

League of Municipalities Year End Review

Labor & Employment Law

Legislation, Administrative Law, Interest Arbitration, and Case Law

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NEWARK, NJ



NEW YORK, NY



CAMDEN, NJ



RED BANK, NJ



PHILADELPHIA, PA

Legislation

A-2803

- **Establishment of Civil Service Commission**
 - Allocated within Department of Labor and Workforce Development but independent of any supervision or control by the department
 - Consists of five members appointed by the governor with Senate consent for four year staggered terms (only three from a party)
- **Estimated savings of one million**
- **Duties of Civil Service Commission**
 - A) After a hearing, render final administrative decision on appeals concerning permanent career service employees or those in their working test period in following categories:
 - 1) removal
 - 2) suspension or fine
 - 3) disciplinary decision
 - 4) termination for unsatisfactory performance
 - B) On review of record, final administrative decision on other appeals
 - C) Provide for interim remedies or relief in pending appeal
 - D) Adopt and enforce rules to carry out this title and implement comprehensive personnel management system
 - E) Interpret this title to other public bodies
 - F) Authorize studies, inquiries, investigations, or hearings in operation of this title
 - Have subpoena power

Legislation

A-2803 (cont.)

- Appeal
 - If employee is to be removed, demoted, or receive five day or more suspension, employee has right to appeal to Civil Service Commission; or if aggregate suspension days in one year is greater than fifteen; or three suspensions or fines of five or less days in a calendar year
 - Has to be appealed no later than twenty days after written determination from appointing authority
- Department of Personnel is abolished
- Division of Equal Employment Opportunity and Affirmative Action is transferred to Department of Treasury, except power to adjudicate complaints of violations of state policy against discrimination which remains with Civil Service Commission
- Working Well NJ Wellness program is transferred to Department of Health and Senior Services
- Law Enforcement Officer Crisis Intervention Services transferred to Department of Health and Senior Services
- Employee Awards committee is transferred to Civil Service commission

Legislation

Public Employee Pension and Reform Act of 2008

- Increases annual salary required for new workers to qualify for state pension system to \$7500 from the previous annual requirements of \$500 to qualify for the Teacher Pension and Annuity Fund, and \$1500 for the Public Employees Retirement System
- Raised retirement age to 62 for new employees to qualify for a pension without a reduction
- Number of paid holidays reduced to 12, eliminating Lincoln's Birthday holiday and combining it with Washington's Birthday to be observed as President's Day
- Employee eligible for other health care coverage can waive benefits coverage under State Health Benefits Program and receive annual payment from employer not exceeding 50% of amount saved by waiver. Not negotiable.

Legislation

Public Employee's Retirement System

- Eligible State employee or an eligible Judiciary employee who is at least 58 years of age and has at least 25 years of service credit under PERS or Teacher's Pension and Annuity Fund, other than a veteran who retires on veteran's retirement, receives an additional three years of service credit under the PERS or Teachers' Pension and Annuity Fund.
- Eligible State employee who is at least 60 years old and has at least 20, but less than 25 years of service credit, retirement system pays the premium or periodic charges for benefits provided to retired State employee and employee's dependents in the same manner provided for payment to retired state employees with 25 or more years of service credit.
- Eligible state employee who is at least 60 years old, and has at least 10 but less than 20 years of service credit, shall receive additional pension under PERS or Teachers' Pension and Annuity Fund of \$500/month in teach of 24 months following effective date of retirement

Legislation

Pension Holiday

- New Jersey pension fund has lost more than \$23 billion in 2008
- Fund is worth \$57.8 billion, less than half of the \$118 billion in benefits it is due to payout
- Governor Corzine has proposed bill that would allow municipalities to defer 50% of their pension contributions
- Proposed plan would cut total payments of \$1 billion owed by municipalities in 2009 in half, providing \$540 million in combined relief to cities, towns, counties, and school districts
- Plan would also allow Municipalities to defer 40% of their scheduled payments in 2010 and 20% in 2011
- Purpose of proposal is to help local governments get through the current recession without dramatically raising property taxes

PERC Decisions

Bergenfield Board of Education and Bergenfield Education Association

- Issue: Does State Health Benefits Program (SHBP) regulations preempt a prescription premium-sharing clause in the collective negotiations agreement?
- Ruling: Clause is not preempted
- Governor signing P.L. 2007, c. 62 supersedes existing SHBP regulations which said that employee only had to pay changes for dependents, not himself
- Amendment also applied to existing agreements that could not be formally implemented because of SHBP restrictions

