General Counsel's Annual Report -- 1997
Public Employment Relations Commission

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STATISTICS

The Commission received one opinion from the New Jersey Supreme Court: it approved, with one exception, the standards used in managerial executive cases and all the standards used in confidential employee cases. The Commission received six opinions from the Appellate Division: four affirmances, one partial affirmance and partial reversal, and one reversal. In addition, three appeals were dismissed or withdrawn.

APPEALS FROM COMMISSION DECISIONS

Representation Cases

In *New Jersey Turnpike Auth. v. AFSCME, Council 73*, 150 *N.J.* 331 (1997), the Supreme Court addressed the "managerial executive" and "confidential employee" exclusions from the coverage of the Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq*. The Court rejected lower court interpretations that would have substantially expanded these exclusions.

The Act covers all public employees except "elected officials, members of boards and commissions, managerial executives, and confidential employees." Supervisors and professional employees are entitled to organize and seek negotiations.

N.J.S.A. 34:13A-3(f) defines "managerial executives" as:

> persons who formulate management policies and practices and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator and the assistant superintendent of the district.

The lower court believed that this definition incorporated private sector standards for excluding "managerial employees" from the coverage of the National Labor Relations Act, 29 *U.S.C.* §141 *et seq.*, and concluded that the

Legislature had intended to deny representational rights to all employees above the first level of supervision. That conclusion would have disrupted negotiations units throughout New Jersey. The Supreme Court rejected that conclusion, noting that the Legislature had spurned a definition based on private sector standards.

The Court also held that a managerial executive need not have organization-wide power. *Compare Gloucester Cty.*, P.E.R.C. No. 90-36, 15 *NJPER* 624 (¶20261 1989) (despite lacking power over matters outside her own department, welfare reform coordinator was a managerial executive). The Court thus disagreed with a statement in *Borough of Montvale*, P.E.R.C. No. 81-52, 6 *NJPER* 507 (¶11259 1980) that a managerial executive must possess and exercise "a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes." The *Montvale* standards were approved in all other respects. Those standards now provide:

> A person formulates policies when he develops a particular set of objectives designed to further the mission of a segment of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises.

N.J.S.A. 34:13A-3(g) defines confidential employees as:

> [E]mployees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

In applying this test, the Commission uses the approach stated in *State of New Jersey*, P.E.R.C. No. 86-18, 11 *NJPER* 507 (¶16179 1995):

> We scrutinize the facts of each case to find for whom each employee works, what he [or she] does, or what he [or she] knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employee's right to confidentiality concerning the collective negotiations process if the

employee was included in a negotiating unit.

Turnpike Authority approves this approach. The focus will continue to be on whether an employee works with or knows about confidential negotiations information which could be transmitted to a majority representative at the employer's expense.

The Court rejected the lower court's suggestion, based on dictum in *Wayne Tp. v. AFSCME, Council 52,* 220 *N.J. Super*. 340 (App. Div. 1987), that mere access to confidential information would necessarily result in an employee's exclusion. The Court also rejected the lower court's approach automatically excluding any employee who assimilates, evaluates, analyzes, or provides significant information to their superiors concerning negotiations issues. While stating that an employee who engages in some or all of these activities will be "highly likely" to be found a confidential employee, the Court left it to the Commission to determine whether the facts of a case warrant exclusion.

Unfair Practice Cases

In *Jersey City and Jersey City POBA*, P.E.R.C. No. 96-87, 22 *NJPER* 251 (¶27131 1996), the Commission applied the unit work doctrine and held that the employer violated *N.J.S.A*. 34:13A-5.4a(1) and (5) when it unilaterally shifted work done by police officers for over 30 years to civilian employees with respect to: the property room, the bureau of criminal identification, crossing guard supervision, radio repairs, and the pistol range. In the BCI and the property room, police officers who retired were promptly rehired as civilian. With respect to the other positions, police officers who had always done these duties were replaced by civilian employees without any changes in duties.[1] The Appellate Division affirmed the Commission's decision. 23 *NJPER* 325 (¶28148 App. Div. 1997). The Supreme Court has granted certification, 152 *N.J*. 8 (1997), and will examine the unit work doctrine for the first time.

