General Counsel's Annual Report – 2004
Public Employment Relations Commission

Robert E. Anderson
General Counsel

Don Horowitz
Deputy General Counsel

Statistics

The Commission received nine decisions from the Appellate Division. All were affirmances. Seven appeals were dismissed or withdrawn, one interim relief order was enforced, and one motion for leave to appeal an interim relief order was denied.

Appeals from Commission Decisions

Unfair Practice Cases

The Commission's decisions in two companion cases were affirmed in one Appellate Division opinion. *Morris Cty. and Morris Council No. 6, NJCSA, IFPTE,* P.E.R.C. No. 2003-22, 28 *NJPER* 421 (¶33154 2002), and *Morris Cty. and CWA Local 1040,* P.E.R.C. No. 2003-32, 28 *NJPER* 456 (¶33168 2002), aff'd 371 *N.J. Super. 246* (App. Div. 2004), certif. den. __ *N.J.* ___ (2005). The Court held that majority representatives were entitled to receive the home addresses of negotiations unit employees so they could communicate with them confidentially about negotiations and grievances. The record reflected no objections to disclosure by unit members, no reasonable basis to fear harassment or disclosure of the list to third parties, and no special confidentiality considerations outweighing the unions' fundamental need for the addresses to represent employees. The Supreme Court denied certification in both cases.

In *Middlesex Cty. Sheriff and Eckel*, 30 *NJPER* 239 (¶89 App. Div. 2004), certif. den. 182 *N.J.* 151 (2004), aff'g P.E.R.C. No. 2003-4, 28 *NJPER* 308 (¶33115 2002), the Sheriff and the County violated the Employer-Employee Relations Act by transferring a sheriff's officer from a courtroom to the probation department and suspending the officer for ten days in retaliation for his

discussing working conditions with co-employees and supporting the FOP. The officer improperly left his post, but the length of the suspension was motivated in part by hostility towards protected activity and thus had to be reduced and the transfer was also a punitive response to protected activity and thus had to be rescinded. The Supreme Court denied certification.

In *City of Trenton and Trenton Superior Officers Association*, 30 *NJPER* 199 (¶74 App. Div. 2004), aff'g P.E.R.C. No. 2002-70, 28 *NJPER* 243 (¶33092 2002), the Commission dismissed charges asserting, in part, that the City discriminated against a deputy police chief who was also a TSOA official when it refused to promote him to acting police chief. The Court affirmed for the reasons stated in Hearing Examiner Roth's report and the Commission's decision.

Judge Lehrer of the Monmouth County Superior Court enforced the interim relief order issued by Commission designee Roth in *Middletown Tp. and Middletown Tp. PBA Local 124*, I.R. No. 2004-12, 30 *NJPER* 84 (¶30 2004). The employer was required to restore the previous weekly paycheck dates.

The Appellate Division denied leave to appeal the interim relief order in *Gloucester Cty. and CWA Local 1085*, I.R. No. 2004-11, 30 *NJPER* 62 (¶19 2004). Commission designee Osborn restrained the County from unilaterally eliminating the option of a compressed four-day work week for certain staff.

Scope of Negotiations Cases

An Appellate Division panel affirmed a PERC scope of negotiations ruling and confirmed a grievance arbitration award in *City of Newark and Police Superior Officers Ass'n*, __ *NJPER* ___ (¶__ App. Div. 2004), pet. for certif. pending, aff'g P.E.R.C. No. 2003-68, 29 *NJPER* 121 (¶38 2003). The Commission declined to restrain arbitration over a claim that the City violated the parties' contract when it did not indemnify a police officer for a $30,000 compensatory damages award based on an assault violating an inmate's civil rights. The Court held that *N.J.S.A.* 40A:14-155 did not preempt a clause requiring indemnification for compensatory damages based on acts arising in the course of a police officer's employment and that any public policy challenge to the award had to be raised in Court and not before the

Commission. The Court also held that the award sustaining the grievance did not violate public policy.

In *Franklin Tp. Bd. of Ed. v. Franklin Tp. Ed. Ass'n*, 30 *NJPER* 201 (¶75 App. Div. 2004), certif. den. 181 *N.J.* 547 (2004), aff'g 29 *NJPER* 97 (¶27 2003), the Commission restrained arbitration of a grievance challenging a decision to combine two classes of third and fifth grade special education students, but declined to restrain arbitration of a claim that an emergency class coverage clause entitled the teacher of the combined class to extra compensation. Judges Conley and Carchman affirmed the Commission's decision substantially for the reasons in its opinion. Noting that compensation claims are generally severable from the exercise of managerial prerogatives, the Court held that the Commission was not required to undergo a detailed analysis in concluding that this compensation claim was legally arbitrable given the case law and the circumstances.

In *Piscataway Tp. and Piscataway Tp. PBA Local 93*, P.E.R.C. No. 2004-72, 30 *NJPER* 143 (¶57 2004), aff'd App. Div. Dkt. No. A-005020-03T2, the Commission held mandatorily negotiable two procedural proposals raised by the PBA in successor contract negotiations. One proposal concerned the order in which the Township would administer the various components of the promotional process - - e.g. oral interview before written exam. The other proposal sought to have the numerical scores of the written examination withheld until all other components of the promotional process were completed. Both proposals bore on the employees' interests in having a promotional process free of favoritism or potential improprieties and neither proposal interfered with the employer's ultimate right not to promote any officer who did not pass the written exam.

