin v. TRW, Inc.* 167 N.J. 205 (2001), aff'g 330 N.J. Super. 30 (App. Div. 2000), the Supreme Court held that the statutes of limitations in a CEPA case and in a fraud case begin to run on the date an employee is actually discharged. The Supreme Court declined to follow United States Supreme Court cases holding that the Title VII statute of limitations begins to run when an employee is told he or she will be separated from employment as of a certain date - - e.g. an assistant professor being told that she has been denied tenure and will not be employed after a terminal contract expires. Under *Alderiso* and *Holmin*, the date of discharge does not extend to any subsequent date on which severance, health, or other extended benefits are paid.

CEPA actions were dismissed as time-barred in two cases decided after these decisions. In *Daniels v. The Mutual Ins. Co.*, 340 N.J. Super. 11 (App. Div. 2001), the CEPA statute of limitations in a constructive discharge case began on the date the resignation was tendered rather than on the last date of actual employment. And in *Villalobos v. Fava*,

342 N.J. Super. 38 (App. Div. 2001), certif. den. 170 N.J. 210 (2001), the discovery rule applicable to claims under the Tort Claims Act did not apply to a CEPA claim filed by a former employee of a county prosecutor's office. The Court also rejected a claim that the prosecutor was estopped from invoking the statute of limitations.

## Remedies

*New Jersey Dept. of Labor v. Pepsi-Cola Co.*, 170 N.J. 59 (2001), upheld the power of the Commissioner of Labor to award prejudgment interest on an award of damages in a wage-and-hour dispute, even absent an authorizing regulation. PERC has long exercised that power in unfair practice cases, with the courts' approval.

*Burris v. West Orange Tp. Police Dept.*, 338 N.J. Super. 493 (App. Div. 2001), held that the MSB had statutory authority to award attorneys' fees to prevailing employees, including fees incurred in departmental disciplinary hearings before MSB appeals. PERC, by contrast, has no statutory authority to award attorneys' fees.

## **Injunctions**

*Delaware River and Bay Authority v. York Hunter Construction, Inc.* 344 N.J. Super. 361 (Ch. Div. 2001), sets forth and applies the standards for granting injunctions. A loss of money is generally not considered irreparable injury even if the money may not be collectible. Insolvency alone is not a sufficient basis for an injunction.

## **Statutes**

Pursuant to *N.J.S.A. 11A:3-7*, negotiations and a written agreement are required before any changes can be made to the State employee compensation plan. An amendment to *N.J.S.A. 11A:8-1*, signed at the same time, requires that layoffs of permanent employees in State or local services be made in inverse order of seniority.