General Counsel's Annual Report – 2005
Public Employment Relations Commission

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Appeals from Commission Decisions

Unfair Practice Cases

In *Lakehurst Bd. of Ed. and Lakehurst Ed. Ass'n*, P.E.R.C. No. 2004-74, 30 *NJPER* 186 (¶69 2004), aff'd 31 *NJPER* 290 (¶113 App. Div. 2005), the Commission found several unfair practices, but also dismissed several allegations. The Association appealed the dismissal of allegations that the superintendent had called a teacher "passive-aggressive" and that the principal had rated two teachers "needs improvement" after they prevailed in a grievance contesting related reprimands. The Court affirmed, concluding that the facts found by PERC were well-supported and its application of the law to the facts was reasonable.

In *Irvington Bd. of Ed. and Irvington Ed. Ass'n*, P.E.R.C. No. 2003-83, 29 *NJPER* 218 (¶65 2003), aff'd 31 *NJPER* 15 (¶8 App. Div. 2005), the Commission held that the Board discriminatorily refused to appoint an employee to a stipended position on a curriculum committee in retaliation for her Association leadership. The Court accepted the Commission's findings and inferences and deferred to its evaluation of the evidence.

In *Warren Hills Reg. Bd. of Ed. v. Warren Hills Reg. H.S. Ed. Ass'n*, P.E.R.C. No. 2005-26, aff'd 30 *NJPER* 439 (¶145 App. Div. 2005), pet. for certif. pending, the Commission held that the Board violated *N.J.S.A*. 34:13-5.4a(1) and (3) when it terminated its school bus drivers and subcontracted their work to a private company in retaliation for their electing the Association as their majority representative. The Commission and the Court accepted the Hearing Examiner's credibility determinations and his findings concerning the motivations of the superintendent who recommended subcontracting. In determining that the Board

had not proved that it would have subcontracted the bus service absent the superintendent's hostility to the drivers' seeking union representation, the Hearing Examiner properly relied on these factors: the decision to subcontract was made immediately after the employees voted for representation; the district had never considered subcontracting before, despite periods of economic hardship; and the superintendent had made comments exhibiting his hostility to the drivers' becoming unionized.

Scope of Negotiations Cases

In *Rutgers, The State Univ. and Rutgers Council of AAUP Chapters*, P.E.R.C. No. 2004-64, 30 *NJPER* 109 (¶44 2004), aff'd in part and rev'd in part, 381 *N.J. Super*. 63 (App. Div. 2005), the Commission held that several aspects of Rutgers' patent policy were mandatorily negotiable and several other aspects were not mandatorily negotiable. Rutgers appealed the aspects of the policy that were held to be negotiable. The AAUP did not cross appeal.

The Court agreed with the Commission that it was appropriate to analyze individual aspects of the policy separately rather than to hold that the entire policy was either negotiable or non-negotiable. The Court rejected Rutgers' argument that *City of Jersey City v. Jersey City POBA*, 154 *N.J.* 555 (1998), required the latter approach. The Court also held that Rutgers must negotiate over the terms of assignments of patents from faculty to the University; those terms may significantly impact compensation for work performed.

However, the Court reversed the Commission's rulings on two other issues. This partial reversal was the first time a Commission decision has been reversed, either in whole or in part, in over two years.

The first ruling was on the unilaterally-imposed provision stating that laboratory notebooks and research materials are the University's property. The Commission held that this provision was mandatorily negotiable to the extent it applied to notebooks and research materials *unrelated* to patent applications but not to the extent that Rutgers needed these documents to apply for and protect its patent rights. The Court's opinion missed that distinction; it characterized Rutgers' interest as "maintaining the integrity of the books for purposes of pursuing patent applications," the very interest protected by

the Commission's ruling. The Court accepted a stipulation from Rutgers' counsel at oral argument that employees could keep copies of the information in their notebooks and concluded that the University's assertion of ownership would not impede the employees' ability to publish research results, an interest cited by the Commission in determining that this issue was negotiable.

The Commission also held that the provision requiring "prompt" disclosure to the University of an invention or discovery was negotiable. The Commission concluded that negotiations over what constitutes a "prompt" disclosure would not significantly interfere with the patent program, but the Court reasoned that "the subject does not permit a more precise formulation." The Court found essentially that negotiations on this issue would be pointless, not that negotiations would significantly interfere with any prerogative.

In *City of Newark and Newark Firefighters Union*, P.E.R.C. No. 2005-2, 30 *NJPER* 294 (¶102 2004), aff'd 31 *NJPER* 287 (¶112 App. Div. 2005), the Commission restrained arbitration of grievances contesting the involuntary transfers of several firefighters between fire companies and denials of transfer requests. The City asserted several reasons for these decisions, including a desire to achieve racial balance in the fire companies. The grievances asserted that the City was required to transfer employees by seniority, but the Commission and the Court held that the City had a non-arbitrable prerogative to decide whom to transfer between companies and that the NFU's claim of racial discrimination did not make the transfer decisions arbitrable. *See Teaneck Tp. Bd. of Ed. v. Teaneck Teachers Ass'n*, 94 *N.J.* 9 (1983). The Court also held that the Commission properly declined to consider the merits of the NFU's racial discrimination claim or to take evidence on the merits of the reasons given by the City for its decisions.