Representation Fee Deductions

Two decisions upheld the constitutionality of the 2002 amendments to the representation fee provisions of the Employer-Employee Relations Act. *Hunterdon Cty. and CWA Local 1034*, 369 *N.J. Super*. 572 (App. Div. 2004), certif. den. 182 *N.J.* 139 (2004), aff'g P.E.R.C. No. 2003-24, 28 *NJPER* 433 (¶33159 2002) and *Raritan Valley Community College and Raritan Valley Community College Staff Federation/AFT, Local No. 4143*, _ *NJPER* __ (¶__ App. Div.

2004), aff'g P.D.D. No. 2004-4, 29 *NJPER* 404 (¶133 2003). The amendments to *N.J.S.A.* 34:13A-5.5 and 5.6 require the Commission to order deductions of fees if the majority representative can demonstrate that a majority of negotiations unit employees are dues-paying members and that it has a demand-and-return system that non-members can invoke to contest the amount of the fees. These amendments serve a valid purpose of increasing labor relations stability and peace by decreasing the number of free riders.

Commission Regulations

The Commission has proposed regulations readopting its contested transfer regulations, *N.J.A.C.* 19:18-1, and increasing the fees to be paid interest arbitrators. *N.J.A.C.* 19:16-5.11.

The Commission readopted its regulations concerning definitions, service and construction, *N.J.A.C.* 19:10. It now permits faxes and e-mail attachments for certain filings. *N.J.A.C.* 19:10-2.2.

Other Court Cases

Grievance Procedure

In *Mulholland v. Town of Morristown Police Dept.*, App. Div. Dkt. No. A-5916-02T1 (2/9/04), a patrol officer claimed that his contractual right to overtime had been improperly suspended for 20 days. But the Court held that the officer could not begin a civil action until he had exhausted the grievance procedure in the collective negotiations agreement covering him.

Grievance Arbitration

1. Decisions Confirming Awards

In *City of Newark*, described supra at p. 2, the Court held that the arbitration award requiring indemnification did not violate public policy. In another case involving the same parties and decided on the same day, the Court confirmed another award. *City of Newark v. FOP Lodge, No. 12*, App. Div. Dkt. No. A-1129-03T3 (12/17/04). That award required the City to defray the costs of civil litigation against a police officer who injured two bystanders during a high-speed pursuit of a suspect. The Court held that the arbitrator carefully considered and properly rejected the City's claim that reimbursement of the costs would violate public policy. The officer was

guilty of questionable judgment rather than misconduct based on an ulterior illegal goal.

In *Vineland Bd. of Ed. v. Amalgamated Local*, App. Div. Dkt. No. A-4584-02T5 (3/29/04), the Court confirmed an award entitling bus drivers who worked during July and August 2001 to be paid at the contract rate effective September 2001. The arbitrator relied upon past practice and rejected a contention that the bus drivers were substitutes or temporary employees.

PBA Local 372 v. Lavallette Borough, App. Div. Dkt. No. A-1807-0T5 (7/9/04), certif. den. 182 *N.J.* 142 (2004), confirmed an award holding that the employer properly calculated entitlements to vacations, holidays, and sick leave based on an eight-hour work day, even though some officers worked ten-hour shifts rather than eight-hour shifts. All officers worked 40 hours a week and received the same benefits given the same formula; that formula had been used without objection for many years; and any change had to be negotiated.

2. Decisions Vacating Awards

In *Hudson Cty. v. Kruznis*, App. Div. Dkt. No. A-5895-02T5 (7/12/04), the Court vacated an award ordering the County to provide paid leave for the days two senior corrections officers spent attending a federal district court trial in a reverse discrimination case the officers had filed against the County. The arbitrator found that granting paid leave for court time was a recognized past practice, but the Court found no support in past practice or County regulations for granting leaves for private court appearances as opposed to job-related court appearances.

In *Paterson Police PBA Local 1 v. City of Paterson*, App. Div. Dkt. No. A-4353-03T3 (12/22/04), the Court vacated an award rescinding memoranda capping the amount of compensatory time off police officers and superior officers could accumulate in lieu of overtime payments. PBA and SOA contracts provided that "[t]he employee may request compensatory time in lieu of money" and the parties' pre-memoranda practice allowed employees to accumulate comp time up to the FLSA limit of 480 hours. The arbitrator held that a past practice clause entitled the employees to continue to accumulate comp time up to the FLSA limit and that the "request" language concerning compensatory time did not negate that right. The Court found the contract unambiguously empowered the City to deny any request for compensatory

time and thus held that the arbitrator's contractual interpretation was not reasonably debatable.

3. Contractual Arbitrability Cases

In *Camden Bd. of Ed. v. Alexander*, 181 *N.J.* 187 (2004), the Supreme Court restrained arbitration of grievances asserting that the Board violated a just cause clause when it did not renew the annual employment contracts of 15 non-tenured custodians. By a 4-3 vote, the Court held that the grievances were not contractually arbitrable absent clear language making non-renewal decisions subject to the just cause and arbitration provisions.

