General Counsel's Annual Report – 2006
Public Employment Relations Commission

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Appeals from Commission Decisions

Scope of Negotiations Cases

In *Passaic Valley Water Commission and CWA Local 1032*, P.E.R.C. No. 2005-66, 31 *NJPER* 121 (¶51 2005), aff'd 32 *NJPER* 139 (¶64 App. Div. 2006), certif. den. 188 *N.J.* 356 (2006), the Commission declined to restrain arbitration of a grievance seeking additional compensation for a water repairer who was assigned to perform duties in the higher classification of senior water repairer. The Commission rejected an argument that Civil Service statutes and DOP regulations preempted such a claim. An Appellate Division panel affirmed, noting that DOP regulations did not provide a monetary remedy for past abuses in assigning out-of-title work to employees. The Supreme Court denied certification.

Interest Arbitration Cases

In *Monmouth Univ. and West Long Branch PBA Local No. 141*, P.E.R.C. No. 2005-72, 31 *NJPER* 142 (¶62 2005), aff'd 32 *NJPER* 346 (¶145 App. Div. 2006), the Commission held that Monmouth University is a private sector employer and thus its supervisory police officers are not entitled to invoke interest arbitration. The Appellate Division panel affirmed, holding that Monmouth University is not a "branch or agency of the public service" under *N.J.S.A.* 34:13A-15 and does not become a public employer simply because it employs its own police force.

Contested Transfer Cases

In *Old Bridge Tp. Bd. of Ed. and Old Bridge Tp. Ed. Ass'n,* P.E.R.C. No. 2005-64, 31 *NJPER* 116 (¶49 2005), aff'd 32 *NJPER* 201 (¶87 App. Div. 2006), the Commission

dismissed a contested transfer petition. It found that the teacher was transferred to a work-alone position because he could not get along with other staff members. The Court affirmed substantially for the reasons stated in the Commission's opinion, adding that it deferred to the Commission's expertise in public employment.

Unfair Practice Cases

In *Piscataway Tp. and Piscataway Tp. PBA Local 93,* P.E.R.C. No. 2005-79, 31 *NJPER* 176 (¶71 2005), aff'd App. Div. Dkt. No. A-6488-04T1 (12/21/06), an Appellate Division panel affirmed the order issued to remedy the employer's failure to negotiate before implementing two new procedures in a promotion policy. The Commission declined to order the Township to rescind the promotions of four police officers to sergeant, reasoning that the record did not indicate that the results of the promotional process would have been any different had the PBA's position on the two issues been incorporated into the promotional policy.

In *FOP Middlesex Cty. Sheriff's Officers, Lodge 59 v. Sheriff Joseph C. Spicuzzo,* Civ. 98-4907 (D.N.J. 3/31/06), a federal district court dismissed allegations that would have required the Court to review PERC findings and conclusions made in *Middlesex Cty. Sheriff and Eckel,* P.E.R.C. No. 2003-4, 28 *NJPER* 308 (¶33115 2002), aff'd 30 *NJPER* 239 (¶89 App. Div. 2004), certif. den. 182 *N.J.* 151 (2004). The Court reasoned that it lacked jurisdiction to review final adjudications made by New Jersey agencies and courts. The Court, however, did not dismiss constitutional claims made by a plaintiff who had proved before PERC that the Sheriff retaliated against him for his FOP activity. That plaintiff could seek to prove violations of his rights of free speech and association that might entitle him to a distinct remedy from that awarded by PERC.

Interlocutory Appeals

Leave to file an interlocutory appeal from an interim relief order was denied in *Camden Cty. and Camden Council No. 10*, I.R. No. 2006-18, 32 *NJPER* 114 (¶54 2006). Commission designee Stuart Reichman enjoined the employer from unilaterally changing its policy of giving suspended employees the option of paying COBRA premiums to maintain health insurance during their suspensions or having the employer make such payments and then deduct the

accrued premiums from the employees' paychecks after they resumed work.

In *Franklin Tp. and PBA Local 188*, P.E.R.C. No. 2006-103, 32 *NJPER* 135 (¶62 2006), App. Div. Dkt. No. A-6307-05T1, the Appellate Division dismissed an "appeal" filed by the Township from a PERC interim relief order requiring the Township to maintain a fund to pay for any differences in health benefits and use of out-of-network doctors. The Township never filed a motion for leave to file an interlocutory appeal.