In *Waldwick Bd. of Ed. and Waldwick Ed. Ass'n*, P.E.R.C. No. 2004-61, 30 *NJPER* 104 (¶41 2004), aff'd 31 *NJPER* 46 (¶22 App. Div. 2005), the Commission held that negotiations over extended sick leave for school board employees is preempted by *N.J.S.A.* 18A:30-6, a statute requiring that extended sick leave be granted "for such length of time as may be determined by the board of education in each individual case." The Court declined to overrule *Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance &*

Custodial Ass'n, 152 *N.J. Super*. 235 (App. Div. 1977), which held that this statute requires case-by-case determinations and prohibits a negotiated rule.

In *Dover Tp. v. Teamsters Local 97*, App. Div. Dkt. No. A-6267-03T3 (10/31/05), an Appellate Division panel (Judges Skillman and Payne) transferred a grievance arbitration case centering on a negotiability question to the Commission. An arbitrator held that the employer violated the collective negotiations agreement when it had a tree removal service perform work previously done by negotiations unit employees on an overtime basis. The employer did not file a scope petition, but at arbitration contended that it had a managerial prerogative to subcontract. The arbitrator rejected that defense, concluding that the Union did not oppose the subcontractor performing any tree cutting, but instead claimed a right to be afforded overtime work when the outside contractor was used as a supplement for tree removal. The trial court vacated the award on the ground that the employer had a managerial prerogative to subcontract the tree removal work. The Union appealed and the Appellate Division concluded that the negotiability issue was within the Commission's primary jurisdiction and should not have been answered by the arbitrator or the trial court.

Amendments to Employer-Employee Relations Act

An amendment to section 5.3 of the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, authorizes an employee organization to obtain Commission certification as the majority representative based on a card check rather than an election. Certification is authorized if no other organization is seeking to represent the employees and if a majority of employees in the unit have signed cards authorizing such representation.

Another amendment limits the number of negotiations units of civilian State employees to the ten units already in place. *N.J.S.A.* 34:13A-5.10. Employees in new or existing titles may be added to these units through unit clarification procedures.

Commission Regulations

The Commission readopted with minor amendments its regulations governing representation, unfair practice, and contested transfer cases. It also amended *N.J.A.C.*

19:16-5.1 to increase the fees to be paid to interest arbitrators and adopted rules to implement the card-check amendment to *N.J.S.A.* 34:13A-5.3.

Interest Arbitration

Superior Court Judge Curran of the Hudson County Superior Court dismissed with prejudice the Complaint in *Raefski v. Town of Harrison*, Dkt. No. HUD-L-6557-04. Seeking to vacate an interest arbitration award, an employee sued his employer, his majority representative, and the arbitrator. The Court granted the defendants' motions to dismiss. These motions asserted that the Court had no jurisdiction over appeals of interest arbitration awards; the employee had no standing to bring such an action; the motion was untimely since it was not filed within 14 days of receiving the award; and the arbitrator had immunity.

Agency Immunity

Judge Pisano of the United States District Court dismissed a Complaint filed by a former court reporter employed by the Administrative Office of the Courts against 44 named defendants, including several unions and union attorneys, several judges, the Attorney General, and the Commission. *Yuhasz v. Leder*, Civ. Action No. 04-1508 (JAP), appeal pending. The 332-paragraph Complaint contested a 1995 job transfer and subsequent discharge and was the eighth lawsuit Yuhasz had filed contesting these events. The Court dismissed the Complaint on several grounds, including res judicata, the entire controversy doctrine, timeliness, and failure to state a claim. The Court specifically held that the Eleventh Amendment to the United States Constitution barred a federal court action against the Commission absent the State's consent and that in any event, her claims lacked a factual basis and were untimely. The Court also required Yuhasz to show cause why she should not be barred from filing future Complaints based on the same matters without obtaining leave of court.

Court Cases Involving Grievance Arbitration

1. Decisions Confirming Awards

In *ATU Local 1317 v. De Camp Bus Lines, Inc*., 2005 *N.J. Super*. *LEXIS* 385 (Law Div. 2005), Judge Goldman confirmed two back pay awards, one to a bus driver who had been unjustly suspended and the other to a bus

driver who had been improperly denied the opportunity to drive a run. The opinion subjects the back pay awards to deductions for FUTA, FICA and other employment taxes and withholdings and grants interest from the date of the awards at the post-judgment rate set by R.4:42-11(a)(ii).

In *New Jersey Transit Corp. v. PBA Local 304*, App. Div. Dkt. No. A-6516-03T3 (4/25/05), the arbitrator held that NJT violated the contract when it required a police officer on light duty to pass a physical agility examination before returning to full duty. The contract called for NJT to submit the issue of physical fitness to a panel consisting of a doctor appointed by management, a doctor appointed by the union, and a neutral doctor, but it did not do so. NJT did not file a pre-arbitration scope petition and instead asked the arbitrator to find that it had a prerogative to order a physical agility test under *Bridgewater Tp. v. PBA Local 174*, 196 *N.J. Super*. 258 (App. Div. 1984). The arbitrator declined to consider that contention because it had not been brought up at the arbitration hearing and the PBA did not have a chance to respond to that argument. The trial court held that the arbitrator should have considered *Bridgewater*, but the Appellate Division disagreed. It reasoned that the arbitrator's decision was not based on negotiability and that the award should not have been vacated based on the arbitrator's procedural decision.