The majority and dissenting opinions agreed that the grievances were within the scope of negotiations – that is, the parties could have agreed that custodians would be protected against disciplinary non-renewals without just cause and could arbitrate their allegedly unjust non-renewals. But the opinions disagreed over whether contracts must specify non-renewals in the just cause and arbitration provisions to permit arbitration. The majority placed the burden on unions to gain specific language permitting arbitration; the dissent placed the burden on school boards to gain specific language excluding such disputes from arbitration.

The majority and dissenting opinions are far apart in the way they approach this problem and that difference in approach leads to the difference in results. Here's the backdrop to this contractual arbitrability dispute and a brief description of the different views.

Backdrop

The parties' grievance procedure covered "a complaint that there has been to him/her a personal loss, injury or inconvenience because of a violation, misinterpretation, or misapplication of the Agreement" and ended in binding arbitration. The arbitrator was limited to the issue submitted and could not consider anything else or add anything to the contract. The contract also contained clauses stating that "[n]o employee shall be disciplined or reprimanded without just cause" and recognizing the Board's authority, subject only to the language of the Agreement, to take disciplinary action against employees.

N.J.S.A. 18A:27-4.1 sets forth the procedure by which a school board determines whether to renew an employment contract.

The superintendent must make a recommendation as to whether or not to renew a contract. An employee whose contract is not to be renewed is given a written statement of reasons for non-renewal and a right to appear informally to try to convince the board to offer reemployment.

In *Camden,* 15 custodians accused of excessive absenteeism received letters warning them that disciplinary action might be taken against them, including non-renewals of their contracts. The superintendent thereafter recommended non-renewal and the Board approved those recommendations. The majority representative (CWA) asserted that the non-renewals violated the just cause clause. The Board sought a restraint of arbitration, asserting that it hadn't agreed to arbitrate disputes over non-renewals. The trial court declined to restrain arbitration and the Board appealed. In the meantime, one of the grievances was arbitrated and the arbitrator ruled that the non-renewal before him was disciplinary and lacked just cause. The Appellate Division panel held that the grievances were contractually arbitrable, but the Supreme Court reversed that decision. Justice Wallace heard oral argument, but did not participate in the decision. He was replaced by Judge Petrella from the Appellate Division.

The Majority Opinion

This opinion started with the premise that public sector arbitration is much different from private sector arbitration and warrants greater judicial review both before and after arbitration. Even though the school board statute does not preempt negotiations over the protections claimed by the employees, it nevertheless confers a "prerogative" on school boards that cannot be waived absent clear and unmistakable language entitling employees to just cause protection and arbitration of non-renewals. The majority rejected the private sector presumption of contractual arbitrability established by the *Steelworkers' Trilogy*.

The Dissenting Opinion

This opinion started with the premise that once a matter is found to be within the scope of negotiations, public sector arbitration is not different from private sector arbitration and the courts should take a hands-off approach before and after arbitration to encourage that process to work. The *Steelworkers' Trilogy* should apply with full force in allowing arbitration unless a presumption of arbitrability has been

overcome in a particular case and in sustaining awards based on the arbitrator's contractual interpretation. The dissenting opinion found this case to be an easy one because the grievance procedure made arbitrable any dispute over the meaning of any other contractual clause and the parties had a dispute over the meaning of the just cause clause. An arbitrator could consider the backdrop of education statutes in deciding what the parties intended the just cause clause to mean, but the interrelationship of that statute and the wording of the contract bore on the merits of the contractual dispute, not its arbitrability, and the contractual merits were for the arbitrator alone.

4. Other Arbitration-Related Decisions

Del Piano v. Merrill Lynch, 372 *N.J. Super*. 503 (App. Div. 2004), rejected a claim that an arbitrator's "evident partiality" required vacating an award issued under the Code of Arbitration Procedure adopted by the National Association of Securities Dealers. The Court held that the party claiming evident partiality had the burden of proving such partiality by a preponderance of the evidence rather than clear and convincing evidence. It found no evidence of actual but undisclosed dealings between the arbitrator (an industry representative) and Merrill Lynch nor any evidence that the arbitrator knew of any dealings between his employer (Deutsche Bank) and Merrill Lynch that would have created an appearance of bias. Assuming that the arbitrator had a duty of making a "reasonable inquiry" to discover any potential conflicts of interest, the Court found that such an inquiry would not have disclosed any interest or bias that was "direct, definite, and capable of reasonable demonstration, rather than remote or speculative." *Id*. at 516.

In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 *F*.3d 404 (3d Cir. 2004), the Third Circuit Court of Appeals held that the Federal Arbitration Act does not authorize arbitrators to issue discovery subpoenas to nonparties. Arbitrators must subpoena the nonparties to attend the hearing and bring documents with them.

In *Shoremount v. APS Corp.*, 368 *N.J. Super*. 252 (App. Div. 2004), the entire controversy doctrine barred defendants from asserting setoff claims in a court action after a minority shareholder prevailed in arbitration. The Court recognized that the entire

controversy doctrine is not to be imported wholesale into arbitration proceedings and should be applied cautiously to litigation involving limited-issue arbitration and only when necessary to achieve the purposes of the doctrine. In this case, however, defendants had a fair and reasonable opportunity to raise all setoff claims in the arbitration.