Motions for Stays

The Appellate Division denied the FOP's request for an emergency stay of the agency's order certifying the PBA as the majority representative of correction officers employed by the State of New Jersey. *State of New Jersey and PBA Local 105 and New Jersey State Corrections Ass'n, FOP Lodge 200*, D.R. No. 2006-18, 32 *NJPER* 145 (¶66 2006), review den. P.E.R.C. No. 2006-92, 32 *NJPER* 223 (¶92 2006), app. pending App. Div. Dkt. No. A-5635-05T3. The Court's order stated:

> In essence, the intervenor argues that the PBA received the eligibility list on December 22, 2005 while the intervenor did not receive the list until January 9, 2006. The intervenor, however, had a list of employees and their home addresses by December 13, 2005 - - a week before the eligibility lists were due. Consequently, the intervenor has not demonstrated any prejudice or disadvantage in the delay. Moreover, the intervenor has not demonstrated sufficient grounds for emergent relief.

Judge Ariel Rodriguez of the Appellate Division denied a request for a stay of a representation election in *Hudson Cty. and United Workers of America, Local 322 and District 1199J, NUHHCE, AFSCME, AFL-CIO*, P.E.R.C. No. 2006-76, 32 *NJPER* 101 (¶49 2006). A faction of United Workers of America, Local 322 claimed that it should be considered that union's spokesperson, but the Commission declined to stay an election that had been scheduled pursuant to a Consent Election Agreement signed by representatives of all parties, including a representative of the faction seeking a stay. The Commission noted that it does not normally decide internal union disputes and that any such dispute persisting after the election should be decided by a court of competent jurisdiction. The faction seeking a stay then asked Judge Gallipoli, Assignment

Judge of Hudson County, to stay the election; but he found that the trial court lacked jurisdiction over what was an appeal of an agency's interlocutory order and transferred the case to the Appellate Division. Judge Rodriguez then denied the requested stay and the election took place the next day. District 1199J won the election and was certified as the majority representative. No appeal was filed from the certification order and the Appellate Division later dismissed the "appeal" resulting from the order transferring the initial filing to the Appellate Division.

Amendments to Employer-Employee Relations Act

The Legislature added this paragraph to the end of *N.J.S.A.* 34:13A-5.3:

> In interpreting the meaning and extent of a provision of a collective negotiation agreement providing for grievance arbitration, a court or agency shall be bound by a presumption in favor of arbitration. Doubts as to the scope of an arbitration clause shall be resolved in favor of requiring arbitration.

For a case concerning this amendment, see the discussion of *Alpha Bd. of Ed.* on page 5.

Commission Regulations

The Commission readopted with minor amendments its regulations governing scope-of-negotiations proceedings, *N.J.A.C.* 19:13-1.1 *et seq.*; grievance arbitration, mediation and fact-finding, *N.J.A.C.* 19:12-1.1 *et seq.*; interest arbitration, *N.J.A.C.* 19:16-1.1 *et seq.*, and the issuance of subpoenas in PERC cases, *N.J.A.C.* 19:15-1.1 *et seq*. With respect to scope-of-negotiations petitions, any factual allegations must be supported by certifications based on personal knowledge. *N.J.A.C.* 19:13-3.5(f)1.

Litigation Against PERC

The Third Circuit Court of Appeals has affirmed the dismissal of two lawsuits filed by a court reporter formerly employed by the Administrative Office of the Courts against the Commission and many other defendants. *Yuhasz v. Poritz*, Dkt. No. 05-1660 (2/15/06), and *Yuhasz v. Leder*, Dkt. Nos. 05-1838 and 05-2872 (2/15/06). The allegations against the Commission were time-barred, but the Court suggested that other reasons could have been given as well. The district court opinion in *Yuhasz v. Leder* is summarized in the 2005 Annual Report,

which can be found on the PERC Website at www.state.nj.us/perc. The district court specifically held that the agency was entitled to judicial immunity for its decision involving Yuhasz.

Court Cases Involving Grievance Arbitration

Decisions Confirming Awards

In *Alpha Bd. of Ed. v. Alpha Ed. Ass'n,* 188 *N.J.* 595 (2006), our Supreme Court reversed an Appellate Division decision vacating a grievance arbitration award. That award held that the board committed a continuing violation of the parties' contract when it denied paid health insurance to part-time employees and ordered the board to pay for such insurance prospectively. The Chancery Division confirmed the award, but the Appellate Division concluded that the continuing violation doctrine did not apply. The Supreme Court, by a 5-1 vote, concluded that the arbitrator could have reasonably applied the continuing violation doctrine. It also found that the recent amendment to section 5.3 of the PERC Act (quoted previously in this report) overruled *Camden Bd. of Ed. v. Alexander*, 181 *N.J.* 187 (2004), and established a presumption of contractual arbitrability in the New Jersey public sector. The Court remanded the case to the Appellate Division to determine whether the arbitrator's decision on the contractual merits was reasonably debatable. Judge Rivera-Soto dissented, disagreeing with the majority's analysis of both the continuing violation doctrine and the amendment to section 5.3.