In *Bergen Cty. PBA Local 134 v. Bergen Cty. Sheriff's Office*, App. Div. A-5882-03T3 (6/14/05), the arbitrator rejected a grievance asserting that correction officers who had transferred to positions as sheriff's officers were entitled to have their correction officer time counted in determining seniority rankings for selecting vacations. The Court held that the arbitrator properly relied on a letter from the Commissioner of Personnel in determining rights under the contractual seniority provisions. That letter stated that if a permanent sheriff's officer was transferred to a correction officer position, seniority would be retroactively calculated, but that if a permanent correction officer was transferred to a sheriff's officer position, the transfer would be provisional pending completion of additional required training with permanent appointment only on approval of the lateral title change. The contract had linked vacation selection by seniority to "permanent appointment to a title" and the letter gave

meaning to that "term of art drawn from DOP parlance."

In *Brentwood Medical Associates v. United Mine Workers of America*, 396 *F.*3d 237 (3d Cir. 2005), the Third Circuit Court of Appeals upheld an award sustaining a bumping grievance even though the arbitrator's decision inexplicably cited seniority/bumping language not in the contract. The Court concluded that the arbitrator's reasoning on other grounds could still support the award. A dissenting opinion would have vacated the award because the error violated a clause prohibiting an arbitrator from adding to or modifying the agreement.

2. Decisions Vacating Awards

In *New Jersey Transit Bus Operations, Inc. v. ATU*, App. Div. Dkt. No. A-0086-04T2 (9/30/05), certif. granted, the Court vacated two awards concerning compensation due part-time bus operators. In one grievance, ATU successfully argued that a bus operator could not be disciplined for failing to report five minutes before his scheduled pull-out time because NJT did not pay for that five minute period. In the other grievance, ATU successfully argued that part-time bus operators should be compensated for time spent filling out accident reports. The Appellate Division vacated the awards because the provisions concerning payment for reporting to work and filling out reports applied only to full-time employees and a provision covering part-time employees stated that they would only receive the pay and benefits specified by that provision and that provision did not specify the disputed payments. The Court held that the contract was clear so the awards did not draw their essence from the contract. It rejected the arbitrator's reliance on a clause stating that "Part-time operators shall receive the same hourly rate as full-time operators." It reasoned that parity in hourly rates does not equate to parity in pay.

In *Borough of Alpha Bd. of Ed. v. Alpha Ed. Ass'n*, App. Div. Dkt. No. A-0155-04T5 (7/21/05), certif. granted, an award required a school board to pay health insurance benefits to part-time professional employees who work at least 20 hours per week. The Court found that the union had elected to raise the issue in collective bargaining rather than a timely grievance. It rejected the arbitrator's finding of a continuing violation, stating that this doctrine

was not intended to rescue a defendant "from the consequence of its deliberate ill-fated strategy."

In *City of Paterson v. Paterson Police PBA Local 1*, App. Div. Dkt. No. A-5759-03T5 (3/16/05), the arbitrator found that the City violated the past practice clause and its duty to discuss major changes when it stopped paying police officers holding certain positions as if they were detectives and when it stopped paying night shift premiums to officers who did not engage in night shift work. The Courts concluded, however, that the provisions relating to detectives and night differential pay clearly prohibited payments to officers who were not detectives or did not work on the night shift.

In *Five Star Parking v. Local 723*, 178 *LRRM* 2800 (D. N.J. 2005), the federal district court vacated an award in which an arbitrator found that the employer and the union had not reached impasse during wage-reopener bargaining and then ordered the employer to rescind a wage reduction. The Court found that the arbitrator's award rested solely on federal labor law and that the impasse questions should have been addressed to the NLRB.

3. Decisions Concerning Contractual Arbitrability

In two cases, the same Appellate Division panel held that grievances contesting mid-year terminations of school board employees were not contractually arbitrable.

The first case is *Pascack Valley Reg. H.S. Bd. of Ed. v. Pascack Valley Reg. Support Staff Ass'n*, App. Div. Dkt. No. A-2599-04T5 (10/25/05). The arbitrator held that the board lacked just cause to discharge a custodian for bigoted remarks to another custodian. The arbitrator modified the discharge to an unpaid suspension of 60 days. The Court vacated the award on the grounds that the custodian's individual employment contract permitted the Board to terminate him on 15 days' notice and that the just cause provision of the collective negotiations agreement did not apply at all since the employee had been terminated on notice rather than discharged. The Court reasoned that just cause clauses do not ordinarily apply to any mid-year discharges where a board gives the notice required by an individual employment contract. Instead, citing Commissioner of Education cases allowing terminations on notice, the Court put the burden on unions to negotiate for provisions expressly requiring a

board to establish just cause to terminate individual employment contracts. The Court found no conflict between the individual contract and the collective negotiations agreement which provided that "[a]ny dismissal or suspension shall be considered a disciplinary action . . . subject to the Grievance Procedure." Finally, the Court held that *N.J.S.A.* 34:13A-29(a) – making disciplinary disputes subject to binding arbitration – did not apply since the termination of an employment agreement on notice is not a form of discipline but rather the exercise of a "clearly enunciated contractual right" under the individual employment agreement.