Interest Arbitration

In *Tri-Borough Communications Employees Ass'n v. Montvale Bor.*, Dkt. No. BER-C-101-04 (6/25/04), appeal pending, Judge Doyne dismissed a Complaint in which a majority representative of emergency dispatchers sought to compel the employer to submit to interest arbitration. The dispatchers had no statutory right to demand arbitration and the Court had no equitable power to order it. The Court noted the Commission's exclusive jurisdiction to entertain the plaintiff's unfair practice charge alleging a refusal to negotiate in good faith and to issue any remedy. The Court also denied reconsideration based on a new contention that the dispatchers perform "police services" under *N.J.S.A.* 34:13A-14.

Forfeiture of Public Employment and Pensions

In *State of New Jersey v. Och*, 371 *N.J. Super.* 274 (App. Div. 2004), certif. den. 182 *N.J.* 150 (2004), a non-tenured maintenance repairman for the Middle Township Board of Education received a one-year term of probation after pleading guilty to wandering or loitering for the purpose of obtaining a controlled dangerous substance. Although the Assistant Prosecutor had represented to the trial judge that this disorderly persons offense would not mandate forfeiture of the repairman's public employment, the Board filed a civil action seeking to compel forfeiture pursuant to *N.J.S.A.* 2C:51-2. The Court allowed the repairman to withdraw his guilty plea before the Board proceeded with its application to have defendant forfeit his employment on the basis that his conviction involved or touched upon his position.

Terminations

In *Buscemi v. Cumberland Cty. Prosecutor's Office*, App. Div. Dkt. No. A-2749-03T2 (11/17/04), the Court affirmed a summary judgment and dismissed a claim that the Prosecutor wrongfully terminated Buscemi, an investigator, after 14 years.

In 2001, the then Prosecutor issued a Standard Operating Procedure with a section entitled "Discipline." That section stated:

> "No permanent employee shall be disciplined, demoted or discharged without just cause."

According to Buscemi, the investigators' union accepted a less favorable health benefits package in exchange for this SOP.

In May 2003, a new Prosecutor discharged Buscemi. The Appellate Division panel presumed that "the newly appointed prosecutor wished that another join his team in Buscemi's position or to otherwise reorganize his office."

The panel reasoned that the SOP did not apply to Buscemi because he was not the subject of discipline and that the SOP's discipline section did not confer tenure rights on unclassified employees . If the SOP were interpreted to cover at-will terminations for reasons other than discipline, it would be preempted by *N.J.S.A.* 2A:157-10. Further, such an interpretation would significantly interfere with the governmental policy of permitting each prosecutor to assemble his or her own team.

In *Farber v. City of Paterson*, CIV 03-4535 (DRD) (D.N.J. 2004), the former Assistant Director of Economic and Industrial Development alleged that her discharge violated her constitutional rights and public policy and that her majority representative's refusal to arbitrate her discharge violated its duty of fair representation. The City and the union filed motions to dismiss.

Senior District Judge Dickinson R. Debevoise dismissed Farber's claims that the City deprived her of a property interest without due process; at the time of her termination, Farber was a provisional employee without any property interest in her job. However, this claim may be reinstated if DOP were to rule that Farber should have been made a permanent employee before her termination. Judge Debevoise denied the City's motion to dismiss the remaining claims; a public employee holding a provisional untenured position may assert that a discharge based on political reasons violated her constitutional rights and public policy. A provisional employee may also seek to arbitrate a discharge if an arbitration clause encompasses such a dispute.

Goodman v. Department of Corrections, 367 *N.J. Super*. 591 (App. Div. 2004), upheld the termination of a senior corrections officer for taking cocaine.

N.J.S.A. 11A:2-13 did not require dismissal of the charges even though the employer did not hold a departmental hearing within 30 days of notice of the disciplinary action. The Court reasoned that the Legislature would have expressly mandated dismissal of the charges for non-compliance if it had intended such a severe consequence in every case.

Kluczyk v. Tropicana Products, 368 *N.J. Super*. 479 (App. Div. 2004), upheld a jury verdict awarding compensatory and punitive damages to a plaintiff who was fired in retaliation for filing DCR complaints to protest same-sex harassment. Plaintiff was treated differently from others who were not fired even though they lied on their employment applications or committed serious violations of company policy.

In *Mele v. Federal Reserve Bank of New York*, 359 *F*.3d 251 (3d Cir. 2004), a facilities engineer claimed that his termination violated the employer's Management Guide to Personnel Policies. However, the Federal Reserve Act precludes enforcement of an employment contract that would compromise a federal reserve bank's statutory power to dismiss employees at pleasure.

In *Division of State Police v. Schmidlin*, App. Div. Dkt. No. A-6341-01T2 (3/16/04), a state trooper was denied fair discovery in a disciplinary proceeding that led to his termination for allegedly trying to buy illegal steroids and covering up that attempt. The trooper requested discovery of the investigation file of the Division of Criminal Justice; that file included material concerning a confidential informant whose hearsay statements provided critical evidence against the trooper. The superintendent denied the trooper access to the file based on the assurance of the prosecutor investigating potential criminal charges that the file did not contain any exculpatory information. The Court held that this delegation of authority was an unacceptable approach to the discovery request and remanded to allow the trooper to seek full discovery and to move for a new or reopened hearing.

