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November 21, 2001

M E M O R A N D U M

TO: Commissioners

FROM: Bob Anderson
General Counsel

RE: Report on Developments in the Counsel's Office Since October 25, 2001

Commission Appeals

On November 1, 2001, we received two affirmances from the Appellate Division. Copies are
attached.

One opinion is in Jobeck v. Union Cty., App. Div. Dkt. No. A-0137-00T5, aff'g P.E.R.C. No. 2001-4, __ NJPER ___ (¶_____ 2001). The Commission concluded that the County had not discriminated against an employee because of her union activities. The Court found that there was sufficient credible evidence to support that conclusion so it affirmed without further discussion.

The other opinion is in Stefanelli v. Essex Cty. Voc. Schools Bd. of Ed. and PERC, App. Div. Dkt. No. A-6294-99T5 (10/30/01). This was an appeal from a letter of the Director of Arbitration declining to release a panel of grievance arbitrators at an individual employee's request. The Director concluded that the collective negotiations agreement did not clearly authorize an individual employee to demand arbitration; clear authorization for such a demand is required by D'Arrigo v. N.J. State Bd. of Mediation, 119 N.J. 74 (1990). The Court found that this conclusion was not arbitrary or capricious. Don Horowitz represented the Commission.

Appeals have been filed in Lumberton Ed Ass'n and Lumberton Tp. Bd. of Ed., P.E.R.C. No. 2002-13, 27 NJPER 372 (¶32136 2001) (holding that the employer committed an unfair practice by unilaterally adopting a policy prohibiting the stacking of family leaves after other leaves have been taken) and North Bergen Tp. Bd. of Ed. and North Bergen Fed. of Teachers,

Local 1060, P.E.R.C. No. 2002-12, 27 NJPER 370 (¶32135 2001) (holding that the Board violated N.J.S.A. 34:13A-25 when it transferred a switchboard operator in its central office to a secretarial position in a school for disciplinary reasons). In the North Bergen case, the Board has also asked the Appellate Division to stay, pending appeal, the Commission's order directing it to rescind the transfer.

Oral argument has been scheduled for December 12 in City of Newark and Association of Government Attorneys, D.R. No. 2000-11, 26 NJPER 234 (¶31094 2000), request for review denied, P.E.R.C. No. 2000-100, 26 NJPER 289 (¶31116 2000). The issue is whether the City's lower-level attorneys can form a negotiations unit.

Two cases will be submitted for decision. City of Gloucester and FMBA, Local No. 51, P.E.R.C. No. 2001-22, 27 NJPER 2 (¶32002 2000), will be submitted on November 27 to Judges Lintner and Parker. Irvington Bd. of Ed. and Irvington Ed. Ass'n, H.E. No. 2001-11, 27 NJPER 105 (¶32041 2001), will be submitted on December 12 to Judges King and Cuff.

Other Cases

The New Jersey Supreme Court has upheld the power of the Commissioner of Labor to award prejudgment interest on an award of damages in a wage-and-hour dispute over overtime payments. New Jersey Dept. of Labor v. Pepsi Cola Co., __ N.J. ___ (2001). The Court also held that the Commissioner was not required to act by regulation in order to assert the power to award prejudgment interest. PERC has long exercised that power in unfair practice cases, with the courts' approval.

An Appellate Division panel has affirmed an arbitration award denying a claim that an employer violated a contractual clause requiring that employees be allowed to bid by seniority for "consecutive days off." Division 822, ATU v. New Jersey Transit Bus Operations Inc., App. Div. Dkt. No. A-6912-99T5 (10/3/01). The Court concluded that the award was contractually supported by the management rights clause and thus reasonably debatable.

In re Lalama, 343 N.J. Super. 560 (App. Div. 2001), reversed a Merit System Board determination that the City of Paterson had not established a sufficient chain of custody for a urine sample used in a firefighter's drug test. The Court found no basis for rejecting an ALJ's finding, based in part on credibility determinations, that a sufficient chain had been proven. The Court also held that in an administrative proceeding, a party seeking to introduce drug test results need show only a "reasonable probability" that the integrity of the sample has been maintained. No particular form of evidence is required to establish the links in a chain of custody.

In Barron v. State Health Benefits Commission, 343 N.J. Super. 583 (App. Div. 2001), the Court held that a retired high school and college teacher could aggregate his membership in three state-administered pension systems - - PERS, ABP, and TPAF - - to determine whether he had worked the 25 years needed to receive SHBP medical coverage upon retirement. The SHBP had denied coverage. The Court could not "conceive of any reasonable legislative purpose that would be served by providing free medical coverage to a public employee who retires with

twenty-five or more years of service credit in a single retirement system but denying that benefit to an employee who retires with twenty-five years aggregate service in several systems, but less than that number of years in any single system." Id. At 587. The Court also noted that ordinarily public employees transferring from one retirement system to another also transfer their service credit; ABP participants, however, cannot transfer their credits.

In McLelland v. Moore, 343 N.J. Super. 589 (App. Div. 2001), the Court reviewed and applied the standards for determining whether to permit a trial of a CEPA claim. An employee must furnish a trial court with enough proof and legal basis to determine that a statute, rule, or public policy would have been violated if a jury were to find that the alleged conduct occurred. In this case, the Court found that a police officer did not have an objectively reasonable belief that the deputy police chief had illegally obtained a gun permit. Thus, the trial court should have dismissed his retaliation claim.

In Aparin v. Gloucester Cty., __ N.J. Super. ___ (Law Div. 2000), aff'd __ N.J. Super. ___ (App. Div. 2001), Judge Holston held that county park rangers were entitled under civil service law and DOP specifications to receive training approved by the Police Training Commission. The Court distinguished a PERC decision holding that Monmouth County park rangers were not park police oficers for purposes of being in a separate negotiations unit from non-police employees. Monmouth Cty., P.E.R.C. No. 88-10, 13 NJPER 647 (¶18244 1987), aff'd NJPER Supp.2d 192 (¶170 App. Div. 1988).

In Bello v. Lyndhurst Bd. of Ed., 344 N.J. Super. 187 (App. Div. 2001), the Court upheld a trial court order granting summary judgment to a school board accused of having terminated a secretary in retaliation for her political activity. The Court found insufficient evidence to support a finding that hostility towards her political activity was a substantial or motivating factor in her termination. The Court also held that N.J.S.A. 18A:27-4.1 entitles a terminated employee to appeal to the Board and make an informal appearance, but does not create a private cause of action to contest the merits of a termination in court.

In Gonzalez v. State-Operated School Dist. of the City of Newark, __ N.J. Super. ___ (App. Div. 2001), the Court held that certain administration employees who were terminated after the state-operated school district was created were not entitled to back pay under N.J.S.A. 18A:7A-44. These employees served at-will and were terminated before a reorganization abolishing their positions. Thus, the employees did not lose their employment as a result of the abolition of their positions, as required for payment under N.J.S.A. 18A:7A-44.