The second case is *Northvale Bd. of Ed. v. Northvale Ed. Ass'n*, App. Div. Dkt. No. A-2778-04T2 (10/25/05). The Court enjoined arbitration of a grievance challenging a teacher's mid-year termination. The Court held that the individual employment contract entitled the board to terminate the teacher on 60 days' notice and made inapplicable the contractual provision subjecting allegedly unjust discharges to the grievance procedure. The Court's reasoning tracked its reasoning in *Pascack*.

In *Freehold Reg. H.S. Dist. Bd. of Ed. v. Freehold Reg. H.S. Dist. Ed. Ass'n*, App. Div. Dkt. No. A-3719-03T2 (7/15/05), the Court restrained arbitration over a grievance contesting the non-renewal of a baseball coach's annual employment contract. The coach was not renewed "due to his inappropriate handling of school funds." Applying *Camden Bd. of Ed. v. Alexander*, 181 *N.J.* 187 (2004), the Court found no clear contractual language calling for arbitration of non-renewal decisions.

In *Piscataway Tp. Bd. of Ed. v. Piscataway Tp. Ed. Ass'n*, App. Div. Dkt. No. A-2435-03T2 (1/24/05), the Court held that a dispute over a teacher's effective date of termination was not contractually arbitrable. The arbitration clause was limited to disputes arising under the collective negotiations agreement and the grievance relied solely on termination provisions in an individual employment contract.

4. Other Arbitration-Related Decisions

In *Elizabethtown Water Co. v. Vollers Excavating & Construction, Inc.*, 376 *N.J. Super.* 571 (App. Div. 2005), the Court stayed a lawsuit involving a large construction

project and many defendants until an arbitration involving some claims and some parties was completed. Fragmentation of litigation is unavoidable when some matters are subject to arbitration and others are not so the entire controversy doctrine did not require consolidation of all claims. The overlap between parties, issues, and facts was likely to be substantial so the court stayed the court action.

In *Wilde v. O'Leary*, 374 *N.J. Super*. 582 (App. Div. 2005), certif. den. 183 *N.J.* 585 (2005), the Court vacated an award issued pursuant to the NASD Code of Arbitration Procedure. The Court held that the arbitration panel committed misconduct under *N.J.S.A*. 2A:24-8 when it refused to grant plaintiff an extension of time to retain a new expert after defendants strategically waited until plaintiff's expert was presented at hearing before moving to preclude his testimony. Given that plaintiff was required to arbitrate her claim before an industry-controlled panel, the arbitrators had to provide a fair forum and respect due process.

Other Court Cases

Mediation Privilege

State v. Williams, 184 *N.J.* 432 (2005), held that a mediator appointed by a court pursuant to *Rule* 1:40 could not testify in a criminal proceeding regarding a participant's statements during mediation. The defendant who wished to call the mediator had not shown a need for that testimony sufficient to overcome the privilege of mediation confidentiality or that the evidence was not available from other sources. The Supreme Court stated:

> Successful mediation, with its emphasis on conciliation, depends on confidentiality perhaps more than any other form of ADR. *See Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc*., 25 *P*.3d 1117, 1126 (Cal. 2001) ("[C]onfidentiality is essential to effective mediation . . . ."). Confidentiality allows "the parties participating [to] feel that they may be open and honest among themselves . . . .
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> Without such assurances, disputants may be unwilling to reveal relevant information and may be hesitant to disclose potential accommodations that might appear to compromise the

positions they have taken." *Final Report of the Supreme Court Task Force on Dispute Resolution* 23 (1990); *see also* Prigoff, *supra*, 12 *Seton Hall Legis. J.* at 2 ("Compromise negotiations often require the admission of facts which disputants would never otherwise concede."). Indeed, mediation stands in stark contrast to formal adjudication, and even arbitration, in which the avowed goal is to uncover and present evidence of claims and defenses in an adversarial setting. Mediation sessions, on the other hand, "are not conducted under oath, do not follow traditional rules of evidence, and are not limited to developing the facts." *Rinaker v. Superior Court, 74 Cal. Rptr.* 2d 464, 467 (Ct. App. 1998). Mediation communications, which "would not [even] exist but for the settlement attempt," are made by parties "without the expectation that they will later be bound by them." Prigoff, *supra*, 12 *Seton Hall Legis. J.* at 2, 13. Ultimately, allowing participants to treat mediation as a fact-finding expedition would sabotage its effectiveness. *See id.* at 2 (warning that routine breaches of confidentiality would reduce mediation to "discovery device").