In *New Jersey Transit Bus Operations, Inc. v. ATU*, 187 *N.J.* 546 (2006), our Supreme Court reversed an Appellate Division decision vacating two arbitration awards. The employer required part-time bus operators to report to work five minutes before each shift started and to fill out accident reports, but did not pay these operators for these periods. The awards interpreted the parties' collective agreements to require compensation for these periods plus the time spent returning their vehicles post-shift, but an Appellate Division panel concluded that only full-time bus operators were contractually entitled to compensation. The Supreme Court reversed and remanded for reinstatement of the awards. The Court reaffirmed that an arbitrator's contractual interpretation must be enforced if it is

reasonably debatable and the Court concluded that both interpretations were reasonably debatable.

In *Union Cty. (Runnells Hosp.) v. Hospital Professionals and Allied Employees Union*, App. Div. Dkt. No. A-5450-04T1 (7/31/06) , an Appellate Division panel reversed a trial court order vacating an award. The arbitrator held that the employer was obligated to permit an employee to collect disability benefits without exhausting her sick leave benefits. The arbitrator and the panel reasoned that the employer was contractually estopped from requiring sick leave exhaustion because its representative had repeatedly said that exhaustion would not be required. The Court also reasoned that the award did not impose an obligation on the employer outside the contract so much as it estopped the employer from enforcing its FMLA policy against the grievant.

In *Middletown Tp. PBA, Local 124 and Middletown Tp.*, App. Div. Dkt. No. A-3380-04T1 (11/16/06), the Appellate Division affirmed a lower court order confirming an award issued in favor of the PBA and SOA. The arbitrator ruled that the employer had agreed to pay health care benefits to police officers who retired with 25 years of credited service in the Police and Firemen's Retirement System, regardless of how many years of service an officer had with the Township. The employer argued that the contractual benefit was invalid under *N.J.S.A*. 40A:10-23 because the employer had not adopted an ordinance or resolution specifying a required period of service with the employer at the time of retirement, but the Court held that the "ordinance or resolution" requirement was satisfied by an ordinance adopting by reference a collective agreement providing that benefit.

In *Borough of Emerson v. Emerson PBA Local 206*, Dkt. No. BER-C-62-06 (4/28/06), Judge Doyne confirmed an award requiring the Borough to pay a new police officer with PTC certification on step 2 of the salary guide. The arbitrator held that the Borough was equitably estopped from insisting that the officer be paid at step one since the chief had assured him at the interview that he would be hired at step two and the Business Administrator did not contradict him. The Court held that the arbitrator properly applied this doctrine and that the police chief was an agent of the Borough and had apparent authority to bind it.

Decisions Vacating Awards

In *New Jersey Turnpike Auth. v. Local 196, IFPTE*, App. Div. Dkt. No. A-6282-04T5 (5/3/06), certif. granted, 188 *N.J.* 490 (2006), an Appellate Division panel vacated an award reducing a toll collector's discharge to a 14 month unpaid suspension. The toll collector was discharged for firing a paintball gun at the window and windshield of a van traveling on the Garden State Parkway; at the time the employee was driving home from work and still in uniform. The arbitrator found a sufficient nexus between the toll collector's employment and misconduct to warrant disciplining him, but the arbitrator found that the "competing equities" and "the nature of what occurred in the context of the grievant's mental state" (he had been diagnosed as a "manic depressive" and was under stress that day) made termination unjust. The arbitrator conditioned reinstatement on his passing a physical and psychological fitness for duty examination and continued monitoring of his mental fitness thereafter.

The trial court confirmed the award, but the Appellate Division vacated it as against public policy. It stated: "A decision by NJTA to continue his employment would have an impact on the motoring public's perception of the importance of the prohibition against such conduct that is too obvious to require elaboration. The arbitrator's award does not account for impact on safety of the roadway for which NJTA is responsible." The Supreme Court has granted certification.