PERC Decisions

Monmouth County Sheriff's Office and Monmouth County Sheriff's Officers

- PBA sought removal of supervisor's comments on sheriff officer from evaluation
- Presumption that substantive comments on performance evaluation that are designed to improve performance are not disciplinary and cannot be challenged in binding arbitration
- Should disciplinary action result from evaluation, officer can challenge discipline

PERC Decisions

Camden County College and Camden County College Association of Administrative Personnel

- Unfair practice charges allege College violated NJ employer-employee relations act when college replaced existing AmeriHealth PPO with NJ State Health Benefits Program
- Employer will not be found to have acted unilaterally if the contract authorizes a particular change in health benefits
- PERC will order interim relief in cases where there is clear repudiation or violation of contractual benefit level
- Cannot meet standard of interim relief here because proof that new plan is not equivalent to old plan requires resolution of contractual question of what constitutes an equivalent plan
- Case continues to forum where evidence can be presented and factual dispute can be resolved

PERC Decisions

City of Hoboken and Hoboken Municipal Employees Association

- City sought restraint of binding arbitration on grievance filed by Hoboken Municipal Employees Association claiming that a work assignment violated an employee's seniority
- Employee was assigned to clean bathrooms
- Hoboken maintained that cleaning bathrooms is a task assigned to building maintenance workers on as needed basis and contained in their job description
- PERC stated that in general, public employers have a non-negotiable prerogative to assign some or all of the title's duties to employees in a job title
- PERC stated that the Association has not asserted any basis to deviate from the application of the negotiability balancing test found in general rule
- PERC granted Hoboken's request for restraint of binding arbitration

PERC Decisions

Borough of North Arlington and North Arlington P.B.A., Local No. 95

- Borough petitioned for a scope of negotiations determination, seeking a restraint of binding arbitration of a grievance filed by the PBA
 - Grievance seeks compensation for work in a higher rank
- Sergeant had been acting as tour commander, a position normally held by lieutenants, because of staff shortages
- Borough argued that this grievance is preempted by Borough ordinances and regulations that grant chief the authority to make assignments
- Borough also argued that arbitration of grievance would substantially limit its policy making powers
- PERC stated that Borough's own ordinance and department rules do not preempt arbitration of this dispute
- Claim that police officer has been performing duties of a higher rank and is entitled to receive additional compensation is severable from decision to assign those duties and thus is arbitrable
- PERC denied Borough's request for restraint of binding arbitration

PERC Decisions

Borough of East Rutherford and East Rutherford P.B.A. Local 275

- Borough petitioned for scope of negotiations determination, seeking a restraint of binding arbitration of grievance filed by PBA
- Grievance challenged increases in co-payments for NJ Plus and HMO office visits under the State Health Benefits Program and seeks reimbursement of additional co-pay costs and return to negotiated co-pay levels
 - PBA states that it is not seeking to change SHBP or roll-back SHBP co-pay levels but only have arbitrator determine that Borough had contractual agreement to maintain certain level of health care benefits and have employees made whole for decline in level of benefits
- PERC states that level of health benefits is generally negotiable absent a preemptive statute or regulation
- Purchasing insurance from SHBP does not protect an employer from enforcement of agreement over level of health benefits
- PERC denies Borough's request to restrain binding arbitration

PERC Decisions

Lumberton Township Board of Education and Lumberton Township Education Association

- Board petitioned for scope of negotiations determination, seeking a declaration that an existing contract clause is preempted and may not be included in a successor agreement
- Disputed provision concerned retiree prescription and dental insurance coverage
- Level of health benefits is a mandatorily negotiable subject
- Statute or regulation can remove generally negotiable subject from the scope of negotiations
- N.J.S.A. 18A:16-19 preempts parties from agreeing to Board-paid prescription and dental coverage for any retiree who elects State-paid coverage under the SHBP
- Disputed provision is not mandatorily negotiable to extent it applies to employee who elects State-paid coverage but is mandatorily negotiable to extent it applies to retiree who does not elect State-paid coverage