If mediation confidentiality is important, the appearance of mediator impartiality is imperative. A mediator, although neutral, often takes an active role in promoting candid dialogue "by identifying issues [and] encouraging parties to accommodate each others' interests." Id. at 2. To perform that function, a mediator must be able "to instill the trust and confidence of the participants in the mediation process. That confidence is insured if the participants trust that information conveyed to the mediator will remain in confidence. Neutrality is the essence of the mediation process." *Isaacson v. Isaacson*, 348 *N.J. Super.* 560, 575 (App. Div. 2002) (interpreting *Rule* 1:40). Thus, courts should be especially wary of mediator testimony because "no matter how carefully presented, [*it*] *will inevitably be characterized so as to favor one side or the other*." Prigoff, supra, 12 *Seton Hall Legis. J.* at 2 (emphasis added); *see also In re Anonymous*, 283 *F.*3d 627, 640 (4th Cir. 2002) ("If [mediators] were permitted or required to testify about their activities, . . . not even the strictest adherence to purely factual matters would prevent the evidence from favoring or

seeming to favor one side or the other." (alteration in original) (quoting *NLRB v. Macaluso, Inc*., 618 *F*.2d 51 (9th Cir. 1980)); Ellen Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability*?, 85 *Marq. L. Rev*. 79, 82 (2001) ("[I]f a mediator can be converted into the opposing party's weapon in court, then her neutrality is only temporary and illusory.").

Duty of Fair Representation

In *Wilkins v. ABF Freight System*, 178 *LRRM* 2016 (E.D. Pa. 2005), Chief Judge Giles of the United States District Court for Eastern Pennsylvania held that a union need not notify an employee that it will not pursue his or her grievance. The six-month statute of limitations for bringing a duty of fair representation claim against a union begins when an employee should know the union will not pursue the grievance.

Bi-State Agencies

In *In re Alleged Improper Practice Under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction; IP 97-28 v. Port Authority Employment Relations Panel*, Dkt. No. ESX-L-1897-01 (1/21/05), app. pending, App. Div. Dkt. No. A-3134-04T2, Superior Court Judge Furnari affirmed a decision of the Port Authority Employment Relations Panel. The Panel held that the Port Authority violated its Labor Relations Instruction when it unilaterally transferred negotiations unit work from police officers employed by the Authority to security guards employed by a subcontractor. The work consisted of performing traffic control functions outside the International Arrivals Building at JFK and certain security functions both within and outside that building. The Court deferred to the Panel's expertise in applying the Instruction to the facts and legal arguments.

Prejudgment Interest

Under *Potente v. Hudson Cty*., 378 *N.J. Super*. 40 (App. Div. 2005), certif. den. 185 *N.J.* 297 (2005), a successful plaintiff in an LAD action is entitled to collect

prejudgment interest. That is so whether the respondent is a private sector or public sector employer.

Hiring

In re Hruska, 375 *N.J. Super. 202* (App. Div. 2005), held that the Borough of Carteret improperly excluded a candidate from consideration for a paid firefighter position based on an unannounced threshold qualification of being an active volunteer firefighter. The candidate was one of the top three candidates for the civil service position, but was twice passed over for hiring based on the unannounced qualification. While the Borough could legally use active volunteer service in differentiating between candidates on merit and fitness grounds, it violated Civil Service law to exclude a candidate from comparison with other candidates based on a secret eligibility requirement.

Nepotism

In *Wowkun v. Closter Bd. of Ed*., __ *N.J. Super*. ___ (Chan. Div. 2005), Judge Doyne upheld the application of a nepotism policy to terminate a non-tenured science teacher who married a tenured physical education teacher. The policy applied only to non-tenured employees. Judge Doyne rejected claims that the policy violated the New Jersey LAD, Title VII, and the Equal Protection clause of the United States Constitution.

Military Service Credit

In re Military Service Credit, 378 *N.J. Super. 277* (App. Div. 2005), holds that teachers employed in State departments or agencies are not entitled to receive military service credits under *N.J.S.A*. 18A:29-11. This law applies only to "teaching staff members" as defined by *N.J.S.A*. 18A:1-1 - - i.e., teachers employed by local districts, regional boards, or county vocational schools.

Age Discrimination

In *Smith v. City of Jackson*, 544 *U.S.* 228 (2005), the United States Supreme Court concluded that personnel actions may violate the federal Age Discrimination in Employment Act if they have a disparate impact on employees over 40 years old even if they were not motivated by a discriminatory intent. However, the Court dismissed a Complaint alleging that the City of Jackson violated the ADEA when it adopted a pay plan

that gave greater percentage raises to officers with less seniority and lower rank positions. While this pay plan did have a disparate impact, it was permissibly based on a "reasonable factor other than age." That factor was the City's goal of raising the salaries of employees in lower echelons to match those in surrounding communities so as to be better able to recruit and retain new employees.