In *State of New Jersey (Dept. of Corrections v. CWA Local 1040 (Bruce Bryant)*, App. Div. Dkt. No. A-6396-04T1 (7/20/06), the Court vacated an award holding that the employer did not have just cause to suspend an employee for five days. The arbitrator stated that the parties had agreed that the issue to be resolved was whether the suspension was for just cause and, if not, what remedy was appropriate. Finding that a five day suspension was inappropriate since the employer had proved only two of the three grounds for the suspension, he concluded that he had no authority to substitute a lesser sanction. The trial court and the Appellate Division, however, held that the arbitrator could not consider the just cause issue despite the parties' agreement on the issue to be resolved and a provision requiring just cause for discipline. The Appellate Division panel

reasoned that another provision limited the scope of the arbitrator's authority to determining guilt or innocence.

In *Borough of Glassboro v. FOP Lodge No. 108*, App. Div. Dkt. No. A-6653-04T3 (5/10/06), a panel vacated an award holding that a corporal in the patrol division was entitled to be "promoted" to the position of detective corporal. The Court held that the arbitrator's decision was contrary to law and public policy because it interfered with the chief's prerogative to make assignments in accordance with operational needs. The Court noted that the officer had never served as a detective and thus reasoned that his appointment as a detective corporal would not be a true "promotion" within the detective division. The Court concluded that the contract did not restrict the chief's assignment powers, including keeping the officer in the patrol division.

Decisions Concerning Contractual Arbitrability

In *Lenape Reg. H.S. Dist. Bd. of Ed. v. Lenape Dist. Support Staff Ass'n*, App. Div. Dkt. No. A-5095-04T1 (7/12/06), the Court held that a grievance contesting the non-renewal of a school board custodian's employment contract was contractually arbitrable. The collective agreement stated that "the Board has the right and responsibility to take any action deemed necessary in retention and/or non-retention in matters other than job performance" and the non-renewal was based on the custodian's alleged unbecoming conduct, including alleged racial slurs. The accusations had formed the basis of earlier disciplinary actions overturned by an arbitrator.

The Court applied the presumption of contractual arbitrability codified recently in *N.J.S.A*. 34:13A-5.3 and held that the arbitration clause was susceptible of an interpretation covering the asserted dispute. It also noted, however, that it was not determining whether the Board's power to non-renew was in fact contractually restricted and that the arbitrator was required to bar the grievance if the arbitrator determined there was no such restriction. It also stated that if the arbitrator did find that the power to non-renew was restricted, the grievance would have to be considered in light of the previous resolution of the custodian's claims.

In *Local 827, IBEW v. Verizon New Jersey Inc*., 458 *F.*3d 305 (3d Cir. 2006), the Third Circuit Court of Appeals held that three

grievances relating to overtime were not contractually arbitrable given a clause limiting arbitration to disputes arising under specified articles of the collective agreement. Given the narrow arbitration clause, the Court declined to apply a presumption of arbitrability.

Miscellaneous

In *Wein v. Morris,* 388 *N.J. Super.* 640 (App. Div. 2006), the Court held that a party who participated in trial court litigation waived a contractual right to have a commercial dispute arbitrated. Further, the opposing party did not waive a right to contest a belated order compelling arbitration by participating in the arbitration and losing rather than immediately seeking to appeal that order. Although the order appeared to be final because it dismissed all claims and cross-claims, the Court held that it was interlocutory because motions to confirm or vacate an award could be filed later and because the trial court lacked power to dismiss the action and could only stay it. The Court contrasted orders compelling arbitration, which are interlocutory, with orders refusing to compel arbitration, which are appealable under *N. J. S. A*. 2A:23B-28(a).

Although these rulings mooted the appeal of the arbitration award itself, the Court also opined that the arbitrator exceeded his authority under AAA rules when he amended his award. The Court concluded that the arbitrator went beyond correcting "clerical, typographical, or computational errors," as permitted by Rule 46, and granted a form of relief denied by his original award. The Court rejected an argument, based on a California case, that Rule 46 also allowed the arbitrator to "deal with inadvertent omissions."

In *Kimm v. Blisset, LLC*, 388 *N.J. Super*. 14 (App. Div. 2006), then Judge (and now Justice) Hoens authored an opinion holding that the functus ex officio doctrine barred an arbitrator in an attorney fee dispute from issuing a supplemental award modifying or correcting an award. The opinion analyzed the doctrine at length and applied the Uniform Arbitration Act of 2000, *N.J.S.A*. 2A:23B-1 to -32, to this case outside the collective bargaining context.

