General Counsel's Annual Report – 2003
Public Employment Relations Commission

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Statistics

The Commission received one decision from the Supreme Court - - largely an affirmance. It received three decisions from the Appellate Division - - three affirmances and one reversal. Five appeals were dismissed or withdrawn, one case was remanded on the Commission's motion, and two Commission orders were enforced.

Appeals from Commission Decisions

Interest Arbitration

In *Teaneck Tp. v. Teaneck FMBA Local No. 42,* 177 *N.J.* 560 (2003), aff'g 353 *N.J. Super.* 289 (App. Div. 2002), the Supreme Court issued a one sentence decision. The Court affirmed the Appellate Division decision substantially for the reasons expressed in Judge Collester's opinion.

Teaneck involved an appeal from an interest arbitration award granting a 24/72 work schedule to the Township's firefighters and resolving several other issues such as salaries and stipends. The Commission affirmed the award, but delayed implementation of the 24/72 work schedule for firefighters until that schedule was also adopted for their superior officers. P.E.R.C. No. 2000-33, 25 *NJPER* 450 (¶30199 1999). The Commission held that an interest arbitrator should not place firefighters on a different work schedule than superior officers unless he or she determines that the different schedules would not impair supervision or that, under all the circumstances, there are compelling reasons to grant the proposal that outweigh any supervision concerns. On the record before it, the Commission found that different schedules would impair supervision

and that there were not compelling reasons for having a separate schedule despite that impairment.

Both the employer and the FMBA appealed. The Appellate Division affirmed all aspects of the Commission's decision except the delayed implementation. It embraced the Commission's standards for reviewing interest arbitration awards, its approach to analyzing the negotiability of work schedules and for determining whether a work schedule should be awarded, and its standards for analyzing a contention that a work schedule proposal will cause supervision problems. However, the Court held that instead of modifying the award, the Commission should have remanded it to have the arbitrator apply the impairment of supervision and compelling reasons standards in the first instance. The Court stressed that the interest arbitration reform statute vests the arbitrator with the responsibility to weigh the evidence and to fashion an award given the evidence and the statutory criteria.

The Supreme Court granted the employer's petition for certification. That petition raised a single issue: do public employers have a managerial prerogative to keep firefighters and superior officers on a common schedule? At oral argument, the questions indicated that several Justices did not think that issue was difficult or that it had been preserved since no scope-of-negotiations petition had been filed. The Court issued its per curiam affirmance within three weeks of the argument.

Scope-of-Negotiations Cases

In *NJIT and NJIT Superior Officers Ass'n*, 29 *NJPER* 415 (¶139 App. Div. 2003), aff'g P.E.R.C. No. 2003-9, 29 *NJPER* 343 (¶33120 2002), a grievance asserted that a police sergeant was entitled to have the majority representative's law firm represent him in a hearing to determine whether he should be suspended. The employer sought a restraint of arbitration on the grounds that the contract did not permit an attorney, as opposed to a union official, to represent him and that an arbitrator could not consider the union's legal argument that the definition of "representative" in *N.J.S.A.* 34:13A-3(e) encompassed a right to be represented by the union's attorney. The Commission declined to restrain arbitration and the Court affirmed, stressing the deference due Commission rulings and reasoning that the parties' contractual and legal arguments could be

presented to the arbitrator and that NJIT's right to challenge an award on any legally cognizable grounds would be preserved.

In *New Jersey Highway Auth. and IFPTE Local 193 (Toll Supervisors of America), AFL-CIO*, 29 *NJPER* 276 (¶82 App. Div. 2003), aff'g P.E.R.C. No. 2002-76 28 *NJPER* 261 (¶33100 2002), the Commission declined to restrain arbitration of a grievance asserting that the Authority violated the parties' contract when it required toll plaza supervisors to relieve non-supervisors taking breaks on the midnight shift. Examining all the circumstances, the Commission found that the employees' interests in negotiating over out-of-title, workload, and pay rate issues outweighed the employer's interest in assigning this relief work unilaterally. The Court agreed with the Commission's analysis and deferred to its balancing of the parties' interests. It stressed that the grievance involved a claim that the supervisors' workload had been increased and that the assignment of duties outside a job classification or description is mandatorily negotiable and legally arbitrable.

In *Wall Tp. and Wall Tp. PBA Local 234*, 29 *NJPER* 279 (¶83 App. Div. 2003), aff'g P.E.R.C. No. 2002-22, 28 *NJPER* 19 (¶33005 2001), the Commission declined to restrain arbitration of a grievance asserting that the employer violated an agreement to promote police officers in the order set by a promotional list based on criteria unilaterally established by the employer. The Commission relied on *State v. State Supervisory Employees Ass'n*, 78 *N.J.* 54 (1978), and *State v. State NCO Troopers NCO Ass'n*, 179 *N.J. Super.* 80 (App. Div. 1983), in holding that the agreement alleged was procedural and mandatorily negotiable. The Court affirmed substantially for the reasons in the Commission's decision and added that the employer's contention raised contractual issues for the arbitrator rather than negotiability defenses.