In *Lakewood Tp. v. Lakewood Tp. PBA Local 71 and PERC,* Ocean Cty. Law Div. Dkt. No. L-597-97, the Court dismissed a lawsuit seeking a declaration that the employer could not agree to pay employees on Thursdays rather than Fridays. The question

[1] The Commission did not find a duty to negotiate over using civilians in motor pool and mail delivery positions because the functions of these positions had been reorganized.

was at issue in the parties' then pending unfair practice case so the Commission had exclusive jurisdiction to resolve it.

Scope-of-Negotiations Cases

In *Monmouth Cty. v. CWA*, 300 *N.J. Super*. 272 (App. Div. 1997), the Court consolidated eleven appeals from Commission decisions[2] and addressed the rights of police officers and other employees to arbitrate disciplinary disputes. Agreeing with *City of E. Orange*, P.E.R.C. No. 97-85, 23 *NJPER* 123 (¶28059 App. Div. 1997), the Court held retroactive an amendment to *N.J.S.A.* 34:13A-5.3 stating that negotiated disciplinary review procedures could provide for binding arbitration of minor discipline of any public employees except State troopers. The Court then applied the amendment to a series of minor disciplinary disputes involving a variety of public employees and permitted binding arbitration of all disputes involving suspensions of five days or less. (The Court conformed the wording of the amendment to the Civil Service definition of minor discipline.) The Court also agreed with the Commission that alleged procedural violations -- *e.g*. untimely charges or denial of a hearing -- may be arbitrated. Finally, the Court held that a transfer of a police officer and a termination of a provisional corrections officer could not be arbitrated.

Teaching staff members have a right to arbitrate increment withholdings for predominately disciplinary reasons, but must submit withholdings predominately related to the evaluation of teaching performance to the Commissioner of Education. *N.J.S.A.* 34:13A-26 and 27. The Commission is

[2] The eleven cases were *Union Cty. and PBA, Union Cty. Correction Officers, Local No. 199, Inc.*, P.E.R.C. No. 95-43, 21 *NJPER* 64 (¶26046 1995); *So. Brunswick Tp. and PBA Local 166*, P.E.R.C. No. 95-45, 21 *NJPER* 67 (¶26048 1995); *Monmouth Cty. and CWA*, P.E.R.C. No. 95-47, 21 *NJPER* 70 (¶26050 1995); *Hudson Cty. and District 1199J*, P.E.R.C. No. 95-48, 21 *NJPER* 73 (¶26051 1995); *Hudson Cty. and PBA Local 51*, P.E.R.C. No. 95-69, 21 *NJPER* 153 (¶26092 1995); *Woodbridge Tp. and IBT*, P.E.R.C. No. 95-49, 21 *NJPER* 74 (¶26052 1995); *Woodbridge Tp. and AFSCME Local 3044*, P.E.R.C. No. 95-50, 21 *NJPER* 75 (¶26053 1995); *Woodbridge Tp. and AFSCME Local 3044*, P.E.R.C. No. 95-51, 21 *NJPER* 76 (¶26054 1995); *Woodbridge Tp. and AFSCME Local 3044*, P.E.R.C. No. 95-52, 21 *NJPER* 77 (¶26055 1995); *City of Orange Tp. and FMBA Local No. 10*, P.E.R.C. No. 95-53, 21 NJPER 78 (¶26056 1995); and *Bor. of Hopatcong and PBA Local 149*, P.E.R.C. No. 95-73, 21 *NJPER* 157 (¶26096 1995), recon. den. P.E.R.C. No. 96-1, 21 *NJPER* 269 (¶26173 1995).

entrusted with deciding whether a withholding is predominately based on disciplinary reasons or the evaluation of teaching performance, *N.J.S.A.* 34:13A-27d, and has issued over 50 decisions applying that standard. Last year, the Appellate Division reviewed the first two such decisions to reach it.

In *Mansfield Tp. Bd. of Ed. and Mansfield Tp. Ed. Ass'n*, P.E.R.C. No. 96-65, 22 *NJPER* 134 (¶27065 1996), the Commission restrained arbitration over a withholding involving a third-grade teacher. The employer gave two reasons for the withholding:

> Your failure to timely communicate to, and your actions to withhold from, the resource room teacher and/or the child study team, your concerns regarding a classified student in your class, contrary to your acknowledged understanding as to your responsibilities in this area; and
>
> Your failure to obey, and your actions to evade, an express administrative directive that all communications with a particular parent with whom the district was in ongoing multiple litigation, must take place in the presence of another district employee as witness.