Health Benefits

In *Cranford Tp. v. State Health Benefits Commission*, App. Div. Dkt. No. A-5593-03T1 (5/20/05), the Court affirmed a determination of the State Health Benefits Commission requiring the employer to pay the full cost of health care coverage for employees who retired before 1993. An Administrative Law Judge had ruled that *N.J.S.A*. 52:14-17.38, as amended in 1999, allowed the employer to determine contributions for retirees' premiums through collective negotiations agreements. However, the Court held that before 1999, an employer participating in the SHBP was statutorily required to pay for all premiums and that the Legislature did not intend to authorize taking away that benefit from employees who had already retired. That this employer left the SHBP between 1997 and 2000 and that its retirees paid for part of their premiums for that period by virtue of a collective negotiations agreement did not warrant allowing the employer to continue charging these retirees after it rejoined the SHBP.

Pregnancy Law

In *Gerety v. Atlantic City Hilton Casino*, 184 *N.J*. 391 (2005), the New Jersey Supreme Court held, by a 4-3 vote, that the employer casino did not violate the New Jersey Law Against Discrimination when it terminated an employee whose difficult pregnancy caused her to exceed the maximum of 26 weeks leave in a year. The employer had a "no exceptions" standard requiring termination of any employee who exceeded 26 weeks of leave. Such employees were eligible for re-hire, but without seniority. The majority held that the employer's policy did not violate the LAD because it was applied strictly and non-discriminatorily. The minority would have held that an employer must reasonably accommodate its female employees by extending leave for pregnancy when necessary for health reasons, unless the

employer can demonstrate that business necessity prevents that accommodation.

Disciplinary Proceedings

In *DeBenedictis v. State of New Jersey (Div. of State Police)*, 381 *N.J. Super.* 233 (App. Div. 2005), the Court declined to dismiss disciplinary charges that resulted in a one-day suspension of a State trooper. The Court held that the charges were timely filed under the provision in *N.J.S.A*. 53:1-33 allowing charges of unreasonable use of force to be filed within 120 days given a consent decree in a racial profiling case. It also held that the trooper waived his right under *N.J.S.A*. 53:1-33 to a hearing within 30 days by pursuing a contractual grievance. The Court did not consider these questions:

> 1. Whether troopers can ask for a minor disciplinary hearing and then pursue a grievance if the hearing does not result in exoneration; and
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> 2. Whether minor disciplinary hearings are "contested cases" under the Administrative Procedure Act and must be referred to OAL.

In *Aristizibal v. City of Atlantic City*, 380 *N.J. Super.* 405 (Law Div. 2005), Judge Armstrong enjoined the City from proceeding with disciplinary hearings against police officers accused of participating in a "sick-out" in support of negotiations demands. The Court held that the City violated the requirement in *N.J.S.A*. 40A-14-147 that any complaint charging a police officer with violating an internal rule or regulation be filed no later than the 45th day after the date on which the complainant obtained sufficient information to bring charges. The Court concluded that there were valid reasons as of August 23, 2004 for considering charges against officers who had failed to report to work on the two previous days; an immediate investigation should have been conducted; the City Administrator did not have statutory authority to initiate immediate disciplinary actions since *N.J.S.A*. 40A:14-118 vests disciplinary authority in the chief of police; and the pendency of Chancery Division proceedings seeking an injunction against the sick-out and possible sanctions did not justify a delay until November in starting that investigation. The Court also laid out these six principles for applying the 45-day rule under *N.J.S.A*. 40A:14-147:

> 1. The 45-day period runs from the date upon which the person responsible for the

filing of the disciplinary complaint receives sufficient information upon which to base a complaint.

2. The statute contemplates that an investigation may be necessary before a decision can be made as to whether a basis exists to initiate disciplinary charges. However, extensive bureaucratic delay in conducting investigations and bringing disciplinary charges is unacceptable.

3. The 45-day rule applies to the filing of a disciplinary complaint, rather than the date of the service of the complaint upon the police officer.

4. The intent of the statute is to protect law enforcement officers from an appointing authority unduly and prejudicially delaying the imposition of disciplinary action.

5. The 45-day time limit does not apply if an investigation of a police officer for violation of the internal rules or regulations is included directly or indirectly with a concurrent investigation of the officer for a violation of the criminal laws. In such event, the 45-day time limit will commence on the day after the disposition of the criminal investigation.

6. The requirement that the disciplinary hearing take place within 10 to 30 days from the service of the Complaint underscores the statutory intent that disciplinary matters be resolved expeditiously.

In *Hennessey v. Winslow Tp.*, 183 *N.J.* 593 (2005), the Supreme Court held that the failure to appeal a Final Notice of Disciplinary Action to the Merit System Board did not collaterally estop a clerk typist from filing a Superior Court action alleging that her termination violated the Law Against Discrimination. The employer issued a Preliminary Notice of Disciplinary Action asserting that the employee should be terminated for not returning to work at the end of an authorized leave of absence. At a departmental hearing, the hearing officer concluded that the employee could only perform light duty work and there was no light duty position available so the employer could terminate her. Rather than appeal to the MSB, the employee filed a disability discrimination claim with the EEOC. The EEOC determined that the employer had violated the Americans

with Disabilities Act by failing to offer the employee a reasonable accommodation. The employee then filed her lawsuit in the Superior Court. The Supreme Court held that the employee had a right to file a LAD claim in Superior Court instead of an appeal to the Merit System Board.