Unfair Practice Cases

In *City of Trenton and AFSCME Council 73, Local 2286*, 29 *NJPER* 301 (¶92 App. Div. 2003), rev'g P.E.R.C. No. 2001-67, 27 *NJPER* 234 (¶32081 2001), a City ordinance required employees to live in Trenton, but it also exempted several titles from that requirement. One exempted title was Water System Distribution Technician. Some technicians were non-residents when hired and were allowed to remain non-

residents. Other technicians were residents when hired and were required to remain residents. One resident technician filed a grievance claiming that the exemption was being inequitably applied and asking that he be allowed to live outside the City.

The City sought a restraint of arbitration. The Commission denied that request. It held that the statutes authorizing residency ordinances and exemptions - - N.J.S.A. 40A:9-1.3, 1.6, and 1.7 - - did not eliminate the City's discretion to apply the exemption uniformly. It also concluded that the employees' interest in avoiding disparate treatment outweighed the employer's interest in not being bound to apply its exemption uniformly.

The arbitrator sustained the grievance and a trial court confirmed the award. The City appealed both the Commission's negotiability order and the trial court's confirmation order.

The Appellate Division panel reversed the Commission's negotiability ruling and, as a consequence, vacated the award as well. The Court held that N.J.S.A. 40A:9-1.6 preempted the City's power to exempt resident employees from the residency requirement. The City can simultaneously exempt non-residents when necessary to hire employees while enforcing the residency requirement against resident employees. Further, the Court ruled that N.J.S.A. 40A:9-1.6 is part of a comprehensive statutory plan for adopting residency requirements and exemptions and that the City had a managerial prerogative governed by this statute to deny the exemption to residents.

In *Hotel, Restaurant, & Cafeteria Employees Union Local 3 and Dasent*, the Director of Unfair Practices refused to issue a Complaint. D.U.P. No. 2003-10, 29 *NJPER* 200 (¶29 2003). The Director concluded that Dasent had neither alleged facts sufficient to show a breach of the duty of fair representation nor filed a timely charge. Dasent then filed an appeal with the Appellate Division, rather than the Commission pursuant to *N.J.A.C.* 19:14-2.3. On the Commission's unopposed motion, the case has been remanded to the Commission to entertain an appeal.

The New Jersey Employer-Employee Relations Act

The New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, was amended twice in 2003.

Section 5.3 was amended to permit the State and the majority representatives of its employees (except troopers) to negotiate agreements requiring binding arbitration of major disciplinary disputes. This amendment overrides section 5.3's prohibition against arbitrating a disciplinary dispute when there is an alternate statutory appeal procedure - - e.g. an appeal to the Merit System Board. The prohibition still applies to negotiations units of local government employees.

Sections 31 through 37 were added to prohibit school boards from unilaterally imposing their contract offers and to establish a super conciliation process after a fact-finding report has failed to resolve a negotiations impasse. Section 37 specifies that mediators, factfinders, and super conciliators cannot be required to disclose confidential documents or to testify concerning mediations.

Commission Regulations

N.J.S.A. 34:13A-34 and 39 authorize the Commission to adopt regulations concerning the super conciliation process. A new regulation governs appointments of super conciliators. *N.J.A.C.* 19:12-4.4.

N.J.S.A. 34:13A-5.5, as amended in 2002, permits a majority representative to obtain the deduction of representation fees absent a negotiated agreement, provided the Commission determines that a majority of the negotiations unit employees are members of the majority representative and that the majority representative maintains a demand and return system. New regulations govern the filing, processing, and disposition of petitions for representation fee deductions. *N.J.A.C.* 19:19-1.1 *et seq.*

New regulations also specify that interim relief orders are interlocutory, *N.J.A.C.* 19:14-9.1 and 9.5; govern rulemaking petitions, *N.J.A.C.* 19:10-6.1 through 6.5; and authorize an electronic filing program, *N.J.A.C.* 19:10-2.4.

Code of Ethics

The Executive Commission on Ethical Standards approved the Commission's new Code of Ethics. The code may be found at the ECES web site: www.state.nj.us/lps/ethics.

Enforcement Actions

Judge Sapp-Peterson of the Mercer County Superior Court enforced the agency's

order in *Irvington Bd. of Ed. and Irvington Ed. Ass'n*, H.E. No. 2003-9, 27 *NJPER* 560 (¶33174 2002), enforced MER-L-1076-03 (9/23/03). A Hearing Examiner found that the Board violated the Act by refusing to supply information and ordered the Board to turn over documents to the Association. Absent exceptions, that decision became a final agency order. When the Board did not comply, enforcement proceedings were begun. Judge Sapp-Peterson rejected the Board's argument that it had substantially complied with the order and stated that "the fact that the Board many be an understaffed bureaucracy is not a valid defense against the issuance of an enforcement order against it."