The Commission found that the first reason involved "an evaluation of teaching performance given a teacher's responsibility to cooperate with a child study team and other educators to develop the best educational plan for a special education student in her classroom" and that it might also involve interpreting and applying special education statutes and regulations. The Commission found that the second reason alleged insubordination and was disciplinary, but it also related to or arose out of litigation touching upon the responsibilities of a special education teacher. An Appellate Division panel reversed, 23 *NJPER* 209 (¶28101 App. Div. 1997), emphasizing that the withholding was based on a single incident of failing to communicate and that "the regular evaluation process of teaching performance was completely satisfactory, and it was only by virtue of something outside the parameter of the evaluation process that [the teacher] lost her increment."

In *Edison Tp. Bd. of Ed. v. Edison Tp. Principals and Supervisors Ass'n*, P.E.R.C. No. 97-40, 22 *NJPER* 340 (¶27211 1996), aff'd 304 *N.J. Super*. 459 (App. Div. 1997), the Court held that a withholding based on a principal's allegedly excessive absenteeism must be reviewed by an arbitrator. *Edison* establishes that under *N.J.S.A.* 34:13A-26 and 27, all withholdings except those based on the evaluation of teaching performance are to be

reviewed through arbitration. This withholding was not based on the evaluation of teaching performance since the principal's extended leave of absence for a serious illness resulted in there being no performance to evaluate.

In a case *not* involving an appeal from a Commission decision, an Appellate Division panel held that the Commission has jurisdiction to determine whether a withholding involving a non-professional school board employee must be arbitrated. *Randolph Tp. Bd. of Ed. v. Randolph Ed. Ass'n*, 306 *N.J. Super*. 207 (App. Div. 1997). The board withheld a secretary's increment for allegedly excessive absenteeism and the Association demanded arbitration pursuant to *N.J.S.A.* 34:13A-29, making binding arbitration the terminal step of grievance procedures covering the discipline of school board employees. An Appellate Division panel held that *N.J.S.A.* 34:13A-29 precluded the parties from contractually excluding disciplinary withholdings from binding arbitration and that only the Commission had jurisdiction to determine whether a withholding was disciplinary under *N.J.S.A.* 34:13A-29.

In *Rutherford PBA Local 300 v. Rutherford Bor.*, P.E.R.C. No. 97-7, 22 *NJPER* 280 (¶27151 1996), aff'd 23 *NJPER* 242 (¶28116 App. Div. 1997), the Court held that a PBA proposal was not mandatorily negotiable. That proposal would have required the Borough to pay all police officers (below captain) a 5% salary increase if more than 15% of the officers were reassigned from their chosen shifts.

An Appellate Division panel also affirmed *City of Hoboken and Hoboken Police Superior Officers Ass'n*, P.E.R.C. No. 96-16, 21 *NJPER* 348 (¶26214 1995), aff'd 23 *NJPER* 140 (¶28068 App. Div. 1997). The Commission declined to restrain arbitration over a police sergeant's grievance seeking overtime compensation for duties performed as an emergency management coordinator. The employer had argued that the parties' recognition clause did not cover these duties and that the Commission was compelled by *N.J.S.A.* 34:13A-5.3 to decide the recognition clause dispute, but the Commission held that this contractual dispute was outside its scope-of-negotiations jurisdiction. The Court agreed.

Motions

In *Borough of Bogota and Bogota PBA Local 86*, I.R. No. 97-18, 23 *NJPER* 352 (¶28165 1997), a Commission designee applied *Jersey City*, *supra* at pp. 4-5, and restrained the employer from unilaterally shifting dispatching duties traditionally performed by police officers to civilian employees. The Appellate Division denied motions for leave to appeal and a stay. App. Div. Dkt. No. AM-1171-96T5 (6/1/97).

In *Borough of Island Heights and PBA Local 352*, I.R. No. 97-23, 23 *NJPER* 412 (¶28188 1997), a designee restrained the employer from reducing the salary step placement of patrol officers during negotiations. Leave to appeal was denied. Dkt. No. AM-1464-96T2 (7/30/97).