PERC Decisions

Township of Barnegat and Teamsters Local No. 35

- Township petitioned for scope of negotiations determination seeking a restraint of binding arbitration of grievance filed by Teamsters
- Grievance alleges that Township violated seniority provisions of parties' contract when, after abolishing the chief mechanic title, it refused to allow the holder of that position to exercise his seniority rights and bump into a lower title
- Township argues it has managerial prerogative to abolish positions for reasons of economy and efficiency
- "Absent preemptive statutes or regulations, parties may negotiate provisions relating seniority to determinations of which satisfactory employees will be laid off, recalled, bumped, or re-employed"
- PERC stated that the arbitrator can determine whether employee is entitled to the position and that Township's contractual defenses are for arbitrator, not PERC, to consider
- PERC denies Township's request for restraint of arbitration

Interest Arbitrations

Borough of Mountainside and Mountainside P.B.A., Local 126

- Issues about length of contract, pay raises, medical insurance, and holiday fold-in
- Arbitrator compares other provisions (such as paying difference between traditional and PPO plan or plan limits on new employees) to direct premium contributions (which were only in effect in Rahway)
- Trend towards health care cost containment
- Premium contributions found to be reasonable (\$40/month) and awarded
- Arbitrator awarded 3.75%, 4%, 4%, 3.75% salary increase
 - PBA proposed 5% salary increases
 - Borough wanted 3.5%, 3.75%, 3.75%

Interest Arbitrations

Township of Edison and IAFF, Local 1197

- Costs for prescription drugs have risen so increase in co-pay is justified
- Award raised co-pay for prescription drugs, and creates higher co-pay for brand-name drugs than generic drugs
- Township met burden to show change in health insurance benefit is warranted
 - Looks to PBA agreement and awards similar contribution plan (\$29 bimonthly for traditional increases to \$35 for existing workers who choose to stay in plan)
- More balanced with union than other 2008 awards
 - Arbitrator does not award monetary incentive for employees to switch from Traditional Plan as was in the PBA agreement
- New retirees pay same co-pay on drugs and insurance plan
- Arbitrator awarded salary increase of 3.95%, 3.95, 3.85, 3.8, 3.75
 - IAFF salary proposal: 4% increases annually for 5 years
 - Edison proposal: 3.2%, 3.2, 3.2, 3, 2.5

Interest Arbitrations

City of Elizabeth and FMBA, Local #9

- Arbitrator follows pattern of settlement instead of comparisons with other municipalities
- FMBA had burden to establish pattern must be disregarded
- Arbitrator accepts City's changes in prescription drug co-pays to reflect prior settlements
 - Uniformity in program is in public welfare and gives City predictability and more effective administration of plan
- If employee wants brand name over generic, employee pays the difference
- Award: 3% annual salary increase for four years

Interest Arbitrations

Borough of Pt. Pleasant Beach and PBA Local 106

- Award includes employee health care contributions of \$20/month and \$40/month for dual or family coverage health insurance
- Health costs rising faster than inflation and salary increases
- Under interest arbitration statute, health insurance is treated as an economic issue
- There is a movement for employees to share cost of health insurance and reduced plans
- Award also looks to recent settlements and awards including *Borough of Mountainside*
- Salary Increase Award: 4%, 4, 4.25, 4.25
 - PBA salary proposal: 5% increase across the board
 - Borough: 3% increase

Interest Arbitrations

Borough of North Arlington and PBA Local 95

- Arbitrator did not award PBA's proposal of changing minimum call out provision for court appearances from 2 hours to 4 hours
- Arbitrator awards salary increases that averages to 3.81% for four years
 - PBA salary proposed: 5% per year across the board
 - Borough proposed: 0%, 2%, 2.5%
 - While Borough has stressed finances, record reflects it can support and fund reasonable wage increases that give weight toward comparability evidence
- Arbitrator stated that Borough has established the need to ease the cost increases in premiums in recent years to meet its obligation to provide comprehensive health insurance benefits for its employees
- Award allows opt out provision where Borough drops employee from coverage while providing employee with payment, equal to 33.3% of premium, that rewards non-participation
- Award increases co-pay for generic brands from \$3 to \$7.50 and name brands from \$7 to \$15, effective January 1, 2009 and increase to \$10 for generic and \$20 for name brands effective January 1, 2010
- Award increases deductibles per year from \$100 per covered person and \$200 per family unit to \$200 per covered person and \$400 per family unit
- Award includes health care contributions of \$20/month for single coverage, \$30/month for husband and wife coverage, and \$40/month for family coverage
 - New employees are confined to HMO plan at similar benefits level