Judge Passero of the Passaic County Superior Court enforced an interim relief order requiring restoration of a work schedule in *Passaic City PBA Local No. 14 v. City of Passaic*, I.R. No. 2004-2, 29 *NJPER* 310 (¶96 2003), enforced L-3673-03 (9/17/03). Judge Passero denied a subsequent PBA motion that asserted that the order had been further violated by the City's alleged failure to follow shift bidding by seniority when it ultimately restored the schedule.

Other Court Cases

Grievance Arbitration

1. Decisions Confirming Awards

In *OPEIU Local 32 v. Camden Cty. Municipal Utilities Auth.*, 362 *N.J. Super*. 432 (App. Div. 2003), the Court upheld an award of back pay to employees who were denied overtime opportunities given to other employees working out of title. Back pay may be awarded for contractual violations even if a collective negotiations agreement does not expressly authorize that remedy. The Court relied on *State v. Local 195, IFPTE*, 169 *N.J*. 505 (2001).

In *New Jersey State PBA v. Egg Harbor Tp.*, Dkt. Nos. ATL-C-5-03, ATL-C-8-03 (4/22/03), Presiding Judge Seltzer confirmed an award requiring the Township to pay police officers for unused sick and vacation days upon retirement. The arbitrator's interpretation of the contractual provisions was reasonably debatable so the judge rejected the employer's contention that it had a contractual right to pro-rate the amount of days based on an officer's anniversary date. The judge also held that the arbitrator was not required to seek evidence

concerning the fiscal impact of the award when the employer had not presented any such evidence. *South Plainfield Bd. of Ed. v. South Plainfield Ed. Ass'n,* 320 *N.J. Super*. 281 (App. Div. 1999), certif. den. 161 *N.J*. 332 (1999), requires that a grievance arbitrator consider the fiscal impact of an award if evidence is presented, but does not require parties to introduce such evidence.

In *North Plainfield PBA Local No. 85 v. Borough of North Plainfield,* Law Div. Dkt. No. SOM-L-836-03 (9/12/03), Judge Williams confirmed an award ordering the Borough to pay a 3% detective differential to school resource officers and the crime prevention officer. The Borough argued that the grievance was filed beyond the contractual 30 day deadline, but the Borough waived this argument by submitting to arbitration without objection.

In *City of Newark and Police Superior Officers Ass'n.,* P.E.R.C. No. 2003-68, 29 *NJPER* 121 (¶38 2003), appeal pending App. Div. Dkt. No. A-004617-02T2, the Commission declined to restrain arbitration of a grievance asserting that an indemnification clause required the City to pay a civil judgment for compensatory damages against a police officer. Judge Levy confirmed an award in the police officer's favor and rejected an argument that the award violated public policy. Dkt. No. ESX-C-382-02 (9/29/03). The City has appealed that ruling; that appeal and the appeal of the Commission's scope determination will be considered at the same time.

In *Hospital Professionals and Allied Employees of New Jersey, AFT Local 5004 and Englewood Hosp. and Med. Center*, Civ. No. 02-5152 (JWB) (12/22/03), Chief Judge Bissell of the United States District Court of New Jersey upheld an award requiring the Medical Center to take affirmative steps to eliminate its unreasonable reliance on mandatory overtime to meet its nursing needs. The arbitrator ordered the Center to "reevaluate its scheduling structure"; "make a more aggressive, early effort to fill known holes in the schedule"; and "document those affirmative efforts." Judge Bissell rejected arguments that the award exceeded the arbitrator's power or was mooted by a subsequent collective negotiation agreement or by *N.J.S.A.* 34:11-56a31 prohibiting (with limited exceptions) health care facilities from requiring nurses to accept overtime work.

In *Howell Tp. Ed. Ass'n v. Howell Tp. Bd. of Ed.,* App. Div. Dkt. No. A-1562-02T5

(12/23/03), an Appellate Division panel affirmed the trial court's refusal to vacate an award in the Board's favor. The arbitrator found that the involuntary reassignment of a school maintenance worker to a different shift did not constitute discipline without just cause and did not violate any seniority rights. The text of the contract did not require that shift assignments be based on seniority; to the contrary, the contract gave the Board discretion to transfer and assign employees as it saw fit.

