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September 21, 2000

M E M O

To: Commissioners

From: Bob Anderson, General Counsel

Re: Developments in the Counsel's Office Since July 20, 2000

Commission Cases

Attached is an Appellate Division decision affirming *Jackson Tp. Bd. of Ed. and Jackson Tp. Ed. Ass'n; P.E.R.C. No. 99-62, 25 NJPER 87 (¶30037 1999), aff'd App. Div. Dkt. No. A-003477-98T2 (8/1/00), pet. for certif. pending*. The Court holds that a dispute over a non-renewal of a coaching contract was legally arbitrable under *N.J.S.A.34:13A-23* and that this statute was not unconstitutional. The Court rejects an argument that *N.J.S.A. 34:13A* had been repealed by *N.J.S.A. 18A:27-4.1*, noting that the latter statute addressed only the respective roles of a local board and a superintendent in making personnel decisions, not any negotiability issues. The Court also rules that an individual employee may pursue a school law remedy before the Commissioner of Education at the same time as a majority representative pursues a collective bargaining law remedy before an arbitrator.

At the end of the opinion, the Court expresses "serious reservations about the propriety or wisdom of PERC's appearance as a party in this appeal with a brief and oral argument addressing the merits of the dispute (Slip. opin. at 16). The Court notes that this practice "has been fairly common for years" (Slip. opin. at 17). *See, e.g., Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 33-37 (1978)* (affirming PERC's participation in appeals involving unfair practices and scope-of-negotiations disputes). It is also the practice of all other State administrative agencies such as the State Board of Education and the Merit System Board. The Court refers its question about the validity of that practice to the Supreme Court's Civil Practice Committee. Attached is a letter I have sent to that committee.

The Board has petitioned for certification.

The Supreme Court heard oral argument in *Middletown Tp. v. Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 25 NJPER 357 (¶30151 App. Div. 1999), certif. granted ___ N.J. ___ (2000)* on September 11, 2000. The Commission and the Appellate Division held that the employer committed an unfair practice when it unilaterally changed a longstanding practice concerning salary guide placement of newly hired police officers with academy training and experience.

A stipulation of dismissal has been entered in *Clinton Tp. and P.B.A. Local 329, P.E.R.C. No. 2000-3, 25 NJPER 365 (¶30157 1999), recon. den. P.E.R.C. No. 2000-37, 26 NJPER 15 (¶31002 1999), App. Div. Dkt No. A-002208-99T2.*

Four cases have been appealed: (1) *Wyckoff Tp. and Wyckoff PBA Local No. 261, P.E.R.C. No. 2000-106, 26 NJPER ___ (¶_____ 2000)* (declining to restrain arbitration over a grievance contesting the application of a sick leave policy); (2) *Essex Cty. Vocational Schools Bd. of Ed. and Lisandra Stefanelli, Dkt. No. Ar-2000-390 (*Director of Arbitration declined an individual employee's request to have a panel of arbitrators released); (3) *Newark State-Operated School Dist. and CASA*, P.E.R.C. No. 2001-10, 26 *NJPER* ___ (¶_____ 2000) (family illness and sick leave bank issues are mandatorily negotiable; several other issues are not mandatorily negotiable); and (4) *Union Cty. and Jobeck*, P.E.R.C. No. 2001-4, __ *NJPER* ___ (¶ 2000) (dismissing Complaint alleging harassment and discrimination against employee for union organizing).

Other Cases

Judge Sypek of the Mercer County Superior Court has dismissed a Complaint filed by the FOP. The FOP sought the removal of Commissioner Madonna from the Commission because he is a State PBA official and allegedly would be biased against the FOP.

An Appellate Division panel has upheld an arbitration award denying a grievance that had claimed that a school board violated the parties' contract by asking new hires to sign waivers of health benefits for employees working more than 20 hours a week. The arbitrator found that the employees knowingly waived the benefits and that the board would not have hired them to work more than 20 hours if they had insisted on health benefits. In the confirmation and appellate proceedings, the Association argued that the waivers violated *N.J.A.C.. 17:9-1.8*, prohibiting financial enticements not to enroll in the State Health Benefits Program, but the Appellate Division held that this issue itself was waived because it was not presented to the arbitrator.

In *State of New Jersey (Dept. of Corrections) v. Local 195, IFPTE, App. Div. Dkt. No. A-6309-98T1 (6/18/00), pet. for certif. pending,* an Appellate Division panel vacated an arbitration award requiring the State to pay overtime compensation to negotiations unit employees who were improperly bypassed under the contract procedures for allocating overtime opportunities. The contract empowered the arbitrator to "prescribe an appropriate back pay remedy when he finds a violation of

this contract provided such remedy is permitted by law and is consistent with the terms of this contract"; but it also provided that the arbitrator did not have the power to "add to, subtract from, or modify the provisions of the contract or laws of the State, or any policy of the State." The Court held that the common law rule of "no work-no pay" governed the case.

In *Sutley v. Atlantic City Police Dept., App. Div. Dkt. No. A-6287-96T2 (6/29/00)*, the Court held that the Conscientious Employee Protection Act, *N.J.S.A. 34:19-1 to -8,* grants a trial court discretion to award prejudgment interest and punitive damages to successful plaintiffs. Plaintiffs, however, cannot recover per quod damages.

In *DeLisa v. Bergen Cty., ___ N.J. ___ (2000)*, the Supreme Court held that CEPA's protection against employer retaliation extends to employees who communicate information either to employers or to public bodies concerning a co-employee's criminal conduct.

In *Roach v. TRW, Inc., ___ N.J. ___ (2000)*, the Supreme Court sustained a jury verdict under CEPA in favor of an employee who was terminated for complaining to the employer about activities by his coemployees that he reasonably believed were criminal or fraudulent. While the jury also found that the activities reported by the employee were not incompatible with a clear mandate of public policy, the Court held that CEPA violations do not necessarily require a specific showing that the complained-about activities implicate the public interest.

In *Johnstone v. Town of Kearny*, ___ *N.J. Super*. ___ (App. Div. 2000), an Appellate Division panel held that *N.J.S.A*. 40A:14-155 did not entitle a police officer to reimbursement for attorneys' fees. At a trial covering several counts of alleged violations of the federal civil rights law, the officer was acquitted of some counts but convicted on others. The Court found that the officer could not recover unless he prevailed on all counts. The Court, however, distinguished civil service disciplinary proceedings.

In *Garfinkel v. Morristown Obstetrics & Gynecology Associates*, 333 *N.J. Super*. 291 (App. Div. 2000), the Court held that a physician could be compelled to arbitrate gender discrimination, tortious interference, and defamation claims arising from his termination. The Court found that the physician had knowingly entered into an employment contract calling for arbitration and clearly waiving statutory remedies.