Duty of Fair Representation

In *Carino v. Stefan*, 376 *F*.3d 156 (3d Cir. 2004), the Third Circuit Court of Appeals dismissed a private sector worker's malpractice suit against a lawyer hired to arbitrate a grievance. The LMRA immunizes attorneys hired by unions to perform services

related to a collective bargaining agreement from malpractice suits so the worker was limited to suing the union for breaching its duty of fair representation. The Court reasoned that it would be anamolous to allow a malpractice suit against an attorney based on a negligence standard and subject to a prolonged statute of limitations period when a suit against a union would have to meet a higher standard of proof (that the misconduct was "arbitrary, discriminatory, or in bad faith") and be filed within a shorter period (six months).

In *Farber v. City of Paterson*, CIV 03-4535 (DRD) (D.N.J. 2004), supra at p. 10, Judge Debevoise declined to dismiss a claim that a union breached its duty of fair representation. Although the claim was brought more than six months after it accrued, the Court ruled that the six year statute of limitations for torts applied rather than the six months statute of limitations in the Employer-Employee Relations Act. However, mere negligence in handling an arbitration claim is not enough to prove that a union violated its duty. The Third Circuit Court of Appeals has granted leave to file an interlocutory appeal and will consider the statute of limitations question.

Constructive Discharge

In *Pennsylvania State Police v. Suders*, 542 *U.S.* ___ (2004), the United States Supreme Court summarized the standards for analyzing a constructive discharge claim in a sexual harassment case:

> To establish hostile work environment, plaintiffs like Suders must show harassing behavior "sufficiently severe or pervasive to alter the conditions of [their] employment". . . . Beyond that, we hold, to establish "constructive discharge," the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quit in reasonable response to an employer-sanctioned adverse

> action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions. . . .

The majority and dissenting opinions discussed the NLRB cases that gave rise to the constructive discharge theory. The case was remanded for application of these standards to the facts alleged by a former police communications operator.

Discipline

N.J.S.A. 53:1-33 prohibits the removal or suspension of state troopers without just cause; requires dismissal of any charge alleging an internal rule violation if not brought within 45 days of the date on which a complainant obtained sufficient information to file a complaint; and mandates a hearing within 30 days of the service of a complaint. In *Division of State Police v. Trooper Bryce Maguire, Badge No. 5476,* 368 *N.J. Super*. 564 (App. Div. 2004), certif. den. 181 *N.J.* 545 (2004), the Court considered this statute in reviewing the Superintendent's determination, based on a department hearing officer's findings of fact, that a trooper should be suspended for 15 days for an off-duty road rage incident. The Court held that the complaint was timely filed within 45 days of when the Superintendent received the investigative report, even though the incident occurred more than 100 days before that filing. However, the Court also held that summary discipline proceedings involving suspensions of between 5 and 30 days must be heard by OAL judges rather than state police hearing officers. The Court therefore remanded for a new summary disciplinary hearing before an ALJ.

Under *Innella v. State of New Jersey (Division of State Police),* App. Div. Dkt. No. A-5196-02T2 (5/4/04), state troopers must appeal reprimands and minor suspensions (five days or less) to the Appellate Division rather than the Law Division. The troopers had challenged the reprimands and suspensions as violating their rights to prompt complaints and hearings under *N.J.S.A.* 53:1-33, but the Court held that their complaint really sought to reverse the decisions of the Division of State Police. The Court then reviewed the matter as if it had been directly

appealed and concluded that the Division's decision was not final because the troopers could still pursue grievances or civil service remedies.

In *Ashton v. Whitman*, 2004 *U.S. App. LEXIS* 7363 (3d Cir. 2004), corrections officers received the due process required by *Cleveland Bd. of Ed. v. Loudermill*, 470 *U.S.* 532 (1985), before they were terminated. The officers asserted that they were entitled to receive any exculpatory evidence so they could evaluate the desirability of a settlement, but the Court rejected that extension of *Loudermill* rights since it "would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."

Ganges v. Burlington Cty., App. Div. Dkt. No. A-5433-02T1 (2/02/04), held that a corrections captain was entitled to a trial court's *de novo* review of a three-day suspension for insubordination. The captain had a constitutional right to a trial because no statute, regulation, or agreement accorded him an administrative procedure for appeal or review of the disciplinary action. "[P]rinciples of fundamental fairness and due process dictate that such public employees be provided judicial *de novo* review of the disciplinary action in the Law Division. This ruling simply assures that all disciplined public employees are provided an appropriate and meaningful appeal procedure." (Slip opinion at p. 8). This holding may apply to all forms of discipline where a public employee cannot arbitrate a grievance or appeal by right to the Merit System Board or other governmental body.

Settlement Agreements

Fields v. Thompson Printing Co., Inc., 363 *F.*3d 259 (3d Cir. 2004), held that public policy would not be violated if a former corporate executive received contractual payments of salary and benefits after his discharge over allegations of sexual harassment. The allegations were settled out of court so the executive had not been found guilty of harassment and the contract did not require forfeiture of salary or benefits given a termination for cause.

In *Llerena v. J.B Hanauer & Co.*, 368 *N.J. Super*. 256 (Law Div. 2002), a female plaintiff bringing a sex discrimination claim against a brokerage firm was allowed to compel disclosure of a confidential settlement agreement between the firm and a former worker settling her sexual harassment lawsuit.