2. Decisions Vacating Awards

I*n re Arbitration Between FOP Lodge #97 and Gloucester Cty. Sheriff's Office*, 364 *N.J. Super*. 294 (App. Div. 2003), vacated an award dismissing disciplinary charges as untimely. The parties' contract required that a disciplinary hearing "be conducted within thirty (30) days after service of charge." The arbitrator relied on that clause plus the parties' past practice to dismiss charges brought 45 days after the charge was served; the hearing was scheduled within the 30 day period but was postponed because the lieutenant bringing the charges had to undergo surgery and was not rescheduled until after the period elapsed because the hearing officer was on vacation. Relying on *N.J.S.A.* 40A:14-147 and *In re Charles Frey*, 160 *N.J. Super*. 140 (App. Div. 1978), the Court held that the award violated public policy and that the arbitrator should have construed the contract to allow the hearing officer to grant reasonable postponements absent any prejudice to the accused officers. "The public policy to provide a reasonably prompt hearing before any suspension was upheld. But the public policy to dispose of disciplinary charges against those entrusted with insuring the public safety was thwarted."

3. Contractual Arbitrability Cases

Cresskill Bd. of Ed. v. Cresskill Ed. Ass'n, 362 *N.J. Super*. 7 (App. Div. 2003), restrained arbitration of a grievance challenging the non-renewal of a custodian's annual employment contract. The dispute was not contractually arbitrable because the custodian had no right of reemployment or renewal under either the collective negotiations agreement or his individual contract. Absent a contractual right, it was irrelevant that the decision not to renew the custodian was based on the same reasons used to terminate the custodian in the middle of a

school year and held not to constitute just cause by an arbitrator who had reinstated him. The Supreme Court is considering a similar issue of contractual arbitrability in *Camden Bd. of Ed. v. Alexander*, 352 *N.J. Super*. 442 (App. Div. 2002), certif. granted 175 *N.J*. 77 (2002), a case that permitted arbitration and that was not cited in *Cresskill.*

Middletown Tp. v. McGowan, App. Div. Dkt. No. A-6281-01T3 (10/24/03), restrained arbitration of an employee's claim that he was a permanent employee and should not have been discharged as a temporary employee. The Court relied upon a ruling by the Merit System Board that the employee was temporary under the Civil Service scheme.

4. Other Arbitration-Related Decisions

Leodori v. Cigna Corp., 175 *N.J*. 293 (2003), *cert.* denied, 2003 *U.S. LEXIS* 7308 (2003), held that a handbook provision requiring employees to arbitrate all employment-related claims could not be enforced against an in-house lawyer. The provision was unambiguous, but the lawyer had not signed the "Employee Handbook Receipt and Agreement" form and the record did not otherwise unmistakably show that he had agreed to arbitration.

Spinetti v. Service Corp. Int., 324 *F*.3d 212 (3d Cir. 2003), held that an agreement to arbitrate employment discrimination claims was enforceable even though it contained illegal clauses requiring the employees to bear their own costs and attorneys' fees regardless of the outcome of the arbitration and to pay one-half of the arbitrator's compensation. The first clause violated federal statutes entitling prevailing parties in employment discrimination cases to recover costs and attorneys' fees and the second clause made the plaintiff's access to arbitration prohibitively expensive. Nevertheless, the Court, applying the federal policy favoring arbitration and Pennsylvania contract law, concluded that the clauses could be severed from the agreement to arbitrate and that plaintiff had to arbitrate her claims of sex and age discrimination.

In *Middletown Tp. PBA Local 124 v. Middletown Tp*., Dkt. No. L-4953-01 (5/09/03), Judge Lehrer ordered arbitration of a claim that the Township could not change retiree co-pays. Invoking its power under *N.J.S.A.* 2A:24-5, the Court ordered the Commission to appoint an arbitrator and

ordered the Township to arbitrate the issues presented.

Bi-State Agencies

The Appellate Division affirmed two improper practice decisions of the Port Authority Employment Relations Panel. In the first case, the Panel held that the Authority did not commit an improper practice when it invoked a "second chance" agreement and discharged an automotive mechanic for testing positive on a drug test for a third time. *In re Alleged Improper Practice Under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction, IP 98-16, 17 & IP 99-2*, App. Div. Dkt. No. A-1160-02T5 (10/31/03), pet. for certif. pending. In the second case, the Panel held that the Authority was not required to pay out-of-zone premiums for the period a detective was assigned to JFK airport. *In re Alleged Improper Practice Under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction, IP 00-02*, (11/7/03). In both cases, the Court applied the same deferential standards of review applicable to Commission decisions and affirmed the Panel's decisions since they were supported by substantial credible evidence and were not arbitrary, capricious or unreasonable. These were the first appeals of Panel decisions to reach the Appellate Division. The Union of Automotive Technicians Local 563 has petitioned for certification in the first case.

Forfeiture of Public Employment and Pensions

The constitutional prohibition against double jeopardy is not violated by a statute requiring the forfeiture of an employee's pension given a criminal conviction related to public employment. *Debell v. Bd. of Trustees, PERS*, 357 *N.J. Super*. 461 (App. Div. 2003). Such forfeitures are exempt from IRS and ERISA vesting requirements unless the State terminates the pension plan itself.