REGULATIONS

The Commission adopted regulations specifying the stringent standards for appointments and reappointments to its special panel of interest arbitrators. *N.J.A.C.* 19:16-5.15. The Commission also adopted regulations specifying the procedures for considering whether to remove, suspend, or discipline interest arbitrators. *N.J.A.C.* 19:16-5.16.

OTHER COURT CASES

Representational Rights

Delaware River and Bay Authority employees enjoy the right to negotiate under complementary New Jersey and Delaware laws; Delaware and New Jersey courts have concurrent jurisdiction to enforce that right. *International Union of Operating Engineers, Local 68 v. The Delaware River and Bay Auth.*, 147 *N.J.* 433 (1997). Public policy favors the right to negotiate.

Lay teachers in Catholic schools have a right to organize and bargain collectively under the New Jersey Constitution, Art. I, §19; this right does not violate the First Amendment of the United States Constitution. The scope of negotiations, however, is limited to wages, benefit plans, and other secular employment conditions. *South Jersey Catholic School Teachers v. St. Teresa of the Infant Jesus Elementary School*, 150 *N.J.* 575 (1997).

Grievance Arbitration

1. Public Sector

In *PBA Local 292 v. Borough of North Haledon*, 305 *N.J. Super*. 454 (App. Div. 1997), app. pending, S.Ct. Dkt. No. 45,222, an Appellate Division panel held that a public sector grievance arbitration conducted by a PERC-appointed arbitrator is governed by the Arbitration Act, *N.J.S.A.* 2A:24-1 *et seq*., rather than by common law, and that an award may become unenforceable if an action to confirm such an award is not brought within 90 days. The Court dismissed as untimely an action seeking to confirm an award holding that the employer violated the parties' contract by using a special police officer to work a regular shift and ordering the employer to pay regular police officers $8000 in overtime. A dissenting opinion would allow a common law confirmation action after three months. The Supreme Court will review this case.

In *Marlboro Tp. Bd. of Ed. v. Marlboro Tp. Ed. Ass'n*, 299 *N.J. Super*. 283 (App. Div. 1997), certif. den. 151 *N.J.* 71 (1997), the Court held that a grievance contesting a bus driver's non-reappointment was not contractually arbitrable. Considering the contractual merits rather than limiting itself to interpreting the arbitration clause, the Court reasoned that a "just cause for discipline" clause did not suffice to make a non-reappointment arbitrable. This opinion may place a practical burden on majority representatives of non-professional school board employees to negotiate for tenure clauses beyond "just cause" protections.

In *State of New Jersey (OER) v. CWA*, 296 *N.J. Super*. 223 (App. Div. 1997), certif. granted 150 *N.J*. 25 (1997), an Appellate Division panel vacated an arbitration award requiring the employer to arbitrate misconduct-based discharges of unclassified employees and bear the burden of proof. Considering an issue not argued, the Court held that the parties' contract did not authorize binding arbitration of a dispute over the discharge of an assistant deputy public defender. The Court stated, however, that *N.J.S.A.* 34:13A-5.3 permits public employers to negotiate disciplinary review procedures for unclassified employees.

In *North Bergen Fed. of Teachers, AFT Local 1060 v. North Bergen Tp. Bd. of Ed*., App. Div. Dkt. No. A-2918-96T3 (9/30/97), an Appellate Division panel reversed a trial court decision confirming an arbitration award. The Federation's grievance claimed that a senior qualified employee was entitled to a trial period in a promotional position. The employer filed a scope-of-negotiations

petition, but the Commission declined to restrain arbitration. P.E.R.C. No. 96-87, 22 *NJPER* 245 (¶27129 1996). The arbitrator required the employer to promote the senior employee immediately, without a trial period. Applying private sector standards for reviewing arbitration awards, the trial court confirmed the award absent fraud or misconduct. The employer appealed, asserting that the grievance was not legally arbitrable and that the arbitrator had exceeded his contractual authority by ordering the employee promoted without a trial period. The Court rejected the backdoor attempt to appeal the scope ruling, but remanded the case to the trial court to apply public sector standards for reviewing arbitration awards and thus to determine whether the arbitrator's contractual rulings followed the law and were consistent with the public interest and welfare.