In *Garzella v. Borough of Dunmore*, 237 *F.R.D.* 371 (M.D. PA 2006*)*, 37 *Pennsylvania Public Employee Reporter (PPER)* 388 (¶116 2006), the Court held that the impartial chairperson of an interest

arbitration panel could not be compelled to testify in a police officer's suit against his union and his employer. Interest arbitrators, like grievance arbitrators, are entitled to judicial immunity.

In *ATU Local 880 v. NJ Transit Bus Operators, Inc.,* 385 *N.J. Super.* 298 (App. Div. 2006), certif. den. 188 *N.J.* 352 (2006), the Court held that an employer can deduct withholding taxes from back pay obligations ordered by grievance arbitration awards.

The Supreme Court's Committee on the Unauthorized Practice of Law has held that out-of-state attorneys may participate in arbitrations and mediations in New Jersey, provided they comply with the requirements of RPC 5.5. Opinion 43 (supplementing Opinion 8), 187 *N.J.L.J.* 123 (1/8/07). Out-of-state attorneys must register with the Supreme Court Clerk, authorize the Clerk to accept service of process, and obey the rules on registrations and fees.

Other Court Cases

Port Authority Employment Relations Panel

An Appellate Division panel affirmed an improper practice order issued in *I/M/O The Alleged Improper Practice Under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction*; *IP 97-28, Final Decision and Order of the Port Authority Employment Relations Panel*, App. Div. Dkt. No. A-3134-04T2 (12/8/06), pet. for certif. pending. The Court agreed with the Panel that the Authority committed an improper practice when it did not negotiate with the Port Authority PBA before transferring negotiations unit work – patrolling areas outside and inside JFK International Terminal – from police officers to private security guards. The Court stressed the narrow standard of review and found that the Panel's findings and conclusions of law reached thereunder were unassailable.

Duty of Fair Representation

In *Bullock v. Dressell*, 435 *F.*3d 294 (3d Cir. 2006), the Third Circuit Court of Appeals affirmed a summary judgment for a union. The plaintiff had alleged that the union's business manager violated the Labor Management Reporting and Disclosure Act by blacklisting union "travelers" who had complained about an employer's late payments and benefit contributions and who had asked the union for a copy of the

collective agreement. The Court held that the alleged blacklisting did not constitute actionable "discipline" under the LMRDA since it was not punishment authorized by the union or carried out by the union in its official capacity. The Court, however, reversed a ruling that the employee's duty of fair representation claim was barred by the NLRA's six-month statute of limitations. The Court held that the limitations period applies only to duty of fair representation claims that accompany breach of contract claims and not to disputes "entirely internal to the union." It remanded the case to the district court to determine the most analogous New Jersey statute of limitations.

In *Farber v. City of Paterson*, 440 *F*.3d 131 (3d Cir. 2006), the Third Circuit Court of Appeals held that a plaintiff may bring an action alleging that a public sector majority representative has breached its duty of fair representation and that the statute of limitations for such a claim is the six-year period covering tort claims rather than the six-month period covering unfair practice claims. The Court recognized PERC's exclusive jurisdiction and the labor relations policies favoring a six-month period, but concluded that only the Legislature can shorten the limitations period for a DFR claim.

The Court also dismissed a claim that the City of Paterson conspired to deprive an employee of her First Amendment rights by terminating her because of her political affiliation. The Court concluded that federal civil rights law does not provide a cause of action for individuals injured by conspiracies motivated by discriminatory animus directed toward their political affiliation.

Employee Status

In *Feldman v. Hunterdon Radiological Associates*, 187 *N.J.* 228 (2006), the Supreme Court held that a doctor who was a shareholder and director of a radiologists' association could not maintain a CEPA action against the association. The shareholder-director was not an "employee" for CEPA purposes because she had all the tools needed to root out wrongdoing and did not need to blow the whistle at all.

In *D'Annunzio v. Prudential Ins. Co.*, 383 *N.J. Super*. 270 (App. Div. 2006), certif. granted, 186 *N.J.* 698 (2006), the Court held that CEPA's definition of "employee" does not necessarily exclude workers who might be classified at common law as independent

contractors. Given no express exclusion of independent contractors and given CEPA's definition of "employees" and its purposes, the Court will focus on the employer's control and direction of the worker's performance in determining whether an employee is covered. The Court's analysis accords in spirit and substance with the Commission's analysis of the meaning of "employee" under the PERC Act. *See New Jersey State Judiciary*, P.E.R.C. No. 2003-88, 29 *NJPER* 254 (¶76 2003).