In *State v. Pavlik*, 363 *N.J. Super*. 307 (App. Div. 2003), a laborer in Brick Township's Department of Public Works was not required to forfeit his employment as a result of his convictions for assault, criminal mischief, and harassment arising from a domestic dispute with his grandfather. The convictions did not touch upon his job since there was no nexus between the misconduct and his work as a laborer.

Terminations

Silvestri v. Optus Software, Inc., 175 *N.J*. 113 (2003), granted summary judgment to a computer company sued by an employee terminated "for failure to perform to the company's satisfaction" as required by the employment contract. Absent contrary language, termination pursuant to such a clause may be based on the employer's subjective assessment of its personal satisfaction so long as the assessment is honest and genuine. Justice Zazzali's dissenting opinion would have adopted an objective standard for assessing a termination absent express language authorizing a subjective assessment.

Watson v. City of E. Orange,175 *N.J*. 442 (2003), aff'g 358 *N.J. Super*. 1 (App. Div. 2001), upheld the discharge of a police officer for violating a "last chance" agreement. The officer had been suspended for 90 working days for firing his service revolver on a college campus and the last chance agreement conditioned the officer's continued employment on enrolling in an alcohol recovery program that was mutually acceptable to the employer and the employee. The agreement further provided that the employer would determine in its sole discretion whether these conditions had been met. Despite his supervisor's directive, the officer did not enroll in a program until 15 days before his suspension ended and the record did not show that he completed the program. Four justices concluded that the last chance agreement permitted the employer to discharge the officer for not completing the recovery program during the 90 day suspension. Three dissenting justices would have found that the agreement required the police officer to enroll in the recovery program, but not to complete it during the suspension and that the suspension could be extended until he did.

In *Faber v. Borough of Hawthorne*, 2003 *N.J. Super. LEXIS* 397 (App. Div. 2003), the Court held that the Faulkner Act, *N.J.S.A.* 40:69A-31 to 48, did not prevent a mayor from terminating an office manager in the water department without first consulting with the department head. The reasons for the discharge had nothing to do with the employee's performance and were based instead on fiscal and administrative concerns.

In *Crane v. Yurick*, 2003 *U.S. Dist. LEXIS* 19130 (D.N.J. 2003), Judge Irenas held that *N.J.S.A.* 2A:157-10 creates an at-will employment relationship between a County

Prosecutor and detectives in the Prosecutor's Office so a detective cannot claim a property right to his job based on a just cause clause. The detective could seek to prove, however, that he was terminated for union activity in violation of his First Amendment rights. The opinion does not discuss the Employer-Employee Relations Act or PERC's unfair practice jurisdiction. *N.J.S.A.* 2A:157-10 has since been amended, as discussed under the last heading in this report.

In re J. David Wainwright, App. Div. Dkt. No. A-2021-01T2 (12/03/03), held that a police officer should have been suspended for 30 days without pay instead of being terminated. *N.J.S.A.* 40A:14-147 required a written complaint setting forth the charges and Evesham Township's police rules and regulations required that a Preliminary Notice of Disciplinary Action specify "the penalties to which the member is being exposed as a result of the alleged charges." The notice given the officer recommended an aggregate 30 day suspension. The Court held that the notice could not be orally amended to specify termination as a penalty and that the officer had been lulled into a false sense of security about a suspension being the maximum penalty.

In *Wiegand v. Motiva Enterprises*, 2003 *U.S.Dist. LEXIS* 22518 (D.N.J. 2003) Judge Simandle granted summary judgment to the employer on a claim that it wrongfully terminated a gas station store manager. The manager was fired because he maintained a neo-Nazi website that sold racist hate music and items. The Court concluded that the employer had a strong interest in regulating any appearance of discrimination or racial bias towards fellow employees and customers and that the termination did not violate any clear mandate of public policy under *Pierce v. Ortho Pharmaceutical Corp.*, 84 *N.J.* 58 (1980).

Discipline

In *Jordan v. Solomon*, 362 *N.J. Super*. 633 (App. Div. 2003), a County Prosecutor summarily demoted a senior investigator. The Court held that the Prosecutor was bound to honor progressive discipline procedures created pursuant to a collective bargaining agreement. Procedures for imposing discipline short of termination were found to be mandatorily negotiable under *Camden Cty. Prosecutor*, P.E.R.C. No. 96-32, 21 *NJPER* 397 (¶26243 1995). Applying the procedures to this demotion would not compromise the

Prosecutor's power under *N.J.S.A.* 2A:157-10 to remove investigators at will.

Eckel v. Middlesex Cty. Sheriff's Office, App. Div. Dkt. No. A-1210-01T5 (7/10/03), affirmed a Merit System Board decision sustaining suspensions imposed against an FOP Lodge president and other FOP members who surreptiously taped conversations with the Sheriff and other superior officers. The employees asserted that they were suspended in retaliation for their having testified in an unfair practice proceeding. The Court agreed with the MSB that the employees had not shown that hostility towards their testimony was a substantial or motivating factor in their suspensions. It does not appear that any party argued that this retaliation claim was within PERC's exclusive jurisdiction under *N.J.S.A.* 34:13A-5.4(c) and *N.J.S.A.* 34:13A-5.4a(4).