In *Edison Tp. Bd. of Ed. v. Edison Tp. Custodians and Maintenance Ass'n,* App. Div. Dkt. No. A-0362-96T5 (8/20/97), the Court confirmed an award concluding that the employer had not sufficiently considered seniority in choosing among applicants for a head custodian position and ordering the employer to reconsider the selection from among those who had more seniority than the candidate chosen. The employer argued that once the arbitrator decided it did not have to appoint the most senior employee, he could go no further; the Court, however, concluded that the employer had waived this objection by not seeking judicial intervention once the arbitrator stated he intended to examine the entire selection process.

In *Edison Tp. v. IBT, Local 11*, App. Div. Dkt. No. A-7594-95T5 (6/20/97), the Court confirmed an award holding that the employer did not have just cause to terminate an employee granted an extended medical leave. The arbitrator held that the employer could not require the employee to reapply for continued sick leave when it had not enforced that contractual requirement before.

In *Buena Reg. School Dist. Bd. of Ed. v. Buena Reg. Ed. Ass'n,* 300 *N.J. Super*. 415 (App. Div. 1997), the Court confirmed an award requiring a receiving district to credit teachers for their years of service in a sending district and to pay them contractual longevity benefits. The arbitrator properly interpreted *N.J.S.A.* 18A:28-6.1, preserving seniority rights under sending-receiving agreements, as requiring full credit for all years of service in the sending district for compensation purposes.

In *Rutgers Council of AAUP Chapters v. Rutgers, the State Univ.*, App. Div. Dkt. No. A-5737-95T5 (2/19/97), the arbitrator concluded that the employer did not violate a clause stating that "a teaching assistant ... works normally at the maximum rate of fifteen clock hours per week" when it assigned 22 teaching assistants in the Department of English, New Brunswick to teach three courses. The arbitrator reasoned that the clause set forth a guideline rather than a maximum. The Court held that this award did not violate public policy, was reasonably debatable, and involved the negotiable subject of work hours.

2. Private Sector

In *Hynes v. Clarke,* 297 *N.J. Super*. 44 (App. Div. 1997), a panel vacated an award in favor of the trustees of a union benefits fund against six nonunion workers. The arbitrator found that the employer had paid the workers without withholding the contributions due the fund and ordered the workers to reimburse the fund for the contributions that should have been withheld, even though the workers did not know they had received those payments wrongly. The Court, however, held that the union-employer contract did not authorize an arbitration action against the employees directly.

Tenure, Implied Contract, and CEPA Claims

1. Public Sector

In *Walsh v. State of New Jersey (Dept. of Public Advocate),* 147 *N.J.* 595 (1997), the Supreme Court relied upon Judge Skillman's dissenting opinion below, 290 *N.J. Super*. at 13-17, in holding that an assistant public defender did not have an enforceable implied-in-fact contract to be promoted. Judge Skillman had reasoned that no such contract could exist since assistant public defenders by statute "serve at the pleasure" of their employer and since the Department of Personnel must review promotions of unclassified employees to ensure eligibility requirements are met.

In *Aarons v. State of New Jersey (Casino Control Commission),* App. Div. Dkt. No. A-2459-96T2 (5/13/97), an Appellate Division panel, relying upon *Walsh*, held that a Casino Control Commission inspector could not maintain a wrongful discharge action under *Wooley v. Hoffman-LaRoche, Inc*., 99 *N.J.* 284 (1985). The Court reasoned that the

employee's statutory at-will employment status could not be altered contractually.

In *Angelo v. Essex Cty*., App. Div. Dkt. No. A-1373-96T3 (10/31/97), the Court held that an unclassified employee in the local service could pursue a claim that he was entitled to procedural protections set forth in a handbook. Those protections included a pre-termination hearing.

Cooper v. Mayor of Haddon Heights, 299 *N.J. Super*. 174 (App. Div. 1997), held that salaries of municipal officers and employees can be set by ordinance only, not by handbooks. In addition, *N.J.S.A.* 40A:9-165 -- preventing a municipality from denying a tax assessor, chief financial officer, tax collector, or municipal clerk salary increases granted all other officers and employees -- does not require a municipality to give comparable salary percentage increases as opposed to comparable dollar amount increases.

Comer v. City of Paterson, App. Div. Dkt. No. A-2623-96T3 (12/12/97), upheld a jury award of $131,106.21 in favor of a fire chief who sued the City for payment of terminal leave benefits and unused vacation days. The mayor had ordered the chief to forego using vacation days and instead be paid for unused days upon retirement. The Appellate Division rejected an assertion that such a promise could not be enforced.

