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May 20, 2004

MEMORANDUM

TO: Commissioners

FROM: Robert E. Anderson
General Counsel

SUBJECT: Report on Developments in the Counsel's Office Since April 29, 2004

Commission Cases

_____The Appellate Division has affirmed the Commission's decision in City of Trenton and Trenton Superior Officers Association, P.E.R.C. No. 2002-70, 28 NJPER 243 (¶33092 2002), aff'd __ NJPER __ (¶__ 2004), App. Div. Dkt. No. A-005865-01T3 (5/20/04) (copy attached). The Commission dismissed unfair practice charges asserting, in part, that the City discriminated against Joseph Constance for his activity as a TSOA official when it refused to promote him to acting police chief. The Court affirmed for the reasons stated in Hearing Examiner Roth's report and the Commission's decision.

_____The employer has appealed the Commission's decision in Piscataway Tp. and Piscataway Tp. PBA Local 93, P.E.R.C. No. 2004-72, __ NJPER __ (¶__ 2004). The Commission held that certain provisions of a promotional testing process were mandatorily negotiable. The mandatorily negotiable issues include the order of components in the process (e.g. written exam and oral interview) and withholding the results of the written exam until all parts of the process are completed.

_____The employer has appealed the Commission's decision in Rutgers, The State University and Rutgers Council of AAUP Chapters, P.E.R.C. No. 2004-64, __ NJPER __ (¶__ 2004), app. pending. The Commission held that certain portions of the University's patent policy were mandatorily negotiable and other portions of the policy were not mandatorily negotiable.

_____The Appellate Division has granted the Attorney General’s motion to appear as an amicus curiae in Raritan Valley Community College and Raritan Valley Community College Staff Federation/AFT Local 4143, P.D.D. No. 2004-4, 29 NJPER 404 (¶133 2003), app. pending, App. Div. Dkt. No. A-001319-03T5. The Attorney General will defend the constitutionality of the representation fee statute, as amended in 2002 to permit deductions of fees under certain conditions absent a negotiated agreement. N.J.S.A. 34:13A-5.5. The issue in this appeal is the same one as in a case argued before the Appellate Division on April 26, Hunterdon Cty. and CWA Local 1034, P.E.R.C. No. 2003-24, 28 NJPER 433 (¶33159 2002), app. pending, App. Div. Dkt. No. A-001869-02T5._____

Other Cases

_____In Maw v. Advanced Clinical Communications, ___ N.J. ___ (2004), rev’g 359 N.J. Super. 420 (2003), the Supreme Court held that the Conscientious Employee Protection Act did not apply to a retaliatory discharge action filed by an employee who was terminated for refusing to execute an employment agreement containing a do-not-compete provision. The Court held that such a discharge would not violate a “clear mandate of public policy concerning public health, safety or welfare or protection of the environment.” The majority adopted Judge Cuff’s dissenting opinion below, 359 N.J. Super. at 442-448, and added its own analysis of the “clear mandate” language. Justice Zazzalli wrote a dissenting opinion, joined by Justice Long.

___ In 2002, the Legislature enacted a law, N.J.S.A. 53:1-33, prohibiting the removal or suspension of state troopers without just cause. The law also required dismissal of any charge alleging an internal rule violation if not brought within 45 days of the date on which a complainant obtained sufficient information to file a complaint, and it entitled a trooper to a hearing within 30 days of the service of a complaint. In Division of State Police v. Trooper Bryce Maguire, Badge No. 5476, ___ N.J. Super. ___ (App. Div. 2004) the Court considered this statute in reviewing the Superintendent’s determination, based on a department hearing officer’s findings of fact, that a trooper should be suspended for 15 days for an off-duty road rage incident. The Court held that the complaint was timely filed within 45 days of when the Superintendent received the investigative report, even though the incident occurred more than 100 days before that filing. However, the Court also held that summary discipline proceedings involving suspensions of between 5 and 30 days are contested cases that must be heard by OAL judges rather than state police hearing officers. The Court therefore remanded for a new summary disciplinary hearing before an ALJ.

In Innella v. State of New Jersey (Division of State Police), App. Div. Dkt. No. A-5196-02T2 (5/4/04), an Appellate Division panel held that state troopers must appeal reprimands and accompanying minor suspensions (five days or less) to the Appellate Division rather than the Law Division. The troopers had challenged the reprimands and suspensions as allegedly violating their rights to prompt complaints and hearings under N.J.S.A. 53:1-33, but the Court held that their complaint really sought to reverse the decisions of the Division of State Police. The Court then reviewed the matter as if it had been brought to the Appellate Division directly

and concluded that the Division's decision was not final because the troopers could still pursue grievances or civil service remedies.

In Strickland v. Gloucester Cty., App. Div. Dkt. No. A-4366-02T1 (4/14/04), and Lindsay v. Gloucester Cty., App. Div. Dkt. No. A-4368-02T1 (4/14/04), the Court held that the County was entitled to summary judgment in actions where two former employees sought lump sum payouts of their accumulated, unused sick leave. One employee was laid off after 18 years of employment; the other employee was laid off after 9 years of employment. The collective negotiations agreement covering them provided that "upon retiring on pension, an employee shall be eligible for a one-time supplemental payment based on the number of unused sick days remaining to the employee's credit." The trial court granted summary judgment to the employees, finding that the agreement's ambiguous silence as to non-retirees should be construed as granting them a right to compensation for unused sick leave. The Appellate Division panel disagreed, concluding that the agreement plainly limited this benefit to retirees. The panel recognized that employee compensation upon termination is mandatorily negotiable under N.J.S.A. 34:13A-5.3 unless preempted.

In Fields v. Thompson Printing Co., Inc., F.3d ___, 21 IER Cases 149 (3d Cir. 2004), the Third Circuit Court of Appeals rejected a contention that public policy would be violated if a former corporate executive continued to receive contractual payments of salary and benefits after his discharge over allegations of sexual harassment. The allegations were settled out of court so the executive had not been found guilty of harassment and the contract did not contain a clause requiring forfeiture of salary or benefits given a termination for cause.

REA:aat
Attachment