In *Sea Bright Tp. Police Officer Kevin Lovgren v. Chief,* App. Div. Dkt. No. A-3840-01T3 (4/08/03), the trial court vacated a two-day suspension imposed against a police officer for not being home when a superior officer came to verify his sick leave. The officer had been briefly absent in order to pick up his son and purchase medications. The judge found that no discipline was warranted absent evidence that the officer was not sick or that other officers had been disciplined for brief absences. The Appellate Division agreed with his analysis and reliance on progressive discipline.

In *Ganges v. Burlington Cty.*, App. Div. Dkt. No. A-5849-01T5 (4/17/03), a corrections captain's lawsuit challenged a three-day suspension and sought a *de novo* hearing. The captain had no statutory right to contest the suspension and was not covered by any collective negotiations agreement. The trial judge held that the captain had no constitutional right of access to the courts for a *de novo* hearing for this minor disciplinary action, but the Appellate Division remanded the case for further findings in light of *Cermele v. Lawrence Tp.*, 260 *N.J. Super*. 45 (App. Div. 1992). That case held that a municipal construction official had a right to a *de novo* hearing concerning his three-day suspension.

In re Spadavecchia, App. Div. Dkt. No. A-2755-02T3 (12/18/03), held that the 20 day period for appealing a disciplinary action to the MSB is mandatory and jurisdictional. The Court rejected a contention that the MSB should consider an appeal of a termination

filed six days too late because of inadvertence.

Accumulated Sick Leave Payments

Masseri v. Passaic Cty., App. Div. Dkt. No. A-6198-01T3 (8/26/03), held that the County could agree to pay accumulated sick leave to elected officials who retire, but was not obligated to pay sick leave to an official who was not eligible to retire and who left office because she was not re-elected. The Court distinguished *In re Morris School Dist. Bd. of Ed*. 310 *N.J. Super*. 332 (App. Div. 1998), certif. den. 156 *N.J*. 407 (1998), because the right to receive accumulated sick leave had not vested in this case.

Family Leave

In *Hampton v. Armano Corp.*, 364 *N.J. Super*. 194 (App. Div. 2003), an employee asserted that she was wrongfully discharged for taking time off for medical reasons. While the FMLA did not protect her because she had worked less than 12 months, she asserted that the FMLA nevertheless provided a clear mandate of public policy so as to support a wrongful discharge action. The Court disagreed, reasoning that upholding her claim would undermine the balance Congress sought to achieve in granting FMLA protection to employees who had worked more than 12 months. The Court also held that New Jersey does not have a public policy protecting employees against being terminated for taking sick leave; the New Jersey Family Leave Act, for example, does not provide an employee leave for his or her own illness.

Strong v. Essex Cty., Office of the Essex Cty. Prosecutor, App. Div. Dkt. No. A-1516-02T3 (11/05/03), held, in part, that an Assistant Prosecutor returning from a family leave under *N.J.S.A.* 34:11 B-1 was not entitled to be restored to a non-trial unit within the Prosecutor's office and was simply entitled to return to the position of Assistant Prosecutor. The Court was concerned about limiting a Prosecutor's flexibility to fill emerging needs.

Appointments

In *In Re Juvenile Detention Officer Union Cty.*, 2003 *N.J.Super. LEXIS* 382 (App. Div. 2003), the Appellate Division affirmed a Merit System Board decision granting eight bona fide occupational qualification designations for male-only juvenile detention

officer positions. The Court held that having males only in the eight positions was necessary to protect the privacy rights of juvenile male detainees and that no reasonable accommodations could be made to eliminate the need for the exemptions. The officers were required to maintain visual contact with the detainees, even when they were showering, changing clothes, or using the toilet, and to perform intimate searches of all detainees daily.

Promotions

The New Jersey Supreme Court has invalidated the results of make-up exams administered by the Department of Personnel for promotions to sergeant in the Paterson Police Department. *In re Police Sergeant (PM3776V) City of Paterson*, 176 *N.J.* 49 (2003). The questions on the make-up exam were the same as those on the original exam, a practice that was not per se unconstitutional but that caused problems in this case when, shortly after the original exam, many of the questions were discussed, typed out, and distributed within the department. This breach of security required invalidating the make-up exams but not the original exam. The Court also specified that from now on, the MSB and DOP should administer make-up exams that contain substantially or entirely different questions from those used in the original exam.