2. Private Sector

In *Geldreich v. American Cyanamid Co*., 299 *N.J. Super*. 478 (App. Div. 1997), the Court upheld a wrongful discharge claim based on unqualified statements in a personnel manual that the employer would try to avoid terminations during reductions in force by transferring employees to comparable or lower-level jobs. The Court concluded that these unqualified statements were not negated by a generalized notice elsewhere in the manual disclaiming an intent to create any contractual rights.

In *Falco v. Community Medical Center*, 296 *N.J. Super*. 298 (App. Div. 1997), the panel dismissed a handbook claim given a disclaimer on the first page stating that the handbook was not a contract and a disclaimer in the disciplinary guidelines stating that employment was subject to termination at will. The guidelines had set forth comprehensive disciplinary procedures, including progressive discipline practices.

In *Rivera v. Trump Plaza Hotel*, 305 *N.J. Super*. 596 (App. Div. 1997), the Court dismissed a wrongful discharge action brought by card dealers who were dismissed for

wearing ponytails. The dealers had signed disclaimers stating that they were at-will employees; management gave them an opportunity to change their hairstyles and thus did not breach any covenant of good faith and fair dealing; and the dismissals did not violate a clear mandate of public policy.

In *Crusco v. Oakland Care Center, Inc*., 305 *N.J. Super*. 605 (App. Div. 1997), the Court held that a wrongful discharge claim was not barred by an assertion in the complaint of an untimely claim under the Conscientious Employee Protection Act. The Court stressed that CEPA's waiver provision must be read narrowly because CEPA is remedial legislation.

Health Benefits

A new statute requires the State to pay 80% of the health insurance premiums or periodic charges for qualified retirees from the Police and Firemen's Retirement System, the Consolidated Police and Firemen's Pension Fund, or the Public Employees' Retirement System. *P.L*. 1997, *ch*. 300. The statute does not apply to retired employees whose premiums are already paid by the State or by local employers pursuant to certain cited statutory provisions. In addition, the statute does not replace, supersede, or modify retiree health benefits provided by negotiated agreement, ordinance, or resolution; and it amends *N.J.S.A*. 34:13A-18 to state that an interest arbitrator cannot consider diminishing negotiated benefits because the Legislature provided this statutory benefit.

In *Fair Lawn Retired Policemen v. Borough of Fair Lawn*, 299 *N.J. Super*. 600 (App. Div. 1997), the Court applied *N.J.S.A*. 40A:10-23 to an ordinance covering medical benefits for retirees. *N.J.S.A*. 40A:10-23 provides, in part:

> The employer may, in its discretion, assume the entire cost of such coverage and pay all of the premiums for employees who have retired on a disability pension or after 25 years' or more service with the employer, or have retired and reached the age of 62 or older with at least 15 years of service with the employer, including the premiums on their dependents, if any, *under uniform conditions as the governing body of the local unit shall prescribe*. (Emphasis supplied).

The ordinance distinguished between employees who had retired before 1988 and would continue to pay 50% of the cost of complete coverage; current employees who would pay nothing for complete coverage; and future employees who would not receive any

coverage. The Court held that these distinctions did not violate the uniformity requirement of *N.J.S.A.* 40A:10-23 because the ordinance conformed to collective negotiations agreements addressing distinct groups of employees with different compensation/benefits conditions. The Court also held that *N.J.S.A.* 40A:10-23 did not mandate that the employer pay 100% of costs.

In *Wolfersberger v. Borough of Point Pleasant Beach*, 152 *N.J.* 40 (1997), aff'g 305 *N.J. Super*. 446 (App. Div. 1996), the Supreme Court held that a police retiree who could use military service to establish "25 years of creditable service" for pension purposes under *N.J.S.A.* 43:16A-11.1 could not use that service to establish "service with the employer" for medical benefits under *N.J.S.A.* 40A:10-23.

In *Atlantic City Ed. Ass'n v. Atlantic City Bd. of Ed.*, and *Keyport Teachers' Ass'n v. Keyport Bd. of Ed.*, 299 *N.J. Super.* 649 (App. Div. 1997), an Appellate Division panel reaffirmed case law holding that a school board violates *N.J.S.A.* 18A:16-13 when it self-insures health benefit plans. Judge Wecker's concurring opinion concludes, more narrowly, that the State Board of Education properly disallowed the self-insurance plan at issue because it did not provide adequate financial protection.