The plaintiff's interest in being free from unlawful discrimination coupled with the public's interest in eradicating discrimination outweighed the company's interest in maintaining the confidentiality of the agreement. To protect the privacy of the employee who settled the lawsuit, the Court entered a protective order restricting access to the agreement to the plaintiff, her attorney, and her experts and prohibiting them from making further disclosure without a court order. The Court voided the provision of the settlement agreement requiring the employee to return the payments to her if she told anyone about the terms of the agreement.

Salaries

In *In re Jeffrey S. Katz*, App. Div. Dkt. No. A-5055-02T2 (7/7/04), an attorney for the Office of the Public Defender accepted a demotion in order to be placed at a higher salary guide step. The Department of Personnel, however, disapproved the increase based on a regulation that prohibits demotions from resulting in salary increases. The Appellate Division affirmed, applying *Walsh v. State*, 147 *N.J.* 595 (1997), and holding that the Public Defender did not have the power to make a salary commitment that would negate DOP's power to regulate salaries.

Health Benefits

Green v. State Health Benefits Commission, 373 *N.J. Super*. 408 (App. Div. 2004), reversed a final determination of the State Health Benefits Commission and remanded the case to the SHBC for a hearing to be conducted by an Administrative Law Judge. The SHBC had determined that Mrs. Green, who suffered from multiple sclerosis, was no longer entitled to SHBP coverage for home health aide services. Green had received such coverage for five years based on a home health care plan created by a social worker and her doctor and approved by the insurance company then administering the SHBP. However, the new claims administrator informed Green that she would no longer be eligible for SHBP coverage because the home health care services were "custodial" and the SHBC upheld that denial. The Court remanded for a hearing because neither the claims administrator nor the SHBC had addressed Green's contentions that home health care is cost effective; that an exception had been permitted to allow payment for that reason; and that there had been no change in

circumstances indicating that it was no longer cost effective to pay for this service. An agency's failure to address critical issues and evidence renders a decision arbitrary and capricious.

Drug Testing

In *Negron v. Jersey City Medical Center*, App. Div. Dkt. No. A-2847-02T5 (6/29/04), the security department supervisor was terminated for refusing to take a drug test pursuant to a policy permitting testing given a reasonable individualized suspicion of drug use. The Court held that "[a] private employer can require compliance with an announced drug policy upon reasonable suspicion" and that the plaintiff had not presented sufficient facts to support an inference that the testing demand was improper or unreasonable.

FLSA

In *Aivaliotis v. Borough of North Plainfield*, 2004 *U.S. App. LEXIS* 6790 (3d Cir. 2004), the Court of Appeals dismissed an overtime compensation claim brought by several police officers under the Fair Labor Standards Act. The officers claimed that "due to a quirk in the Gregorian calendar, every four years there are three days of work that have not been compensated for" and "every 11 years that winds up being a full [two-week] pay period." The parties' negotiated salary arrangement did not provide for additional, cumulative payouts to compensate for any calendar quirk.

FMLA

In *Conoshenti v. Public Service Electric & Gas Co.*, 364 *F.*3d 135 (3d Cir. 2004), the Court dismissed a former employee's claim that his discharge violated the federal Family Medical Leave Act. The employee would have been discharged even absent any consideration of his taking the 12 weeks of leave provided by the FMLA. However, the Court declined to dismiss the plaintiff's claim that the employer did not properly advise him of his FMLA rights so that he could make an informed decision about how to structure his leave and thus preserve his job.

Retiree Benefits

In *Bonzella v. Monroe Tp.*, 367 *N.J. Super.* 581 (App. Div. 2004), the employer violated *N.J.S.A.* 40A:10-23 when it required either a husband or his wife, both of whom

had worked for the employer for more than 25 years, to switch from primary to dependent coverage. That requirement also violated the employees' contractual rights; the employer could not take away those rights, earned by 25 years of service, to save costs.

In *Strickland v. Gloucester Cty.*, App. Div. Dkt. No. A-4366-02T1 (4/14/04), and *Lindsay v. Gloucester Cty.*, App. Div. Dkt. No. A-4368-02T1 (4/14/04), the Court dismissed actions where two former employees sought lump sum payouts of their accumulated, unused sick leave. One employee was laid off after 18 years of employment; the other employee was laid off after 9 years of employment. The collective negotiations agreement covering them provided that "upon retiring on pension, an employee shall be eligible for a one-time supplemental payment based on the number of unused sick days remaining to the employee's credit." The trial court found that the agreement's ambiguous silence as to non-retirees should be construed as granting the plaintiffs compensation for unused sick leave. The Appellate Division panel disagreed, concluding that the agreement plainly limited this benefit to retirees. The panel recognized that employee compensation upon termination is mandatorily negotiable under *N.J.S.A.* 34:13A-5.3 unless preempted.

In *Hamilton Tp. Ed. Ass'n v. PERS Bd. of Trustees*, App. Div. Dkt. No. A-3690-03T1 (12/27/04), the Court denied bus drivers pension credit for compensation they earned driving special needs students during the middle of the school day. These "in-between" runs were not part of the drivers' regularly scheduled work day and were thus considered to be "extracurricular duties" under *N.J.S.A.* 43:15A-6(r).