Employer Status

Chrisanthis v. Atlantic Cty., 361 *N.J. Super.* 448 (App. Div. 2003), certif. den. 178 *N.J.* 31 (2003), upheld a summary judgment in favor of the County in a sexual harassment suit. A licensed practical nurse employed by an independent contractor - - Correctional Healthcare Solutions, Inc. (CHS) - - to provide nursing services at the County's correctional facility alleged that she had been sexually harassed by a supervising corrections officer. The Court dismissed the suit against the County (but not CHS or the supervising corrections officer) because the County could not be considered an employer of the nurse. The Court applied the 12 factors set forth in *Pukowsky v. Caruso*, 312 *N.J. Super.* 171, 177-180 (App. Div. 1998), for determining employer status.

Supervisory Status

In *Entrot v. BASF Corp*, 359 *N.J. Super.* 162 (App. Div. 2003), an Appellate Division panel reversed a summary judgment

in the employer's favor in a sex discrimination case and remanded for a trial on whether a co-employee on a temporary team project was a "supervisor." For LAD purposes, supervisory status turns on "whether the power the offending employee possessed was reasonably perceived by the victim, accurately or not, as giving that employee the power to adversely affect the victim's working life." *Id*. at 181. Indicia of such power include the power to fire and demote, to influence compensation, to direct all job functions, and to act in subtle and indirect ways to control the workplace and to restrict the victim-employee's freedom to ignore sexually-harassing conduct.

Wage Payment Act

In Winslow v. Corporate Express, Inc., 364 *N.J. Super*. 128 (App. Div. 2003), a sales representative asserted that his employer illegally reduced his compensation by changing the method of calculating commissions without giving the representative prior notice. The representative asserted that the reduction in compensation without notice violated the Wage Payment Act, *N.J.S.A.* 34:11-4.1 *et seq*., and other statutes and breached an implied contract. The Court held that the Wage Payment Act authorized a private cause of action for this alleged notice violation and the parties' course of dealing concerning the calculation of commissions would permit a trier of fact to find an implied contract. *See Kearny PBA Local #21 v. Town of Kearny*, 81 *N.J*. 208, 221 (1979).

Admissions

In *McDevitt v. Bill Good Builders, Inc.* 175 *N.J*. 519 (2003), the Supreme Court reversed a summary judgment in the employer's favor in an age discrimination case. The plaintiff asserted that the employer's president nodded his head in response to his secretary's telling another employee that the plaintiff had been terminated because he was "too old." The Court concluded that the nodding may have constituted an "adoptive admission." Further, this nodding may have constituted "direct evidence" of discrimination sufficient (if credited) to shift the burden to the employer to prove that it would have terminated the plaintiff even if a discriminatory motive had not been present. The Court stressed that the adoptive admission (if it occurred) was made by the ultimate decisionmaker himself while

executing the adverse action (his secretary was typing the termination letter); that it bore directly on the motivation for the termination; and that it directly communicated proscribed animus as the reason for plaintiff's termination. Id at 532.

CEPA

In *Dzwonar v. McDevitt*, 177 *N.J.* 451 (2003), the Supreme Court dismissed a CEPA claim filed by a former employee of Local 4 of the Hotel and Restaurant Employees International Union. The employee alleged that she was discharged because she repeatedly criticized the Executive Board's failure to read or distribute its minutes at general membership meetings. The Supreme Court concluded that CEPA does not require a plaintiff to show that a law, rule, regulation or clear mandate of public policy actually would be violated if all the facts alleged are true; instead a plaintiff need only show that he or she actually believed that such a violation had occurred and that belief was objectively reasonable. However, the plaintiff did not show an objectively reasonable belief that any federal labor laws had been violated. Her claims simply involved alleged violations of union by-laws and alleged inadequacies in internal union procedures.

Cosgrove v. Cranford Bd. of Ed., 356 *N.J. Super.* 518 (App. Div. 2003), dismissed a CEPA claim filed by a custodian who asserted he was discharged for grieving the allocation of overtime assignments. The Court reasoned that a complaint regarding overtime distribution concerns a personal harm rather than the public harm required by CEPA. Further, the strong public policy against anti-union discrimination is immaterial to this CEPA case because the plaintiff's complaint is about the alleged unfair distribution of overtime, not the procedure for filing complaints through his union.

Green v. Jersey City Bd. of Ed., 177 N.J. 434 (2003), held that when there is a continued course of alleged retaliation, CEPA's one-year statute of limitations runs from the date of a final act of retaliation.

In *Brennan v. Norton, 350 F.3d 399* (3d. Cir. 2003), the Court held that a public employee filing a CEPA claim need not first comply with the 90-day notice requirement under New Jersey's Tort Claims Act.

Immunity

In *Bennett v. City of Atlantic City*, 2003 *U.S. Dist. LEXIS* 19356 (D. N.J. 2003), firefighters and unsuccessful applicants sued the DOP, the MSB, Atlantic City, and the City's fire chief for racial discrimination in hiring and promotion. Judge Irenas of the New Jersey District Court held that the Eleventh Amendment to the United States Constitution immunized DOP and the MSB from suit in federal court, but not the City or chief.

