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February 20, 2008

MEMORANDUM

TO: Commissioners

FROM: Robert E. Anderson
General Counsel

SUBJECT: Monthly Report on Developments in the Counsel's Office Since January 24, 2008

Commission Cases

As Appellate Division panel has affirmed the Commission's decision in Somerset Cty. Sheriff's Office and Somerset Cty. Sheriff FOP, Lodge No. 39, P.E.R.C. No. 2007-33, 32 NJPER 372 (¶156 2006), aff'd App. Div. Dkt. No. A-001899-06T3 (copy attached). The Commission affirmed an interest arbitration award in which the arbitrator reasonably determined that the County's own pattern of settlement with its four other law enforcement units warranted a similar salary award for the fifth unit of law enforcement officers involved in this case. The law enforcement officers in all five units performed coordinated and integrated work. The Court concluded that the Commission made a rational policy judgment in finding that an employer's settlement pattern with similar employee units is an important consideration in applying the statutory criteria and it accepted the determination of the arbitrator and the Commission that sheriff's officers performed work comparable to other law enforcement units.

The Appellate Division has scheduled oral argument for April 14 in an appeal involving another aspect of the Somerset interest arbitration award. Somerset Cty. Sheriff's Office and Somerset Cty. Sheriff FOP, Lodge No. 39, Dkt. No. SOM-L-268-07 (6/24/07), app. pending App. Div. Dkt. No. A-005789-06T3. The County did not implement the award within 14 days of its affirmance by the Commission as required by N.J.S.A. 34:13A-16f(5)(a). The FOP secured enforcement of the award, but the trial court refused to order the County to pay the FOP's attorneys' fees and interest. The FOP appealed that refusal.

The Appellate Division has scheduled oral argument for April 1 in Middletown Tp. and PBA Local 124, P.E.R.C. No. 2007-18, 32 NJPER 325 (¶135 2006), app. pending App. Div. Dkt. No. A-1513-06T3. The Commission held that the Township committed an unfair practice when it eliminated travel/shape-up time for its police officers without first negotiating over that decision with their majority representative.

The Board has withdrawn its appeal in Greater Egg Harbor Reg. H. S. Bd. of Ed. and Oakcrest-Absegami Teachers Ass'n, P.E.R.C. No. 2008-029, 33 NJPER 282 (¶106 2007). The Commission declined to restrain arbitration of a grievance contesting the assignment of teachers in the high school to atrium duty. The assignment involved the non-teaching duty of providing substitute coverage for the visitors' sign-in desk when security guards are absent.

Other Cases

The Township of Hopewell initiated a court proceeding contesting an interest arbitrator's application of N.J.A.C. 19:15-5.7(d) to exclude the public from an interest arbitration hearing absent the parties' agreement to allow the public to attend. The arbitrator ruled that all members of the governing body could attend the proceeding, but not the public at large. Presiding Judge Shuster of the Chancery Division of the Mercer County Superior Court conducted a hearing on February 1 and issued a 23-page decision on February 4 denying the Township's request to either open the arbitration to the public or to stay the arbitration until the Court decided the merits of the suit. In re Interest Arbitration Hearing between the Township of Hopewell and Hopewell PBA Local 342, Dkt. No. C-14-08 (2/4/08) (copy attached). He concluded that the Court had jurisdiction to consider the Township's arguments under the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. ("OPMA"); no irreparable harm would occur if the public could not attend the arbitration; the Public Interest Arbitration Reform Act, N.J.S.A. 34:13A-14 et seq., rather than OPMA controlled the case; the public policy favoring prompt settlement of labor disputes justified privacy in interest arbitration hearings; and OPMA should not be used as a vehicle to eviscerate the Reform Act and the Commission's regulation. Ira Mintz represented the interest arbitrator whose ruling was being appealed.

The New Jersey Supreme Court has granted certification in three cases discussed in my 2007 annual report:

(1) Borough of Glassboro v. FOP Lodge No. 108, 395 N.J. Super. 644 (App. Div. 2007). In this case, a grievance arbitration award ordered the employer to promote a police officer who was arbitrarily denied a promotion to lieutenant. The grievant scored higher than the promoted officer in the first two phases of the promotion process, but fell behind in the rankings after the final phase, a subjective oral examination. The arbitrator found that the promotion denial was arbitrary because the employer had not explained how the last phase had caused the grievant to fall behind. The Court upheld this conclusion and rejected arguments that the award would contravene the public interest by making objective tests the only permissible standard; subjective tests may still be used so long as an employer articulates the basis upon which it scores such tests.

(2) Lourdes Medical Center of Burlington Cty. v. Board of Review, 394 N.J. Super. 446 (App. Div. 2007). In this case, the Court considered whether nurses were entitled to receive unemployment compensation while on strike. N.J.S.A. 43:21-5(d) disqualifies striking workers from receiving benefits if “it is found that the unemployment is due to a stoppage of work which exists because of a labor dispute....” A DOL regulation defines a “stoppage of work” as a “substantial curtailment of work which is due to a labor dispute” and “substantial curtailment” is defined as occurring “if not more than 80 percent of the normal production of goods or services is met.” The Court upheld the validity of the regulation and its 80% rule, but remanded to the DOL’s Board of Review to reconsider its determination that the hiring of replacement nurses meant that the hospital’s work was not curtailed.

(3) State v. DeAngelo, 396 N.J. Super. 123 (App. Div. 2007). There, the Appellate Division upheld a union organizer’s conviction for violating a Lawrence Township ordinance. The ordinance prohibited the display of inflated signs to attract the attention of pedestrians and motorists. The organizer violated the ordinance when he hoisted a 10-foot tall inflatable rat in front of Gold’s Gym to publicize the union’s dispute with Gold’s. The Court rejected arguments that the ordinance was preempted by the National Labor Relations Act; violated the organizer’s constitutional right of free speech; was void for vagueness; and was selectively enforced. Judge Sabatino dissented from the majority’s conclusion that the ordinance did not violate the right to free speech.

In a non-precedential opinion, the Third Circuit Court of Appeals rejected a constitutional challenge to a school district’s mailbox policy in Policastro v. Kontogiannis, 2008 U.S. App. LEXIS 1387 (3d Cir. 2008). The policy provided that mailboxes are the Board’s property and that any staff member wishing to use the mailboxes had to receive a principal’s approval. A memorandum addressing contract negotiations was placed in the teachers’ mailboxes the same day the teachers were to vote on whether to ratify a new contract. The memorandum, while plainly written, resulted in some commotion so the high school principal ordered all remaining copies removed from the mailboxes. The Court concluded that the mailbox policy had not been “applied” to the plaintiff since the removal was based on the disturbances rather than the policy and that the policy itself was not overbroad and had no chilling effect. The Court also concluded that the plaintiff’s requests for declaratory and injunctive relief were moot so it dismissed the lawsuit.

REA:aat
Attachment