STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PO Box 429
TRENTON, NEW JERSEY 08625-0429

ADMINISTRATION/LEGAL
(609) 292-9830
CONCILIATION/ARBITRATION
(609) 292-9898
UNFAIR PRACTICE/REPRESENTATION
(609) 292-6780

For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089

July 18, 2002

M E M O R A N D U M

TO: Commissioners

FROM: Bob Anderson
General Counsel

SUBJECT: Report on Developments in the Counsel's Office Since June 27, 2002

Commission Cases

An Appellate Division panel has affirmed in part and reversed and remanded in part the Commission's decision in Teaneck Tp. and Teaneck FMBA Local No. 42, PERC No. 2000-33, 25 NJPER 450 (¶ 30199 1999), aff'd in part, rev'd and remanded in part, App. Div. Dkt. No. A-001850-99T1 (7/16/02) (included as Item #13B in packet). The Court agrees with the Commission that the Director of Arbitration properly accepted the withdrawal of the first interest arbitrator appointed to the case. It also agrees that the record supported the second interest arbitrator's award of an EMT stipend and adds that the Township was barred from contesting the negotiability of that issue since it did not file a scope-of-negotiations petition before arbitration. The Court also agrees with the Commission that the FMBA's proposal of a 24/72 work schedule for firefighters was mandatorily negotiable and that the record supported awarding that schedule on a trial basis. However, it disagrees with the Commission's modification of the award to delay implementation of the 24/72 schedule for firefighters until that schedule is also adopted for superior officers. The Court accepts the Commission's guidelines for analyzing the Township's supervision concerns, but holds that the Commission should not have modified the award itself. Instead, the Court remands the case to the Commission to "succinctly articulate its new guideline regarding impairment of supervision and to remand to the same arbitrator for evaluation of proofs and factual findings in light of PERC's standards."

This is an important decision and Supreme Court review may be sought.

Judges King and Wefing have denied the employer's motion for a stay of the interest arbitration award upheld in City of Clifton and Clifton FMBA Local 21, PERC No. 2002-56, 28 NJPER 201 (¶33071 2002), stay denied, PERC No. 2002-74. Like Teaneck, that award granted a 24/72 hour work schedule for firefighters on a trial basis. That award must now be implemented while the appeal goes forward.

An Appellate Division panel has affirmed Carroll v. ATU, Local 880 and New Jersey Transit, PERC No. 2001-48, 27 NJPER 128 (¶ 32048 2001), aff'd App. Div. Dkt. No. A-3908-00T2 (7/08/02) (copy attached). A former NJT ticket taker, discharged for failure to deposit and account for company funds, filed an unfair practice charge against NJT and ATU, her majority representative. She asserted that after she was acquitted of related criminal charges, NJT was contractually obligated to reinstate her and ATU was required to pursue a grievance seeking reinstatement. The Commission dismissed the Compliant and the Court affirmed, finding no merit to the contractual claim and no point in pressing a grievance given that determination. The Court's opinion assumes that ATU based its refusal to press the grievance solely on a perceived lack of timeliness, but its attorney also asserted that ATU did not agree with the grievant's claim.

Commission Statute and Regulations

The Legislature has passed a bill (copy attached) amending the representation fee provisions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.5 and 5.6. This bill entitles a majority representative to have representation fees deducted from nonmembers' paychecks if the majority of the employees in the negotiations unit are voluntary dues paying members of the majority representative and a valid demand and return system is in place. The Commission is charged with conducting an investigation to determine if these conditions exist and with ordering deductions if they do.

The Governor has issued Executive Order No. 21. That order implements proposed regulations under the Open Public Records Act pending completion of the rulemaking process on the OPRA exemptions sought by DOL and other agencies.

Other Cases

Attached is an Appellate Division decision upholding the contractual arbitrability of custodians' grievances contesting their non-renewals. Camden Bd. of Ed. v. Alexander, App. Div. Dkt. No. A-6789-00T1 (6/28/02) (to be published). The collective negotiations agreement had a broad arbitration clause covering all contractual disputes. It had a just cause clause, but no clauses expressly addressing tenure, non-renewal of employment contracts, or arbitration of non-renewals. The custodians received letters threatening disciplinary action, including the possibility of non-renewal. The Court concludes that the custodians may arbitrate their non-renewals under a just cause clause if they can prove that their contracts were not renewed for disciplinary reasons. If an employee can't make such a showing, then the case is at an end. If an employee can make such a showing, an arbitrator can then determine if there was just cause for a non-renewal.

The Committee of Opinions has approved for publication the attached decision of Chancery Judge Fisher in Middletown Tp. Bd. of Ed. v. Middletown Tp. Ed. Ass'n, __ N.J. Super. ___ (Ch. Div. 2001). The opinion explains the Court's order jailing striking teachers rather than firing them. The Court reaffirms the common law prohibition against public employee strikes.

In BE&K Construction Co. v. NLRB, __ U.S. ___ (2002), the United States Supreme Court reversed an NLRB decision holding that an employer violated the LMRA by filing a reasonably based, but ultimately unsuccessful lawsuit against a union. Given the constitutional right to petition courts for the redress of grievances, the employer's retaliatory motive for filing the lawsuit was not a basis for finding a violation.

In Elliott-Marine v. Campanella, 351 N.J. Super. 135 (App. Div. 2002), the parties agreed to arbitrate a wrongful-death action. The plaintiff won and then moved to confirm the award, seeking prejudgment interest. The Court held that the plaintiff could not pursue prejudgment interest in a confirmation action when that claim had not been submitted to arbitration. It stated:

> This is particularly true in view of the purpose of, and public policy behind, arbitration - - to promote and encourage a voluntary, alternative method of resolving disputes in a given legal controversy in a single forum, in an efficient, expeditious, relatively inexpensive, and less formal manner that relieves our overburdened judicial resources. Id. at 143.

In Shtab v. Sands Casino Hotel, App. Div. Dkt. No. A-3889-99T5 (5/30/02), an Appellate Division panel held that a grievance arbitration award finding just cause to break an employee's seniority was not entitled to preclusive effect in the employee's lawsuit claiming that the employer violated his rights under the Family Leave Act. The employee was not a party to the arbitration, which was controlled by the union and the employer; the issue was somewhat different; and the award was not confirmed. The Court also ruled that the Division on Civil Rights violated the employee's rights by considering information suppressed by the employer without giving the employee copies of that information or an opportunity to respond.

In IFPTE, Local 196 v. New Jersey Highway Authority, App. Dkt. No. A-6679-00T5 (6/24/02), an Appellate Division panel affirmed a trial court order dismissing a motion to vacate a grievance arbitration award in management's favor. The parties had a dispute over the meaning of this contractual clause: "Retirees will carry into retirement the same coverage they had prior to retirement." Both sides agreed that "coverage" meant the amount and extent of the risk covered; but the union believed that the clause addressed "the economics of the insurance" while the employer argued that the clause addressed the "type or kind of plan." The arbitrator found the clause ambiguous, considered past practice, and interpreted the provision in a reasonably debatable way. The Court thus upheld the award.

Attachments