Preemption

In *Saquar v. Townley Sweeping Service, Inc*., App. Div. Dkt. No. A-1061-02T3 (10/23/03), two private sector employees asserted that they were wrongfully discharged in retaliation for their union organizing. The Court held that this claim was preempted by the NLRA and had to be brought as an unfair labor practice charge before the NLRB. It rejected plaintiff's assertion that *N.J. Const., Art.* I, ¶19 warranted an exception to the federal preemption doctrine; establishing such an exception would swallow the rule.

Remedies

In *Grasso v. West New York Bd. of Ed*., 364 *N.J. Super*. 109 (App. Div. 2003), the Board illegally refused to promote the plaintiff to high school assistant principal because of her sex. The Court held that the jury could properly rely on testimony that the principal told the Assistant Superintendent for Personnel that he wanted an Hispanic male as assistant principal; the principal's comment was not a "stray remark," but was made by an administrator who interviewed candidates and whose recommendation formed the basis for other recommendations proceeding up the chain of decisionmaking. The Court also held that back pay awards for a school board employee denied a promotion should not be limited on the theory that the employee, once promoted, might not have been reappointed or granted tenure; any uncertainty about how the employee would have performed must be resolved against the party that violated the LAD. Finally, the record did not establish that the plaintiff would have been promoted absent any discrimination since several other qualified applicants were also recommended; thus the Court rejected front pay and reinstatement as remedies and reasoned that any back pay award should be reduced.

In *O'Lone v. Department of Human Services*, 351 *N.J. Super*. 170 (App. Div. 2003), the Court held that the MSB improperly denied the back pay claim of a career service employee whose removal was reduced to a suspension. The claim was denied because the employee had not sought substitute employment, but the Court held that the MSB had to determine whether the employee could have found suitable substitute employment if he had diligently searched for it. The Court sets out the evidentiary burdens applicable to a back pay claim in a Civil Service case where an employee's misconduct justifies some discipline but not removal. Such cases differ from LAD cases where it is the employer's misconduct that caused the unemployment in the first place. In the latter type of case, the employer bears that burden of proving that the employee failed to mitigate damages.

Punitive Damages

In *Lockley v. State of New Jersey (DOC)*, 177 *N.J*. 413 (2003), the Court considered a jury's award of punitive damages against the Department of Corrections in a sexual harassment lawsuit. Such damages can be awarded "only in the event of actual participation by upper management or willful indifference." Defining upper management requires a fact-sensitive inquiry under the same standards used to determine who is a managerial executive under the Employer-Employee Relations Act, *N.J.S.A.* 34:13A-3(e). *See New Jersey Turnpike Auth. v. AFSCME Council 73*, 150 *N.J*. 331 (1997). The trial court's jury instruction to consider "whether upper management had been involved" was defective because it was not tailored to the facts, especially the consistent testimony that DOC operated through an almost "paramilitary" structure. The Supreme Court also established the standards for determining the amount of punitive damages against public sector defendants, and held that the public employer's financial condition is irrelevant since the profit motive is absent.

Green v. Jersey City Bd. of Ed., 177 N.J. 434 (2003), held that CEPA permits an award of punitive damages against a school district.

In *Brennan v. Norton, 350 F.3d 399* (3d Cir. 2003), the Court reversed an award of punitive damages against the Town Manager of Teaneck. The Manager was hostile towards the plaintiff firefighter's protected speech on

matters of public concern (such as the presence of asbestos in the fire department); his hostility motivated suspensions and a refusal to extend an injury leave, but the record did not show that the Manager acted out of either recklessness or callousness. The Court added that a contrary conclusion would mean that any finding of retaliatory motive would automatically support punitive damages.

Other Statutes

An amendment to *N.J.S.A.* 2A:157-10 provides that County investigators shall not be removed from office, employment, or position for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations established by the Prosecutor. An investigator may not be suspended, removed, fined or reduced in rank except for just cause and pursuant to a written complaint. An investigator has a right to a hearing, but may waive that right and appeal to any authority specified by law or regulation or by a contractual procedure. A County prosecutor retains the right to remove or demote a chief investigator or deputy chief.

The Legislature has also amended the State Health Benefits Act to permit contracts between the State and its majority representatives to deny the option of traditional plan coverage to employees enrolled in the State Health Benefits Program after July 1, 2003. *See N.J.S.A.* 52:14-17.28. The SHBC may also apply the terms of any such negotiated contract to unrepresented State employees.

A new law changes Chapter 2A's provisions governing the arbitration process. *N.J.S.A.* 2A:23B-1. However, consistent with the Governor's conditional veto, the bill does not apply to arbitration of labor disputes. *N.J.S.A.* 2A:23B-3. The old provisions of Chapter 2A remain in force for those disputes.