In *Rutgers Council of AAUP Chapters v. Rutgers, the State Univ.*, 298 *N.J. Super*. 430 (App. Div. 1997), the Court held that the denial of health insurance coverage to same-sex domestic partners of employees does not violate the Constitution, the Law Against Discrimination, or an executive order.

Due Process and Procedural Claims

Due process does not always require that public employees be given notice and a hearing before being suspended without pay. *Gilbert v. Homar*, __ *U.S.* __, 138 *L.E.*2d 120, 12 *IER* Cases 1473 (1997). A campus police officer was arrested and charged with felony drug possession; the Court reasoned that the arrest and charges evidenced reasonable grounds for a suspension and thus obviated any need for a pre-suspension hearing.

A medical resident accused of poor clinical judgment and improper patient treatment is not entitled to counsel at a hearing that may lead to discharge. *Hernandez v. Overlook Hosp.*, 149 *N.J.* 68 (1997). Three dissenting justices found it unfair to deny a resident counsel at a pre-termination hearing.

In *Brady v. Department of Personnel*, 149 *N.J.* 244 (1997), the Court held that DOP was not required to provide all persons challenging Civil Service test scores with copies of the questions, their answers, and the grading standards. Such materials need not be disclosed absent a specific *prima facie* showing of arbitrariness or discrimination in grading.

In *Matter of State Layoff Title Rights*, App. Div. Dkt. No. A-5847-95T3 (12/9/97), an Appellate Division panel rejected union challenges to DOP layoff right determinations affecting State employees. Administrative due process was not violated by allowing appointing authorities, but not employees and unions, to comment on proposed title right determinations.

Police Discipline

In *Division of State Police v. Jiras*, 305 *N.J. Super*. 476 (App. Div. 1997), the Court held that the Superintendent of State Police did not abuse his discretion by firing a trooper for assaulting a prisoner without provocation. The Court stressed "the special status of the Division of State Police and the special standards of discipline that apply to its members" under *State v. State Troopers Fraternal Ass'n*, 134 *N.J.* 393 (1993). *Id*. at 481.

In *Cosme v. Borough of E. Newark Tp. Committee*, 304 *N.J. Super*. 191 (App. Div. 1997), the Court reversed a trial court decision reducing a police officer's discharge to a one-year suspension. The appellate court upheld the discharge, reasoning that a Civil Service law prohibiting a suspension exceeding six months should be followed as a standard in municipalities outside the Civil Service system.

In *Drumm v. Livingston Tp. Police Dept*., App. Div. Dkt. No. A-5156-95T2 (2/24/97), the Court dismissed disciplinary charges not heard within a reasonable time of their filing. The employer waited for over a year and did not justify its delay.

Compensation Issues

In *State Troopers Fraternal Ass'n v. State*, 149 *N.J*. 38 (1997), some troopers were entitled to retroactive pay increases under a successor contract for the period before they retired while other troopers were properly denied such payments under a DOP regulation prohibiting retroactive pay adjustments. The predecessor contract expired on June 30,

1987; DOP adopted a regulation limiting retroactive pay adjustments to current employees on September 6, 1988; the parties settled the contract in April 1990; and the employer denied retroactive pay increases to all employees who retired after July 1, 1987. The parties' contract required retroactive pay raises for all employees, but the Court held that only employees who retired before the regulation was adopted were entitled to receive them. Employees who retired after the regulation was adopted could not rely on a past practice of receiving retroactive increases and did not have a vested right to such increases.

Drug Testing

Random drug testing of transit police officers carrying firearms for security purposes is constitutional. *New Jersey Transit PBA Local 304 v. New Jersey Transit*, 151 *N.J.* 531 (1997). This decision overrules *FOP, Newark Lodge No. 12 v. City of Newark*, 216 *N.J. Super*. 461 (App. Div. 1987).