Interest Arbitrations

County of Morris and Morris County Sheriff's Officers, P.B.A. Local 151

- One of County's highest priorities was retaining its AAA rating
- Arbitrator awards salary increases of 4% annually for four years
 - PBA salary proposal: 4.4% increase
 - County proposal: 3-3.6% increases
- Award increases premium contributions for all three health plans by 10%
 - County's "excellent management" was able to negotiate with its insurer to have a very small increase in health care costs compared to employers in general
- County's "extraordinary" management and budget surpluses allow it to pay 4% increases despite the downturn economy
- Award sets prescription co-pays at \$5 for generic, \$10 for name brand, and \$15 for formulary prescriptions

FLSA Cases

Canon v. Vineland Housing Authority, 2008 WL 4372798 (D.N.J. 2008)

- Plaintiffs, present and former employees of Vineland Housing Authority, alleged Defendant failed to pay them overtime wages in violation of the FLSA and NJ Wage and Hour Law
- Issue: Is employee's on-call waiting time compensable under the FLSA and NJWHL?
- Court went through 4 factor *Ingram* analysis in determining whether the on-call waiting time is compensable
- First Factor: Fact that Plaintiffs carried pagers and did not have to remain at home while on call suggest their on-call time was not compensable under FLSA and NJWHL
- Second Factor: Defendant's on-call policy was not so restrictive as to frequency of calls and nature of Defendant's demands as to require Plaintiff be compensated for on-call waiting time
- Third Factor: Plaintiffs could switch on-call shifts with other employees with little difficulty
- Fourth Factor: While on-call, Plaintiffs were prevented from engaging in some activities such as going fishing but were able to engage in others such as doing yard work
 - Unrestricted freedom is not standard against which on-call time is measured in determining whether time is compensable under the FLSA and NJWHL
- Based on consideration of the four factor *Ingram* test, the Court granted Defendant's motion for summary judgment.

LAD Cases

Spinks v. Township of Clinton, 402 N.J. Super. 465 (App. Div. 2008)

- Plaintiffs argued that lower court that dismissed their LAD claims treated their cause of action as a disparate-treatment claim, ignoring their disparate-impact and retaliation theories.
- Plaintiff's complaint charged retaliation and unlawful termination based upon age in violation of N.J. LAD
- "An employer must be free to investigate complaints of employee misconduct without fear of LAD liability."
- Employees can only invoke the protection of the LAD when the investigation results in some real detriment, such as demotion, suspension, or termination.
- Court agreed with lower court that resignations and suspensions were the result of fabrication charges brought by the prosecutor, and were not brought by defendants.

LAD Cases

Cutler v. Dorn, 196 N.J. 419 (2008)

- Plaintiff police officer brought claim under LAD against borough and individual defendants claiming hostile work environment at the police department because of his Jewish faith and ancestry.
- Established that workplace religious discrimination claims are to be decided with the same standard that is used in racial and gender discrimination claims.
- The test used in religion or ancestry-based hostile work environment claims is whether a reasonable person of plaintiff's religion or ancestry would consider the workplace acts and comments made to plaintiff to be sufficiently pervasive or severe to alter the conditions of employment and create a hostile working environment.
- A person asserting religious or ancestry-based harassment does not bear a heavier burden in a work environment claim than other forms of harassment.
- Defendant argued that a humor file existed within the police department that showed the level of "ribbing" and "breaking of chops" that went on among members of the department. Defendant also emphasized that Plaintiff participated in the Humor Files. The Court strongly rejected the "humor file" defense.

LAD Cases

Cicchetti v. Morris County Sheriff's Office, 194 N.J. 563 (2008)

- Former sheriff's officer who failed to disclose expunged conviction on job application, brought claims of workplace discrimination based on a disability and hostile work environment.
- Even if Defendant would not have hired Plaintiff if Defendant knew of Plaintiff's conviction, Plaintiff was still entitled to be protected from discrimination and serve in a hostile free workplace during the period in which he was employed.
- Economic damages, including claims for backpay and front pay, may be limited based on employer's discovery of after acquired evidence if the information would have resulted in termination.
- "[R]egardless of whether defendant would have fired plaintiff upon learning of the expunged conviction, plaintiff is entitled to pursue his hostile work environment claim and to recover the full measure of his non-economic damages including, if appropriate, a punitive award."
- Plain meaning of the definition of employer in the LAD does not include supervisor.
 - Individual responsibility of a supervisor for creating or maintaining a hostile work environment or for acts of discrimination can only arise to "aiding and abetting mechanism"

Other Cases

Grasso v. Fraternal Order of Police, Glassboro Lodge No. 108
2008 WL 4066430 (App. Div. 2008)