In *Stomel v. City of Camden*, 383 *N.J. Super*. 615 (App. Div. 2006), certif. granted, 188 *N.J.* 491 (2006), the Court permitted the City's former Public Defender to bring a CEPA claim alleging that the Mayor terminated him in retaliation for reporting an extortion attempt and providing testimony that implicated the Mayor in unlawful activity. The trial court held that the Public Defender was not an "employee" under *N.J.S.A*. 34:19-3, but the appellate court disagreed. Citing *D'Annunzio*, it reasoned that CEPA does not necessarily exclude independent contractors and that CEPA should be construed to protect workers reporting unlawful activities in the workplace.

In *Perlowski v. Elson T. Killam Associates,* Dkt. No. SOM-L-361-03 (Somerset Cty. L. Div. 2005), Judge Derman held that an in-house attorney was an independent contractor rather than an "employee" within the meaning of LAD or CEPA. The Court dismissed the attorney's whistleblower and discrimination claims except to the extent the plaintiff claimed the company had violated a LAD provision protecting independent contractors against a refusal to contract based on age discrimination. *N.J.S.A*. 10:5-121.

Probation Officers

In *In re P.L. 2001, Chapter 362,* 186 *N.J.* 368 (2006), the Supreme Court held that the Probation Officer Community Safety Act unconstitutionally violated the separation of powers between the Legislature and the Judiciary. The Act sought to overrule Judiciary policies precluding probation officers from carrying firearms and enforcing warrants for the arrest of probation violators, policies the Judiciary believed preserve the appearance of the probation officers' impartiality and the Judiciary's independence. The Court also rejected an argument that the parties' collective agreement called for arbitral

resolution of this question; an arbitrator cannot decide the constitutionality of a statute. Finally, the Court held that the rule of necessity prohibited the disqualification of the entire Judiciary from deciding the case, even if there is some perception that the result may be tinged by self-interest.

School Nurses

In *Ramsey Teachers Ass'n v. Ramsey Bd. of Ed.*, 382 *N.J. Super.* 241 (App. Div. 2006), certif. den., 186 *N.J.* 364 (2006), the Court held that a 1999 law allowing a district to supplement the services of certified school nurses with non-certified nurses, provided that the non-certified nurse is assigned to the same building as a certified school nurse, did not require the presence of a certified nurse in a school building at all times.

Home Instructors

In *Donvito v. Northern Valley Reg. H.S. Dist*., 387 *N.J. Super.* 216 (App. Div. 2006), certif. den. 188 *N.J.* 577 (2006), the Court held that time spent as a home instructor did not count towards teacher tenure. Such employment lacked the regularity, the consistency, and demands of a full-time teaching position.

Discipline

In *Roberts v. State of New Jersey, Div. of State Police*, 387 *N.J. Super*. *546* (App. Div. 2006), certif. granted, 188 *N.J.* 577 (2006), the Court declined to dismiss disciplinary charges against a state trooper based on *N.J.S.A*. 53:1-33. That statute requires that charges of violating internal rules and regulations be filed within 45 days of the date the Superintendent obtained enough information to file the complaint. That statute does not apply if a related criminal investigation is proceeding concurrently, but the statute states that the time limit begins to run on the day after the criminal investigation ends. The Court held, however, that the latter time period still does not begin running until the Superintendent obtains sufficient information to file a charge.

In *Klusaritz v. Cape May Cty*., 387 *N.J. Super*. 305 (App. Div. 2006), an Appellate Division panel reversed a Merit System Board (MSB) determination substituting a six-month unpaid suspension for the termination of a principal accountant. The Court held that progressive discipline should

not be applied since the employee could not perform the duties of his higher-level job. Further, while he had not received written notice of his deficiencies, he had been repeatedly told of his superiors' dissatisfaction with his performance, especially his bank reconciliations.

In *Thurber v. City of Burlington*, 387 *N.J. Super*. 279 (App. Div. 2006), certif. granted, 188 *N.J*. 579 (2006), the Court held that the MSB, rather than the assignment judge of the vicinage, had the final say in determining whether and to what extent a deputy municipal court administrator should be disciplined for speeding, driving while under the influence of alcohol, and resisting arrest. The Court reviewed the case law concerning the Judiciary's willingness to allow other agencies such as the MSB and PERC to resolve personnel and labor relations disputes and concluded that the Judiciary should defer to the MSB's administrative competence and expertise. The Court then upheld the six-month unpaid suspension imposed by the MSB and rejected the City's argument that the employee should have been terminated as the assignment judge desired. The Court stated that while serious circumstances may warrant a classified employee's immediate removal, progressive discipline is the norm and this employee had not been disciplined before. Further, the Court found that the uncertainty and delay in the six years of legal proceedings following her arrest was a form of discipline that should not be ignored in reviewing the MSB's determination. Finally, the Court reasoned that termination of a deputy court administrator for these offenses would not be appropriate when municipal judges had merely been reprimanded for similar misconduct.