Workers' Compensation

In *Rosales v. State of New Jersey (Dept. of the Judiciary)*, 373 *N.J. Super. 29* (App. Div. 2004), the Court held that public policy requires that workers' compensation benefits be offset by ordinary disability pension payments received for the same disability.

Tort Claims Act

The New Jersey Torts Claim Act, *N.J.S.A.* 59:1-1 to 12-3, requires that a plaintiff give a public entity written notice of its intention to file a common law intentional

tort action against a public employee. *Velez v. City of Jersey City*, 180 *N.J.* 284 (2004). The Court agreed with the ruling and analysis in *Bonitsis v. NJIT*, 363 *N.J. Super*. 505 (App. Div. 2003). That case reasoned, in part, that written notice should be required so that the employer could decide whether to provide the accused employee with a defense and indemnification, including punitive damages.

Law Against Discrimination

In *Crespo v. Evergo Corp.*, 366 *N.J. Super*. 391 (App. Div. 2004), the Court dismissed an illegal alien's discriminatory termination claim under the LAD. The Immigration Reform and Control Act of 1986 precluded the plaintiff from recovering damages based on her claim that she was discriminatorily denied the opportunity to return to work as a warehouse employee after giving birth; the plaintiff's claims arose solely from her termination and not from aggravated sexual harassment or other egregious circumstances.

In *Hennessey v. Winslow Tp.*, 368 *N.J. Super*. *443* (App. Div. 2004), certif. granted, 180 *N.J.* 455 (2004), a former employee was not collaterally estopped from filing a disability discrimination lawsuit under the LAD because a Township hearing officer had ruled against her in a pre-termination proceeding. The hearing officer found that the Township could not reasonably accommodate her disability and had to terminate her. The Court concluded that this finding did not estop the plaintiff from litigating that question de novo in a lawsuit; the plaintiff could have done so if she had appealed her termination to the Merit System Board and she should have the same right to present her claim fully in a LAD lawsuit.

The Superior Court of Mercer County has dismissed portions of a Complaint in which a Superior Court Judge alleged that she was discriminated against because of her gender and her complaint about gender discrimination when she was transferred from the Civil Division to the Criminal Division. *Schott v. State of New Jersey*, L-1157-03 (8/16/04). The Judge's lateral transfer was not an adverse employment action under the LAD absent a demotion in rank, reduction in pay or benefits, or loss of prestige or opportunity of advancement.

In *Bumbaca v. Edison Tp.*, 373 *N.J. Super*. 239 (App. Div. 2004), the Court held that the LAD does not prohibit discrimination

based on nepotism. The Court dismissed a volunteer firefighter's claim that a practice of hiring relatives kept him from being hired as a paid firefighter.

In *Larsen v. Branchburg Tp.*, Dkt. No. SOM-L-480-03 (10/14/04), Superior Court Judge Peter A. Buchsbaum, J.S.C., dismissed a claim that the LAD required that the employer create a light duty position for a pregnant police officer. Judge Buchsbaum concluded that pregnancy without complications was not a cognizable disability under the LAD and that the plaintiff was not perceived to have a disability under the LAD. Even if the plaintiff had a LAD-covered disability, the employer met its LAD obligations by engaging in an interactive process and offering the officer the reasonable accommodation of a position in the tax assessor's office.

CEPA

In *Maw v. Advanced Clinical Communications, Inc.*, 179 *N.J.* 439 (2004), the Conscientious Employee Protection Act did not apply to a retaliatory discharge action filed by an employee who refused to execute a do-not-compete provision. The Court held that such a discharge would not violate a "clear mandate of public policy concerning public health, safety or welfare or protection of the environment." Justice Zazzalli wrote a dissent, joined by Justice Long.

By a 4-3 vote, the Supreme Court upheld an award of compensatory damages in a CEPA case and remanded for a new trial on punitive damages. *Hernandez v. Montville Tp. Bd. of Ed.*, 179 *N.J.* 81 (2004). An elementary school custodian was terminated after he reported and attempted to discuss clogged toilets that were overflowing for prolonged periods, causing feces and urine to spill on the floor, and an exit sign that was unlit for seven days due to a burned out bulb. Believing the plaintiff's case was based on trivial incidents, the trial court granted judgment N.O.V. for the school board. The Appellate Division reinstated the verdict, concluding that the plaintiff reasonably believed the unsanitary bathroom conditions and unlit exit sign violated health and safety rules and a clear mandate of public policy and that the plaintiff was terminated for blowing the whistle on these violations rather than the board's pretextual reasons. The Supreme Court affirmed in a per curiam opinion voted for by Justices Long, Zazzali, and Albin and Judge Conley, temporarily assigned. Justice

LaVecchia wrote a dissent, joined by Chief Justice Poritz and Justice Verniero, in which she argued that the custodian's idiosyncratic responses to occasional operational problems did not constitute the type of "illegal activity, policy or practice" rendered actionable under *N.J.S.A.* 34:19-3a.

