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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 November 17, 2003

Commission Cases

Judge Passero of the Superior Court in Passaic County has denied a motion to hold the City of Passaic in contempt of Judge Passero's order enforcing an interim relief order of a Commission designee. City of Passaic and Passaic City PBA Local No. 14, I..R. No. 2004-2, 29 NJPER 310 (¶96 2003), enforced Law Div. Dkt. No. 3673-03 (9/19/03). The interim relief order required the City to restore the previous work schedule for police officers pending completion of unfair practice proceedings. The City restored the work schedule, but according to the PBA did not follow the ususal practice of shift bidding by seniority. Judge Passero held that the interim relief order did not address shift bidding.

In City of Newark and Police Superior Officers Ass'n., P.E.R.C. No. 2003-68, 29 NJPER 121 (¶38 2003), appeal pending App. Div. Dkt. No. A-004617-02T2, the Commission declined to restrain arbitration of a grievance asserting that the parties' indemnification clause required the City to pay a civil judgment for compensatory damages against a police officer. Judge Kenneth Levy of the Chancery Division of the Superior Court has confirmed an arbitration award in the police officer's favor and has rejected an argument that the award violated public policy. The City has appealed Judge Levy's ruling and the Appellate Division will consider both that appeal and the appeal of the Commission's scope determination at the same time.

The New Jersey School Boards Association has been granted leave to file an amicus curiae brief and the New Jersey Education Association has requested leave to do so in Franklin Tp. Bd. of Ed. and Franklin Tp. Ed. Assn., P.E.R.C. No. 2003-58, 29 NJPER 97 (¶27 2003), app. pending App. Div. Dkt. No. A-4242-02T3. The Commission declined to restrain arbitration to

the extent a grievance sought extra compensation under an emergency class coverage clause for a teacher required to teach a combined class of third and fifth special education students numbering more than the maximum allowed by the special education code.

Other Cases

The Union of Automotive Technicians, Local 563 is petitioning for certification in In re Alleged Improper Practices Under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction, IP 98-16, 17 & 1P 9-2, App. Div. Dkt. No. A-1160-02T5 (10/31/03). The Appellate Division held that the Authority did not commit an unfair practice when it invoked a "second chance" agreement and discharged an automotive mechanic for testing positive on a drug test for a third time.

An Appellate Division panel has vacated a grievance arbitration award dismissing disciplinary charges as untimely. In re Arbitration Between FOP Lodge #97 and Gloucester Cty. Sheriff's Office, 2003 N.J. Super. LEXIS 349 (App. Div. 2003). The parties' contract required that a disciplinary hearing " be conducted within thirty (30) days after service of charge." The arbitrator relied on that clause plus the parties' past practice to dismiss charges brought 45 days after the charge was served; the hearing was scheduled within the 30 day period but was postponed because the lieutenant bringing the charges had to undergo surgery and was not rescheduled until after the period elapsed because the hearing officer was on vacation. Relying on N.J.S.A. 40A:14-147 and In re Charles Frey, 160 N.J. Super. 140 (App. Div. 1978), the Court held that the arbitrator's award violated public policy and that the arbitrator should have construed the contract to grant the hearing officer discretion to grant reasonable postponements. "The public policy to provide a reasonably prompt hearing before any suspension was upheld. But the public policy to dispose of disciplinary charges against those entrusted with insuring the public safety was thwarted" (Slip. opinion at 9).

In Middletown Tp. v. McGowan, App. Div. Dkt. No. A-6281-01T3 (10/24/03), an Appellate Division panel restrained arbitration of an employee's claim that he was a permanent employee and should not have been discharged as a temporary employee. The Merit System Board had previously ruled that the employee was temporary under the Civil Service scheme and the Court relied upon that ruling in restraining arbitration.

In Saquar v. Townley Sweeping Service, Inc., App. Div. Dkt. No. A-1061-02T3 (10/23/03), two private sector employees filed a wrongful discharge action, asserting that they were discharged in retaliation for their union organizing. An Appellate Division panel held that this claim was preempted by the NLRA and had to be brought as an unfair labor practice charge before the NLRB. It rejected plaintiff's assertion that N.J. Const., Art. I, ¶19 warranted an exception to the federal preemption doctrine and reasoned that establishing such an exception would swallow the preemption rule.

In Strong v. Essex Cty., Office of the Essex Cty. Prosecutor, App. Div. Dkt. No. A-1516-02T3 (11/05/03), the Court held, in part, that an Assistant Prosecutor taking a family leave under N.J.S.A. 34:11 B-1 was not entitled to be restored to a particular unit within the Prosecutor's office after the leave and was simply entitled to return to the position of Assistant Prosecutor. The Court was concerned about limiting a Prosecutor's flexibility to fill emerging needs.

In Winslow v. Corporate Express, Inc., 2003 N.J. Super. LEXIS 331 (App. Div. 2003), a sales representative asserted that his employer illegally reduced his compensation by changing the method of calculating commissions without giving the representative prior notice of the change. The representative asserted that the reduction in compensation without notice violated the Wage Payment Act, N.J.S.A. 34:11-4.1 et seq., and other statutes and breached an implied contract. The Court held that the Wage Payment Act authorized a private cause of action for this alleged notice violation and that the parties' previous course of dealing concerning the calculation of commissions would permit a trier of fact to find an implied contract. See Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208, 221 (1979).

In Bennett v. City of Atlantic City, 2003 U.S. Dist. LEXIS 19356 (D. N.J. 2003), firefighters and unsuccessful applicants sued the Department of Personnel, the Merit System Board, Atlantic City, and the City's fire chief. The suit alleged racial discrimination in hiring and promotion. Judge Irenas of the New Jersey District Court held that the Eleventh Amendment to the United States Constitution immunized DOP and the MSB from suit, but not the City or fire chief.

In State v. Pavlik, 363 N.J. Super. 307 (App. Div. 2003), the Court held that a laborer in Brick Township's Department of Public Works was not required to forfeit his employment as a result of his convictions for assault, criminal mischief, and harassment arising from a violent domestic dispute with his grandfather. The Court found that the convictions did not involve or touch upon his job since there was no nexus between the misconduct and his work as a laborer.

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