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

February 20, 2003

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 January 30, 2003

Commission Cases

The City of Clifton has moved to have its appeal reinstated in City of Clifton and Clifton FMBA Local 21, P.E.R.C. No. 2002-56, 28 NJPER 201 (¶33071 2002). The Court had dismissed the appeal for failure to prosecute. The City is also moving to have the appeal held in abeyance while the Supreme Court considers the negotiability of the 24/72 hour work schedule in Teaneck Tp. and FMBA Local No. 42, 353 N.J. Super. 289 (App. Div. 2002), certif. granted __ N.J. ___ (2002).

An appeal has been filed in Essex Cty. and JNESO, Dist. Council1, IUOE, P.E.R.C. No. 2003-42, __ NJPER ___ (¶_____ 2003), app. pending. The Commission dismissed an unfair practice charge alleging that the employer violated the Employer-Employee Relations Act by permitting an individual employee to choose to be represented by his attorney rather than the majority representative at a pre-disciplinary departmental hearing. The Commission concluded that the Civil Service Act entitled a civil service employee to choose to be represented by an attorney at a hearing involving major discipline charges.

Other Cases

The New Jersey Supreme Court has granted a petition for certification and a cross-petition for certification in Camden Bd. of Ed. v. Alexander, 352 N.J. Super. 442 (App. Div. 2002), certif. granted, 175 N.J. 77 (2002). The Appellate Division held that custodians could arbitrate the non-renewals of their contracts under a just cause clause if they could prove that their contracts were not renewed for disciplinary reasons. If they could do so, the arbitrator could then determine if there was just cause for non-renewal.

In Silvestri v. Optus Software, Inc., __ N.J. ___ (2003), the New Jersey Supreme Court upheld a grant of summary judgment to a computer company sued by an employee terminated "for failure to perform to the company's satisfaction" as required by the employment contract. The majority held that, absent language to the contrary, termination may be based on the employer's subjective assessment of its personal satisfaction so long as the assessment is honest and genuine. Justice Zazzali's dissenting opinion would have adopted an objective standard for assessing a termination absent express language authorizing a subjective assessment.

In Leodori v. Cigna Corp., __ N.J. ___ (2003), our Supreme Court held that a provision in an employee handbook requiring employees to arbitrate all employment-related claims could not be enforced against the plaintiff, an in-house lawyer. The provision was unambiguous, but the lawyer had not actually agreed to be bound by that provision. He had not signed the "Employee Handbook Receipt and Agreement" form and the record did not otherwise unmistakably show that he had agreed to the arbitration provision.

In O'Lone v. Department of Human Services, __ N.J. Super. ___ (App. Div. 2003), the Court held that the Merit System Board improperly denied the back pay claim of a career service employee whose removal was reduced to a suspension. The MSB denied the claim because the employee had not sought substitute employment, but the Court held that the MSB had to determine whether the employee could have found suitable substitute employment if he had diligently searched for it. The Court sets out the evidentiary burdens applicable to a back pay claim in a Civil Service case where an employee's misconduct justifies some discipline but not removal. Such cases differ from cases under the Law Against Discrimination where it is the employer's misconduct that caused the unemployment in the first place. In the latter type of case, the employer bears that burden of proving that the employee failed to mitigate damages.

REA:aat