In *Yurick v. State of New Jersey*, App. Div. Dkt. No. A-5247-02T5 (6/30/04) (App. Div. 2004), a majority opinion joined by Judges Havey and Fall declined to dismiss a CEPA claim brought by the former Gloucester County Prosecutor against the State, the Governor, the Attorney General, and the Gloucester County Board of Chosen Freeholders. Judge Hoens dissented, arguing that the former County prosecutor should not be considered an employee for purposes of filing a CEPA claim and that his goal of seeking to remain in office after his term expired raised a private concern and interfered with the Governor's right to select his successor. The dissent also asserted that the Complaint did not allege a sufficient CEPA claim against the freeholders based on their failure to provide the budget requested by the Prosecutor or to fund raises for staff; the dissent would require a claim for increased funding to be pursued before the Assignment Judge under *N.J.S.A.* 2A:158-7.

In *Reynolds v. TCM Sweeping, Inc.*, __ *F.Supp*.2d ___ (D.N.J. 2004), the federal LMRA did not preempt a state-law CEPA claim. The CEPA claim alleged that a mechanic was fired for refusing to withdraw a grievance seeking back pay for alleged violations of the Davis-Bacon Act wage requirements. An arbitrator had earlier ruled that the employer had just cause to discharge the employee for driving company trucks recklessly and for threatening a supervisor, but the Court held that the CEPA claim was not inextricably intertwined with the provisions of the collective bargaining agreement covering the employee. The Court also held that removal of the CEPA claim to federal court was improper so the case was remanded to the New Jersey Superior Court.

Continuing Violations

In *Mancini v. Teaneck Tp.*, 179 *N.J.* 425 (2004), the Township waived its affirmative defense of laches against a plaintiff bringing a sexual harassment claim based on an alleged continuing violation. The Township asserted laches in its Answer, but did not build a record on that defense or

mention it again until petitioning for certification. The Court's opinion lays out the standards for assessing claims of continuing violations and defenses of laches in that context.

School District Oversight

Camden City Bd. of Ed. v. McGreevey, 369 *N.J. Super*. 592 (App. Div. 2004), upheld the constitutionality of the Municipal Rehabilitation and Economic Recovery Act, *N.J.S.A.* 52:27BBB-1 to -65. This statute imposes State oversight of school district governance in financially distressed communities. Under this statute, the Governor reviews the minutes of school board meetings and can veto any action. This statute does not constitute special legislation simply because it applies only to the Camden school district at present. Moreover, the Open Public Meetings Act does not apply when the Governor exercises a veto.

Safe Working Environment

In *Antonelli v. State of New Jersey*, 310 *F. Supp*.2d 700 (D.N.J. 2004), the FMBA did not have standing to assert that the scoring of an examination used to hire firefighters violated its members' alleged "right to safety and security" under the Fourteenth Amendment to the United States Constitution. The FMBA claimed that the exam was not job-related and that hiring unqualified firefighters would jeopardize other firefighters. The Court concluded, however, that the Constitution does not obligate a government employer to provide a safe working environment.

Remedies

In *Kluczyk v. Tropicana Products*, 368 *N.J. Super*. 479 (App. Div. 2004), the Court rejected an assertion that punitive damages can never be awarded when a discharge is premised on the advice of counsel. Such advice is only one factor, not a per se basis, for assessing whether a termination was made in good faith.

In *Epperson v. Wal-Mart Stores, Inc.*, 373 *N.J. Super. 522* (App. Div. 2004), the Court held that a successful malicious prosecution plaintiff may recover lost wages from a former employer who wrongfully terminated him.

Statutes

The Legislature has imposed stricter caps on annual budget increases for school

districts, *N.J.S.A.* 18A:7F-5, and municipalities and counties, *N.J.S.A.* 40A:4-45.1 *et seq*. The cap for school district budget increases was lowered from 3% to the greater of 2.5% or the Consumer Price Index. The cap for county or municipality budget increases had been 5% or the index, whichever was less; that cap is now 2.5% or the cost-of-living adjustment, whichever is less. The statutory provisions are complex and must be studied rather than summarized here.

Acting Governor Codey has signed the Uniform Mediation Act. *N.J.S.A.* 2A:23C-1 *et seq.* According to the Sponsors' Statement and a Committee Statement, the act protects all individuals who choose to resolve their disputes through court-ordered mediation or voluntary mediation where the parties and mediator expect that mediation communications will be privileged against disclosure. The act, however, does not apply to mediations conducted by PERC. Section 3b provides:

> b. The act shall not apply to a mediation:
>
> (1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship or to any mediation conducted by the Public Employment Relations Commission or the State Board of Mediation;
>
> (2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the act applies to a mediation arising out of a dispute that has been filed with a court or an administrative agency other than the Public Employment Relations Commission or the State Board of Mediation. . . .

In both the case of the Uniform Arbitration Act adopted two years ago and the case of the Uniform Mediation Act, the Legislature exempted labor relations processes from the acts and left such processes to the well-developed body of statutes, regulations, and case law providing the safeguards needed to make the labor relations system work.

The Domestic Partnership Act took effect on July 10, *N.J.S.A.* 26:8A-1 *et seq.* It extended certain health and pension benefits to same-sex domestic partners of employees with coverage in the State Employer group of the State Health Benefits Program.

New legislation amends CEPA to require New Jersey employers to advise employees of their rights under that statute. Employers may do so by written or electronic

notice, but not solely by posting. *N.J.S.A.* 34:19-7.