- Plaintiff argued that despite his retired status, FOP was required to fairly represent him in a dispute with Glassboro regarding Medicare insurance costs reimbursement.
- Relationship between the FOP and those it represents is governed by the Employer-Employee Relations Act which is directed to those currently working
- Courts continually distinguish between employees and retirees in the labor relations context
- Court affirmed trial court in holding FOP had no duty to represent plaintiff

Other Cases

*In the Matter of Township of Middletown and PBA Local 124
2008 WL 3461071 (App. Div. 2008)*

- Township appealed from final PERC decision ordering Township to reinstate practice of compensating patrol officers for “shape-up” or travel time when called into work for emergent or immediate overtime duty
- PBA cross-appeals from PERC decision that Township did not violate the Employer-Employee Relations Act by refusing to comply with Police Chief’s grievance determination because PBA failed to follow grievance procedures in the CBA
- Court, affirming PERC, held that “shape-up”/travel time was an established working condition and Township had obligation to negotiate before changing that condition.
- Court also affirmed PERC decision that Township did not violate Employer-Employee Relations Act by stating “[t]he determination of whether a party to a CBA has complied with the grievance procedure set forth therein, and the consequences of a failure to comply with those procedures, are matters particularly within PERC’s expertise, to which we extend substantial deference.”

Other Cases

Mineer v. Sheriff James McGettigan, 2008 WL 2744376 (App. Div. 2008)

- Plaintiff filed a complaint against defendants alleging that he had been denied a promotion and subjected to hostile and retaliatory work environment in violation of the Conscientious Employee Protection Act (CEPA) and his rights under the NJ Constitution.
- Plaintiff claimed that Sheriff McGettigan was angered and harbored animosity towards him for declining to contribute money or services to McGettigan's re-election campaign.
- Plaintiff alleged there was a campaign to create a hostile and retaliatory work environment when co-workers began to shun and ostracize him
- Plaintiff also alleged that he was involuntarily transferred to a less prestigious post that offered him no chance for professional advancement
- The Court held that the trial court erred by finding Plaintiff had not identified the claimed protected speech
 - Plaintiff was not alleging that he was denied promotion because he publicly opposed McGettigan's candidacy but is alleging he was subjected to retaliation because he refused to contribute money and attend events for the campaign

Other Cases

Mineer (cont.)

- Plaintiff had an interest in refraining from engaging in political activities on behalf of McGettigan that is protected by Article I, paragraph 6 of the NJ Constitution
- Plaintiff alleged that he had been denied a promotion to the position of captain
- Court upheld trial court's holding that plaintiff does not have a valid due process claim for money damages arising from the denial of his promotion
 - No authority to support contention that Plaintiff has a property interest in such a promotion
- Court held that trial court erred by finding Plaintiff's CEPA claim was barred by statute of limitations
 - Judge failed to consider whether three acts of alleged retaliatory actions were part of continuing course of unlawful retaliatory conduct

Other Cases

State v. M.A., 402 N.J. Super. 353 (App. Div. 2008)

- On appeal, Defendant contended that his employer had no authority to consent to the search of his computers because Defendant owned the computers and that he had a reasonable expectation of privacy in personal information stored in the computers
- Court held that there is substantial credible evidence that employer, not Defendant, owned the computers
- Because employer owned the computers, he had authority to consent to their search, and because employer consented, search was valid
- Defendant abandoned computer before the search and thus had no reasonable expectation of privacy in them
- Court concluded that defendant had no reasonable expectation of privacy in personal information stored in his workplace computer
- Court stated that even if Defendant had a subjective expectation of privacy due to him using a confidential password, the expectation was unreasonable because Defendant was using computers for criminal activity
- Court distinguished *State v. Reid* that stated “when users surf the Web from the privacy of their homes, they have reason to expect that their actions are confidential,” stating that Reid’s crime occurred at home on a personal computer that was never brought to work or shared with co-workers.

Other Cases

In re Herrick, 2008 WL 2875703 (App. Div. 2008)

- Two police lieutenants temporarily served as captains while captains were on extended military leave
- When captains on leave returned to work, police lieutenants were returned to being lieutenants
- Lieutenants both sought relief from Department of Personnel by filing appeals from “major disciplinary” action
- DOP denied the appeal on ground that lieutenant was not entitled to appeal because he was returned to his permanent title
- Court affirmed holding that return of an officer to his permanent title upon expiration of title holder’s return from leave of absence is not major discipline