Payment for Unused Sick Leave

In *Ciaglia v. Hudson Cty.*, App. Div. Dkt. No. A-6757-03T5 (5/27/05), the Court allowed the County to cap the payments due non-union employees for unused sick leave upon their retirement or death, even though employees had already accumulated unused days beyond the cap. It thus granted summary judgment to the County in a suit brought by the estate of the Hudson County Tax Administrator. The County's handbook did not confer a contractual right upon employees to receive payment for unused days.

Layoffs

In *Montague School Personnel Ass'n v. Montague Tp. Bd. of Ed.*, App. Div. Dkt. No. A-3055-04T5 (12/8/05), the Court concluded that a receptionist had been properly terminated as a result of a reduction in force and had no bumping rights to another position under the parties' contract. The appellate court sustained the trial judge's finding that the receptionist was not a secretary.

Workplace Privacy

In *Doe v. XYC Corp.*, 382 *N.J. Super.* 122 (App. Div. 2005), the Court held that an employer "who is on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee's actions and to take prompt and effective action to stop the unauthorized activity, lest it result in harm to innocent third parties." The Court also concluded "that the employee had no legitimate expectation of privacy that would prevent his employer from accessing his computer to determine if he was using it to view pornography." The Court reversed a summary judgment in favor of an employer who had been sued by an employee's spouse on behalf of her minor daughter. The employee had allegedly photographed his stepdaughter in indecent positions and then transmitted the photos over the internet from his workplace computer.

Access to Employee Mailboxes

A federal district court dismissed a lawsuit filed by a science teacher against the Tenafly Board of Education in which the teacher alleged that the high school principal violated the First Amendment by removing a memo he wrote from the teachers' school mailboxes. The memo questioned details of a pending contract settlement, including whether teachers were being given enough time to review it before a ratification vote. The lawsuit also contested the Board's policy requiring prior approval before items were placed in mailboxes and its policies concerning use of e-mail and billboards. In *Policastro and Kontogiannis*, 2005 *U.S. App. LEXIS* 12103 (3d Cir. 2005), the Third Circuit Court of Appeals permitted these claims to be heard, but the district court on remand found that the claims of unconstitutional restrictions had not been proven and that the Board had shown that the principal's actions appropriately avoided disruption of school operations.

CEPA Claims

In *Klein v. UMDNJ*, 377 *N.J. Super*. 28 (App. Div. 2005), the Court upheld a summary judgment against a doctor who filed a CEPA claim. The Court found that the plaintiff had suffered no adverse employment action. While plaintiff was temporarily reassigned from clinical to administrative duties and then was indefinitely assigned to administer anesthesia under another faculty member's supervision, he did not suffer a termination, suspension or demotion and he voluntarily withdrew from all clinical duties when the employer would not remove the supervision requirement or issue an apology or retraction. In addition, the doctor did not identify a rule, regulation, law or public policy that he had complained about; instead he had a private dispute about issues such as the layout of the Radiology Department, the difficulty of operating the equipment in a confined space, and the balancing of adequate staffing and equipment with budgetary constraints.

In *Nardello v. Voorhees Tp.*, App. Div. Dkt. No. A-1811-03T2 (4/4/05), the Court reversed a summary judgment granted for the employer. The panel concluded that the plaintiff had alleged sufficient facts to prove, if true, that an adverse employment action had occurred even though he had not been discharged, suspended, or demoted. The

plaintiff alleged a series of incidents after he informed superiors of cover-ups and misconduct: he was allegedly denied permission to obtain firearms instruction training; coerced to resign as leader and a member of the SWAT team; not allowed to work in crime prevention programs; removed from the detective bureau; and given demeaning jobs for his rank. Together, these alleged incidents could constitute an actionable pattern of retaliatory conduct.

In *Beasley v. Passaic Cty.*, 377 *N.J. Super*. 585 (App. Div. 2005), the Court reversed a judgment against the County in a CEPA action filed by a supervisory officer at the Passaic County Juvenile Detention Center. The trial judge erroneously admitted the double hearsay testimony of the Center's director that "downtown" wanted him fired. Because the "downtown" statement was not attributed to any individual, the County could not cross-examine the source of such information. The decision also discussed what constitutes an "adverse employment action taken against an employee in the terms and conditions of employment" under N.J.S.A. 34:19-2(e). Injury to an employee's pride is not actionable. However, many separate but relatively minor instances of behavior directed against an employee may be actionable as a pattern of retaliatory conduct even if each one is not individually actionable.

In *Zubrycky v. ASA Apple, Inc.*, 381 *N.J. Super.* 162 (App. Div. 2005), the Court dismissed a CEPA lawsuit based on a claim of constructive discharge. The Court held that an employee must take all reasonable steps to remain employed; the employer's conduct was not so intolerable that a reasonable person would be forced to resign.