Privatization

In *CWA v. Whitman*, 298 *N.J. Super*. 162 (App. Div. 1997), the trial court dismissed a lawsuit contesting the reprivatization of motor vehicle agencies. The Appellate Division held that the Complaint failed to state a cause of action to the extent it alleged that reprivatization violated bidding requirements, Civil Service statutes, due process, or equal protection guarantees. However, the plaintiffs could seek to prove that their First Amendment rights were violated when they were not appointed as motor vehicle agents.

Tort Claims Immunity

Resident physicians employed by UMDNJ but working at an affiliated hospital are public employees immune from liability under the Tort Claims Act. *Wajner v. Newark Beth Israel Med. Center*, 298 *N.J. Super*. 116 (App. Div. 1997). But a UMDNJ professor performing surgery at an affiliated hospital was an independent contractor because he was not under UMDNJ's control at that time. *Lowe v. Zarghami*, 305 *N.J. Super*. 90 (App. Div. 1997).

Public Records

Keddie v. Rutgers, the State Univ., 148 *N.J.* 36 (1997), held that the employer's legal bills in labor and employment cases were not

public records under the Right-to-Know law, *N.J.S.A.* 47:1A-2, but were common-law public records. The Court remanded the case to the trial court to consider whether the plaintiffs' interest in disclosure outweighed Rutgers' interest in non-disclosure.

Taxpayer Standing

A taxpayer lacks standing to enforce a collective negotiations agreement allegedly requiring a 12% salary differential between each police officer rank. *Loigman v. Middletown Tp.*, 297 *N.J. Super*. 287 (App. Div. 1997). The Court, however, "remanded" the case to the Commission to determine, in the event a scope of negotiations petition was filed, whether the contract clause was an illegal parity clause. No petition was filed.

Federal Preemption

In *Labree v. Mobil Oil Corp.*, 300 *N.J. Super*. 234 (App. Div. 1997), the NLRA was held to preempt a wrongful discharge action alleging retaliation for receiving workers' compensation benefits. The Court determined that the wrongful discharge claim could not be separated from plaintiff's alleged right under a collective negotiations agreement to light duty.

Sexual Harassment Discovery

Materials relating to an internal investigation of a sexual harassment complaint are generally discoverable. *Payton v. New Jersey Turnpike Auth.*, 148 *N.J*. 524 (1997). If, however, a loss of confidentiality concerning a particular document would undermine investigations, a trial court may consider such procedures as redaction, gag orders, or sealing portions of the record. Only in extreme cases may the need for confidentiality require suppression.

Arbitration of Statutory Discrimination Claims

In *Alamo Rent A Car, Inc. v. Galarza,* 306 *N.J. Super*. 384 (App. Div. 1997), the Court held that employees may agree in employment contracts to arbitrate statutory anti-discrimination claims and may thus waive their right to invoke an administrative forum and seek administrative remedies. The parties' employment contract, however, did not clearly and unmistakably establish such a waiver because it required arbitration of contractual claims.

In *Great Western Mortgage Corp. v. Peacock*, 110 *F*.3d 222, 73 *FEP Cases* 856 (3d Cir. 1997), the Court held that an employee who signed an employment contract with an arbitration clause may be compelled to arbitrate her sexual harassment claim and that the arbitrator must decide whether the employee waived any punitive damages claim.

Workfare

The Work First New Jersey Act establishes a workfare program for welfare recipients. *P.L. ch*. 38, codified at *N.J.S.A.* 44:10-55. Section 8h of that act, however, states that a recipient shall not be placed or used in a workfare position:

> (a) that was previously filled by a regular employee if that position, or a substantially similar position at that workplace, has been made vacant through a demotion, substantial reduction of hours or a layoff of a regular employee in the previous 12 months, or has been eliminated by the employer at any time during the previous 12 months;
>
> (b) in a manner that infringes upon a wage rate or an employment benefit, or violates the contractual overtime provisions of a regular employee at that workplace;
>
> (c) in a manner that violates an existing collective bargaining agreement or a statutory provision that applies to that workplace;
>
> (d) in a manner that supplants or duplicates a position in an existing, approved apprenticeship program;
>
> (e) by or through an employment agency or temporary help service firm as a community work experience or alternative work experience worker;
>
> (f) if there is a contractual or statutory recall right to that position at that workplace; or
>
> (g) if there is an ongoing strike or lockout at that workplace.

These restrictions apply in public, non-profit, and private workplaces. *N.J.A.C.* 12:35-6.1.