In *In Re Herrmann*, 387 *N.J. Super.* 450 (App. Div. 2006), certif. granted, 189 *N.J.* 104 (2006), the Court reversed an MSB determination upholding the dismissal of a family services specialist trainee. The Court agreed with an ALJ and the MSB that the employee had inexcusably flicked a cigarette lighter in the face of a five-year-old child during a home inspection of suspected child abuse and that discipline was warranted. But it found two problems with dismissal: (1) this incident was the only specification for the charge and by itself did not warrant dismissal without progressive discipline, and (2) the other alleged shortcomings relied upon - - poor attitude, lack of evaluation skills and

judgment, and failure to document incidents -- were not charged.

Forfeiture

In re Forfeiture of Public Office of Nunez, 384 *N.J. Super.* 345 (App. Div. 2006), certif. den., 187 *N.J.* 491 (2006), disallowed a forfeiture of employment based on an employee's conviction of a crime. Forfeiture was not appropriate since the conviction had been expunged.

Transfers, Assignments, and Ranks

The Third Circuit Court of Appeals invalidated a transfer and assignment policy covering 108 fire companies. *Lomack v. City of Newark*, 463 *F.*3d 303 (3d Cir. 2006). The Court held that the policy violated the Equal Protection clause of the United States Constitution because it was based on racial balancing and lacked a compelling State interest. The Commission had earlier restrained arbitration of a grievance contesting that policy. *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).

In *PBA Local 378 v. Sussex Cty., Office of the Sheriff*, App. Div. Dkt. No. A-0375-05T5 (5/30/06), the Court granted summary judgment to the employer in a LAD lawsuit. The PBA filed the lawsuit on behalf of female correction officers whose regular days off were changed to ensure that there would be at least two female officers on each shift, one for the female cell blocks and another for the female intake unit. DOP had granted bona fide occupational qualification exemptions permitting the hiring of female correction officers to staff certain shifts and the Court held that the parties' agreement permitted the Sheriff to base assignments on the BFOQ exemptions and the inmates' privacy rather than seniority.

In *In re Referendum Petition to Repeal Ordinance 04-75*, 388 *N.J. Super.* 405 (App. Div. 2006), the Court held that an ordinance reorganizing Trenton's police department was subject to approval or disapproval by referendum. The ordinance created a table of organization eliminating the position of deputy chief, specifying lines of authority, and setting the number of officers in each rank. The ordinance was considered a legislative act under the Faulkner Act rather than an executive or administrative act and was thus subject to citizen review.

Drug Testing

New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., 384 *N.J. Super.* 512 (App. Div. 2006), *certif. granted* 188 *N.J.* 220 (2006), upheld the constitutionality of an annual medical examination program. That program called for disclosure of every police officer's medical history and for blood and urine testing to determine an officer's fitness for duty. The Court concluded that a bona-fide annual physical examination program conducted pursuant to a uniform, non-discriminatory policy in a well-regulated industry does not violate the federal or state constitutions. It cited management's prerogative to require physical fitness tests and medical examinations to determine if a police officer is able to work. *Bridgewater Tp. v. PBA Local 174*, 196 *N.J. Super*. 258 (App. Div. 1984). While upholding the program, the Court also ordered NJT (if it had not done so) to develop and implement a policy prohibiting unauthorized disclosure of confidential medical information.

Pensions

In Re Puglisi, 186 *N.J.* 221 (2006), affirmed a decision of the PFRS Board of Trustees holding that a lieutenant's salary increase following his promotion to captain was made primarily in anticipation of his retirement and could not be included in his pension calculations. The promotion was made as part of an agreement settling a political discrimination lawsuit by promoting the officer to captain for a one-year terminal leave.

Actionable Employment Decisions

In *Burlington Northern & Santa Fe Railroad Co. v. White*, 126 *S. Ct.* 2405 (2006), the United State Supreme Court held that the anti-retaliation section of Title VII of the Civil Rights Act of 1964 does not confine forbidden actions and harms to adverse employment actions. In contrast to the anti-discrimination provision of Title VII, that provision also covers employer actions that could well dissuade a reasonable worker from making or supporting a charge of discrimination. In making this distinction, the Court relied on comparable discrimination and retaliation provisions in the NLRA. In applying this standard, the Court concluded that an unpaid, 37-day suspension (later rescinded) and a reassignment to more onerous and less

prestigious duties, albeit within an employer's job description, constituted retaliatory acts.