In *Yurick v. State*, 184 *N.J*. 70 (2005), the Supreme Court dismissed a CEPA action brought by a former county prosecutor against Governor McGreevey, the Attorney General, and the State. Pursuant to *N.J.S.A*. 52:17B-106, the Attorney General superseded the prosecutor after his five-year term of office expired. The Court concluded that the prosecutor did not have a reasonable expectation that he would be permitted to serve as a holdover and held that his supersession could not be considered a "retaliatory action." The Court also held that the plaintiff could not claim that the freeholders' alleged underfunding of his office constituted a retaliatory action under CEPA when he did not invoke his right under

N.J.S.A. 2A:158-7 to ask an assignment judge to order an increase in funding.

Williams v. Local 54, Hotel Employees and Restaurant Employees Union, App. Div. Dkt. No. A-5801-03T3 (8/17/05), held that a former business agent could bring a CEPA claim against Local 54. The agent was allegedly fired because she complained that Local 54's president misappropriated union funds for his own political and personal reasons. Distinguishing *Dzwonar v. McDevitt*, 348 *N.J. Super*. 164 (App. Div. 2002), aff'd on other grounds, 177 *N.J*. 451 (2003), the Court held that the Labor Management Reporting and Disclosure Act, 29 *U.S.C*. §§401-531, did not preempt a CEPA claim based on alleged criminal conduct rather than internal union policy.

In *Caver v. City of Trenton*, 420 *F*.3d 343 (3d Cir. 2005), the Third Circuit Court of Appeals affirmed a summary judgment against a police officer in a case alleging that he was retaliated against in violation of Title VII, CEPA, and the LAD. In analyzing the CEPA claim, the Court concluded that transferring the officer to light duty was an adverse employment action, but referring the officer for a psychiatric evaluation was not. In analyzing the Title VII claim, the Court held that an unreviewed state administrative determination -- in this case, an ALJ's ruling in plaintiff's favor on his Civil Service appeal of his termination - - should not be given preclusive effect in a Title VII action.

Constitutional Claims

In *Lomack v. City of Newark*, 2005 *U.S. Dist. LEXIS* 18892 (D.N.J. 2005), Chief Judge Bissell of the federal district court upheld the constitutionality of the City's plan to desegregate its fire companies by involuntarily transferring some firefighters after new firefighters had been assigned and all voluntary transfers granted. The City had a compelling interest in eliminating segregation and had narrowly tailored its remedial plan to that goal. The Court stressed that the City had a non-negotiable prerogative to transfer and reassign firefighters.

In *Visiting Homemaker Service of Hudson Cty. v. Hudson Cty. Freeholder Bd*., 380 *N.J. Super*. 596 (App. Div. 2005), the Court rejected arguments that the County's hiring wage ordinance violated the New Jersey and United States Constitutions. That ordinance applies to County contractors whose employees provide food, janitorial, security and home health care services and requires

those contractors to provide a wage matching or exceeding 150% of the federal minimum wage, as well as five vacation days a year plus medical benefits.

A trial court judge held that the ordinance was unconstitutional and preempted by New Jersey's minimum wage law. However, the Legislature amended *N.J.S.A*. 34:11-56a4 to permit this ordinance and the Appellate Division found no equal protection defect in the ordinance. The County had a rational purpose in adopting it: to ensure that workers are paid a wage that enables them to lift their families out of poverty and attain self-sufficiency, thereby reducing hardship in the County and reducing the need for taxpayers to fund social services providing supplemental support for local business employers.

Police Directors

In *Jordan v. Harvey*, 381 *N.J. Super*. 112 (App. Div. 2005), the Court held that the City of Asbury Park could not authorize its police director to perform law enforcement duties. The police director position was a civilian one and the State regulatory scheme concerning the qualifications and appointment of police officers and police chiefs precludes a municipality from conferring such powers on an employee in a manner other than that specifically authorized by statute. Permitting a civilian police director to engage in law enforcement activities could enable a municipality to circumvent training requirements and age restrictions and the statutory requirement that police chiefs be appointed by promotion from within the department.

Providing A Defense

In *Aperuta v. Pirrello*, 381 *N.J. Super*. 449 (App. Div. 2005), the Court required Morris Township to provide a defense to a police officer who was sued for defamation after he told a third party that the plaintiff may have AIDS. The third party had a relationship with the plaintiff and the police officer told him about what he believed to be the plaintiff's condition because he did not want him to risk getting AIDS. The Court held that the *N.J.S.A*. 40:14-155 applies because the legal proceeding "was directly related to the lawful exercise of police powers in the furtherance of his official duties." The police officer was sued because of an affirmative act taken to protect the third party; his conduct was not a "perversion" of his job or taken to

accomplish an "ulterior illegal goal." The Court also found that the officer's action was within the "scope of his employment." It reasoned that the scope of employment test accorded with *N.J.S.A*. 40A:14-155. A concurring opinion by Judge Weissbard would abandon the "perversion" and "ulterior or illegal goal" tests and adopt "the scope of employment" test.

Other Statutes

The unemployment compensation law was amended to provide benefits to employees who have been locked out during a labor dispute. Such benefits will be paid if the employees have not engaged in a strike immediately before being locked out and if their majority representative has directed them to continue working under their preexisting terms and conditions of employment. P.L. 2005, c. 103.