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January 23, 2003

MEMORANDUM

TO: Commissioners

FROM: Bob Anderson  
General Counsel

SUBJECT: Report on Developments in the Counsel's Office Since December 19, 2002

Commission Cases

Attached is an Appellate Division decision affirming Wall Tp. and Wall Tp. PBA Local 234, P.E.R.C. 02-22, 28 NJPER 19 (¶33005 2001), aff'd App. Div. Dkt. No. A-1640-01T2 (1/6/03). The Commission declined to restrain binding arbitration of a grievance asserting that the employer violated an agreement to promote police officers in the order set by a promotional list based on criteria unilaterally established by the employer. The Court affirmed substantially for the reasons set forth in the Commission's decision and added that the employer's contentions raised contractual issues for the arbitrator rather than negotiability defenses.

\_\_\_\_\_ The Appellate Division has dismissed the appeal in City of Clifton and Clifton FMBA Local 21, P.E.R.C. No. 2002-56, 28 NJPER 201 (¶33071 2002), P.E.R.C. No. 2002-74. The Court based its dismissal on the City's failure to prosecute the appeal. The Commission had affirmed an interest arbitration award of a 24/72 hour work schedule.

\_\_\_\_\_ Other Cases

In State v. Williams, 355 N.J. Super. 579 (App. Div. 2002), a police officer was convicted of fourth degree aggravated assault for pointing a gun in the direction of another person under circumstances manifesting extreme indifference to human life. Reversing the lower court, an Appellate Division panel held that the conviction resulted in the forfeiture of the officer's employment under N.J.S.A. 2C:51-2a(2) because the misconduct involved or touched upon the officer's public office. The lower court had stressed that the conduct occurred when the

officer was off duty and on sick leave, “miles away from Bayonne” and “in his own vehicle with his wife and child”; but the Appellate Division stressed instead that Williams had identified himself as a police officer and had displayed and pointed his service revolver.

In Brown v. State of New Jersey (Dept. of Treasury), 356 N.J. Super. 71 (App. Div. 2002), the Court upheld the constitutionality of an amendment to N.J.S.A. 43:16A-7, a provision of the Police and Firemen’s Retirement System laws. The amendment enhanced retirement benefits for PFRS members who retired on accidental disability on or after April 1, 1991. Plaintiffs were pre-1991 retirees who challenged their exclusion from this benefit as special legislation and a violation of equal protection, but the Court found that the Legislature rationally provided an increased benefit to some retirees while protecting the fiscal integrity of the system.

In re Dreyer, \_\_\_ N.J. Super. \_\_\_ (App. Div. 2002), held that in Civil Service communities, volunteer firefighters who apply for paid firefighting positions do not have an absolute preference over non-volunteers. While they are granted service credits based on their years of volunteer firefighting, the firefighter’s credits in this case were insufficient to give him preference over non-volunteers who scored higher on the Civil Service examination.

In New Jersey State Council v. New Jersey Transit Bus Operations, Inc., App. Div. Dkt. No. A-1035-01T2 (12/10/02), an Appellate Division panel upheld an arbitration award denying a grievance in which the union claimed that an employee should have received disability benefits and vacation pay simultaneously. The contract did not clearly require double payments so the arbitration panel properly relied upon an unequivocal past practice of denying double payments.

In Pascack Valley Reg. H.S. Dist. Bd. of Ed. v. Pascack Valley Reg. Support Staff Ass’n, App. Div. Dkt. No. A-1313-01T5 (11/14/02), an Appellate Division panel restrained arbitration of a grievance contesting a custodian’s dismissal and the non-renewal of her contract. In April 2000, the custodian received a notice of unsatisfactory service for not following her supervisor’s directions. In May 2000, she was notified that her contract would not be renewed for the next year and that she should stop working immediately, although she would be paid until the end of the year. She grieved the notice of unsatisfactory service and claimed that the notice resulted in her wrongful discharge. The Board denied the grievance and the Association sought arbitration. Relying on Marlboro Tp. Bd. of Ed. v. Marlboro Tp. Ed. Ass’n, 299 N.J. Super 283 (App. Div. 1997), certif. den., 151 N.J. 71 (1997), the Appellate Division restrained arbitration and observed that the rights of a disciplined employee should rise no higher than those of a similarly situated faultless employee who had no right to a renewed contract.

In Cosgrove v. Cranford Bd. of Ed., \_\_\_ N.J. Super. \_\_\_ (App. Div. 2002), the Court dismissed a CEPA claim filed by a custodian who asserted he was discharged for grieving the allocation of overtime assignments. The Court reasoned that a complaint regarding overtime distribution concerns a personal harm rather than the public harm required by CEPA. Further, the strong public policy against anti-union discrimination is immaterial to this CEPA case because the plaintiff’s complaint is about the alleged unfair distribution of overtime, not the

procedure for filing complaints through his union.

In Pukowsky v. Egg Harbor Tp. Bd. of Ed., App. Div. Dkt. No. A-0789-02T2 (11/22/02), a payroll supervisor retired and sought payment for unused sick leave days. She had worked in the central office and was not in a negotiations unit, but the Board apparently had a policy of paying central office employees the same benefits as employees covered by the best negotiated contract. That policy would have entitled the payroll supervisor to compensation for unused sick days at a 60% rate (about \$28,000), but after she announced her retirement, the Board adopted a new policy capping reimbursement at \$5,000. The trial court upheld the employee's implied contract claim as did the Appellate Division. The Court rejected contentions that the Board could not be bound by an implied contract or the "ad hoc decisions" of prior boards.

In Grainger v. State of New Jersey, App. Div. Dkt. No. A-1257-01T1 (11/14/02), the Court upheld a summary judgment dismissing a CEPA claim filed by a temporary employee in the human resources office of the Ocean County court vicinage. After her temporary employment ended, the plaintiff unsuccessfully sought to obtain several court clerk positions. She claimed that she did not obtain these positions because she had upheld employee claims to FMLA benefits after they had initially been denied. The Court, however, found no basis for a CEPA claim, reasoning in part that "failure to obtain prospective employment does not appear to constitute adverse action under CEPA" and that CEPA did not protect reporting the miscalculation of leave benefits to her supervisor.

An appeal has been filed by the Port Authority Police Detectives Endowment Association from a decision of Judge Jonathan Harris of the Superior Court in Bergen County. In re Alleged Improper Practice under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction, IP-00-02, Dkt. No. L-3412-02. Judge Harris affirmed a decision of the Port Authority Employment Relations Panel dismissing an improper practice charge filed by the DEA. The charge alleged that the Authority violated the parties' memorandum of agreement by not paying out-of-zone premium payments to a detective assigned to a special detail.

REA:aat