In *Maimone v. City of Atlantic City*, 188 *N.J.* 221 (2006), our Supreme Court held that a police officer could maintain a CEPA claim asserting that he was transferred from a detective position to patrol duty because he complained about the City's failure to enforce laws against prostitution. The Court reasoned that the transfer, although not a demotion, was an adverse employment action because it reduced his compensation and deprived him of overtime opportunities and the use of a vehicle to commute.

In *Schott v. State of New Jersey*, App. Div. Dkt. No. A-Z612-04J1 (7/13/06), certif. den., 188 *N.J.* 577 (2006), the Court dismissed a LAD action asserting that a Superior Court Judge was transferred from the Civil Division to the Criminal Division because she had complained that male judges received preferential treatment. The Court held that the judge's lateral transfer was not an adverse employment action under LAD. Although the judge lost her Executive Judge position in the civil division, that loss had no impact on her tangible benefits or employment opportunities. Further, the judge's subjective views about the desirability of working in the civil division and earning a reputation as a distinguished civil jurist could play no part in determining whether a reasonable woman would consider the transfer to be an adverse action.

Protected Speech

In *Garcetti v. Ceballos*, 126 *S.Ct*. 1951 (2006), the United States Supreme Court held that the First Amendment does not protect statements made by public employees pursuant to their official duties. The Court dismissed a lawsuit claiming that a deputy district attorney was denied a promotion and transferred to a remote location in retaliation for a memorandum he wrote questioning the truthfulness of an affidavit used to obtain a search warrant. The Court distinguished an employee speaking as a citizen about a public concern; such speech can only be restricted if necessary for their employer to operate efficiently.

In *Ruiz v. Morris Cty. Sheriff's Dept*., 2006 *U. S. Dist. LEXIS* 497 (D.N.J. 2006), Judge Debevoise granted partial summary judgment in a case alleging that the sheriff's office retaliated against an employee for publicly expressing his opinions about

protective vests and privatization of the county jail. The Court determined that the protective vest issue did not involve a public concern triggering First Amendment protection; the question was not whether the employer would provide vests, but whether employees could be disciplined for failing to wear them. The privatization issued did involve a public concern so that claim was not dismissed.

Indemnification

Prado v. State of New Jersey, 388 *N.J. Super.* 359 (App. Div. 2006), held that the State was required to indemnify a Special Assistant to the Commissioner of the Department of Labor and Workforce Development for costs incurred in defending several lawsuits. The lawsuit asserted that he violated the LAD, and specifically alleged that he had used ethnically and sexually offensive language at a staff meeting of the Office of Wage and Hour Compliance. Indemnification was required under *N.J.S.A.* 59:10-2 because the alleged conduct occurred within the scope of his employment and the State had not shown that he acted because of willful misconduct.

Prejudgment Interest

In *Potente v. Hudson Cty.*, 187 *N.J.* 511 (2006), the Supreme Court held that a successful plaintiff in a LAD suit may recover pre-judgment interest from a defendant public entity. The Court, however, reversed a directed verdict in the plaintiff's favor, finding conflicting facts concerning the employee's alleged refusal to cooperate with efforts to accommodate his disability.

Collateral Estoppel

In *Olivieri v. Y.M. F. Carpet, Inc.*, 186 *N.J.* 511 (2006), the Supreme Court declined to give collateral estoppel effect to a successful application for unemployment compensation benefits. In the CEPA action, the employer asserted that the employee quit her job, a position rejected in the administrative proceedings. The quality and extensiveness of the procedures followed in the informal proceedings before the unemployment hearing examiner did not warrant preclusive effect.

Miscellaneous Statutes and Executive Orders

The State must pay prevailing federal wage rates to workers employed by building service contractors that provide cleaning, maintenance and security in buildings owned or leased by the State. The new law applies to building service contracts entered into or renewed 60 or more days after its January 12, 2006 enactment.

Executive Order No. 23 recognizes the Child Care Workers Union as the majority representative of home-based family child care providers and authorizes the State to enter an agreement with CCWU. AFSCME and CWA jointly formed CCWU and the State Board of Mediation conducted a card-check before certifying CCWU as representing a majority of providers. The order states that covered child care providers are not State employees. The subjects to be included in any agreement must be consistent with the scope of negotiations under the PERC Act and may include representation fees. The Executive Order does not provide a right to strike.