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April 17, 2003

M E M O R A N D U M

TO: Commissioners

FROM: Robert E. Anderson
General Counsel

SUBJECT: Report on Developments in the Counsel's Office Since March 27, 2003

Commission Cases

The Supreme Court has granted the application of the State FMBA to file an amicus curiae brief in Teaneck Tp. and FMBA Local No. 42, P.E.R.C. No. 2000-33, 25 NJPER 450 (¶30199 1999), aff'd in pt., rev'd in pt. and rem'd in pt., 353 N.J. Super. 289 (App. Div. 2002), certif. granted 175 N.J. 76 (2002). The State FMBA, however, must retain a different law firm to represent it than the one that represents the FMBA local.

In City of Clifton and Clifton FMBA Local 21, P.E.R.C. No. 2002-56, 28 NJPER 201 (¶33071 2002), stay pending app. den. P.E.R.C. No. 2002-74, 28 NJPER 254 (¶33097 2002), App. Div. Dkt. No. A-4573-01T2, the Commission upheld an interest arbitration award granting firefighters a 24/72 work schedule. The City appealed that decision to the Appellate Division while the FMBA began an enforcement action in Passaic County Superior Court. The parties have now settled and withdrawn these actions.

The Counsel's Office has initiated an enforcement action in Irvington Bd. of Ed. and Irvington Ed. Ass'n, H.E. No. 2003-9, 28 NJPER 560 (¶33174 2002), made final on December 30, 2002. The agency had ordered the employer to provide the majority representative with information relevant to processing grievances and administering the parties' collective negotiations agreement.

An appeal has been filed in State of New Jersey (Dept. of Human Services and CWA), P.E.R.C. No. 2003-56, __ NJPER ___ (¶_____ 2003). The Commission dismissed as untimely the part of CWA's unfair practice charge asserting that the employer illegally removed four doctors from its negotiations unit and reduced their compensation, hours and benefits. CWA has appealed that ruling. The Commission also held that the employer violated the Act when it did not provide CWA with requested information concerning the doctors' current employment status. The employer has not cross-appealed that ruling.

An appeal has been filed by the employer in Franklin Tp. Bd. of Ed. and Franklin Tp. Ed. Ass'n, P.E.R.C. No. 2003-58, __ NJPER ___ (¶_____ 2003). The Commission restrained arbitration of a grievance to the extent it sought to have the Board maintain class size, but denied a restraint to the extent the grievance sought to have the Board pay extra compensation to the teachers having to teach extra students above the limits set by the State's special education code.

Other Cases

The New Jersey Supreme Court has upheld the discharge of a police officer for violating a "last chance" agreement. Watson v. City of E. Orange,175 N.J. 442 (2003), aff'g 358 N.J. Super. 1 (App. Div. 2001). The officer had been suspended for 90 working days for firing his service revolver on a college campus and the last chance agreement conditioned the officer's continued employment on enrolling in an alcohol recovery program that was mutually acceptable to the employer and the employee. The agreement further provided that the employer would determine in its sole discretion whether these conditions had been met. Despite his supervisor's directive, the officer did not enroll in a program until 15 days before his suspension ended and the record did not show that he completed the program. Four Supreme Court Justices concluded that the last chance agreement gave the employer the discretion to discharge the officer for not completing the recovery program during the 90 day suspension. Three Justices disagreed. They concluded that the agreement required the police officer to enroll in the recovery program, but not to complete it during the suspension and that the suspension could be extended until he did. The dissenting justices would have found that the agreement was unambiguous in not requiring completion of the program during the 90 day suspension.

In Debell v. Bd. of Trustees, PERS, 357 N.J. Super. 461 (App. Div. 2003), the Court held that the constitutional prohibition against double jeopardy is not violated by a statute requiring the forfeiture of a public employee's pension given a criminal conviction related to public employment. Further, such forfeitures are exempt from IRS and ERISA vesting requirements unless the pension plan itself is terminated by the State.

In McDevitt v. Bill Good Builders, Inc. 175 N.J. 519 (2003), the Supreme Court reversed a summary judgment in the employer's favor in an age discrimination case. The plaintiff asserted that the employer's president nodded his head in response to his secretary's telling another employee that the plaintiff had been terminated because he was "too old." The Court concluded that the nodding may have constituted an "adoptive admission" by the president. Further, the Court found that this nodding may have constituted "direct evidence" of discrimination sufficient (if credited) to shift the burden to the employer to prove that it would

have terminated the plaintiff even if a discriminatory motive had not been present. The Court stressed that the adoptive admission (if it occurred) was made by the ultimate decisionmaker himself while executing the adverse action (his secretary was typing the termination letter); that it bore directly on the motivation for the termination; and that it directly communicated proscribed animus as the reason for plaintiff's termination. Id at 332.

In Spinetti v. Service Corp. Int., ___F.3d___(3d Cir. 2003), the Third Circuit Court of Appeals held that an agreement to arbitrate employment discrimination claims was enforceable even though it contained illegal clauses requiring the employees to bear their own costs and attorneys' fees regardless of the outcome of the arbitration and to pay one-half of the arbitrator's compensation. The Court held that the first clause violated federal statutes entitling prevailing parties in employment discrimination cases to recover costs and attorneys' fees and that the second clause as applied to the plaintiff effectively made access to arbitration prohibitively expensive. Nevertheless, the Court, applying the federal policy favoring arbitration and Pennsylvania contract law, concluded that the clauses could be severed from the agreement to arbitrate and that plaintiff therefore had to arbitrate her termination claim.

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