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M E M O R A N D U M

TO: Commissioners

FROM: Robert E. Anderson
General Counsel

SUBJECT: Monthly Report on Developments in the Counsel's Office Since June 24, 2004

Commission Cases

Affirmances

The Commission received affirmances in three appeals.

The Commission's decisions in two companion cases were affirmed in one Appellate Division opinion. Morris Cty. and Morris Council No. 6, NJCSA, IFPTE, AFL-CIO, P.E.R.C. No. 2003-22, 28 NJPER 421 (¶33154 2002), App. Div. Dkt. No. A-000837-02T1 and Morris Cty. and CWA Local 1040, AFL-CIO, P.E.R.C. No. 2003-32, 28 NJPER 456 (¶33168 2002), App. Div. Dkt. No. A-001575-02T3, aff'd 2004 N.J. Super. LEXIS 319 (App. Div. 2004) (copy attached). In both cases, the Court agreed with the Commission that majority representatives were entitled to receive the home addresses of negotiations unit employees in order to communicate with them about negotiations and grievances. The record reflected no objections to disclosure by unit members, no reasonable basis for a fear of harassment or disclosure of the list to third parties, and no special confidentiality considerations that would outweigh the unions' fundamental need for the addresses in order to represent employees.

The third affirmance was in Middlesex Cty. Sheriff and Eckel, P.E.R.C. No. 2003-4, 28 NJPER 308 (¶33115 2002), aff'd App. Div. Dkt. No. A-000057-02T2 (7/8/04) (copy attached). The Commission held that the Sheriff and the County violated the Act by transferring a sheriff's

officer from a courtroom post to the probation department and by suspending the officer for ten days in retaliation for his discussing working conditions with co-employees and supporting the FOP. The officer improperly left his post, but the length of the suspension was motivated in part by hostility towards protected activity and thus had to be reduced and the transfer was also a punitive response to protected activity and thus had to be rescinded. Don Horowitz represented the Commission on appeal.

Petitions for Certification

Petitions for certification have been filed in five cases where the Appellate Division affirmed Commission decisions. The first three cases are the two Morris Cty. Cases and the Middlesex Cty. Sheriff case described in the preceding section of this report.

The fourth case is Hunterdon Cty. and CWA Local 1034, P.E.R.C. No. 2003-24, 28 NJPER 433 (¶33159 2002), aff'd 2004 N.J. Super. LEXIS 194 (App. Div. 2004). The petition is limited to whether N.J.S.A. 34:13A-5.5, permitting deduction of representation fees absent a negotiated agreement, is constitutional. The Appellate Division held it was. The Commission took no position on that question in its opinion or in its appellate brief.

The last case is Franklin Tp. Bd. of Ed. v. Franklin Tp. Ed. Ass'n, P.E.R.C. No. 2003-58, 29 NJPER 97 (¶27 2003), aff'd App. Div. Dkt. No. A-4242-02T3 (6/10/04). The Commission declined to restrain arbitration of a grievance seeking extra compensation under an emergency class coverage clause for a special education teacher required to teach a combined class of third and fifth grade students. The Commission restrained arbitration over the decision to combine the two classes into one. The Court agreed with the Commission's application of the balancing test to the facts and narrow issue presented.

Other Appeals

The Appellate Division granted a motion to permit the filing of a notice of appeal nunc pro tunc in Middletown Tp. and Middletown Tp. PBA Local 124, I.R. No. 2004-12, 30 NJPER 84 (¶30 2004), enforced Dkt. No. C-115-04. The interim relief order appealed from has already been enforced by Judge Lehrer of the Monmouth County Superior Court and the Township has complied with it. The parties have since settled the underlying unfair practice charge so this appeal should be withdrawn soon.

An appeal has been filed in Borough of Surf City and PBA Local 175, P.E.R.C. No. 2004-80, __ NJPER ___ (¶___ 2004). The Commission denied the employer's motion to file a late appeal of an interest arbitration award. N.J.S.A. 34:13A-16f(5)(a) directs that such appeals be filed within 14 days of receiving an award. This appeal was filed three days later.

Other Cases

The New Jersey Supreme Court has held that the New Jersey Torts Claim Act, N.J.S.A. 59:1-1 to 12-3, requires that a plaintiff give a public entity written notice of its intention to file a common law intentional tort action against a public employee. Velez v. City of Jersey City, 204 N.J. LEXIS 695 (2004). However, the Court decided to apply this ruling prospectively to all similar causes of action accruing after the date of its opinion. The Court agreed with the ruling and analysis in Bonitsis v. NJIT, 363 N.J. Super. 505 (App. Div. 2003). That case reasoned, in part, that written notice should be required so that the employer could decide whether to provide the accused employee with a defense and indemnification, including punitive damages.

In Hudson Cty. v. Kruznis and Hudson Cty. Superior Officers Ass'n1, PBA Local 109A, App. Div. Dkt. No. A-5895-02T5 (7/15/04), an Appellate Division panel upheld a trial court decision vacating a grievance arbitration award. The arbitrator had ordered the County to provide paid leave for the days two senior corrections officers spent attending a federal district court trial in a reverse discrimination case the officers filed against the County. The arbitrator found that granting paid leave for court time was a recognized past practice, but the Court found no support in past practice or County regulations for granting leave to officers making private court appearances as opposed to job-related court appearances.

In PBA Local 372 v. Lavallette Borough, App. Div. Dkt. No. A-1807-0T5 (7/9/04), the Court upheld a trial court decision confirming a grievance arbitration award. The arbitrator had held that the employer did not violate the parties' contract when it calculated entitlements to vacations, holidays, and sick leave based on an eight-hour work day, even though some officers worked ten-hour shifts rather than eight-hour shifts. All officers worked 40 hours a week and received the same benefits given the same formula; that formula had been used without objection for many years and any desired change in that practice should be pursued through successor contract negotiations.

In In re Jeffrey S. Katz, Office of the Public Defender, App. Div. Dkt. No. A-5055-02T2 (7/7/04), an attorney for the Office of the Public Defender accepted a voluntary demotion to a lower title in order to be placed at a higher salary guide step and thus obtain a salary increase. The Department of Personnel, however, disapproved the increase based on a regulation that prohibits demotions from resulting in salary increases. The Appellate Division affirmed that ruling, applying Walsh v. State, 147 N.J. 595 (1997), rev'g on dissent, 290 N.J. Super. 1 (App. Div. 1996), and holding that the Public Defender did not have the power to make a salary commitment that would negate DOP's power to regulate salaries.

In Negron v. Jersey City Medical Center, App. Div. Dkt. No. A-2847-02T5 (6/29/04), the Court upheld summary judgment for the employer in a case brought by a security department supervisor terminated for refusing to take a drug test pursuant to a policy permitting testing given a reasonable individualized suspicion of drug use. The Court held that "[a] private employer can require compliance with an announced drug policy upon reasonable suspicion" and that plaintiff

had not presented sufficient facts to support an inference that the demand that he submit to testing was improper or unreasonable.

In State of New Jersey v. Och, App. Div.Dkt. No. A-5285-02T5 (7/21/04), a non-tenured maintenance repairman for the Middle Township Board of Education pled guilty to wandering or loitering for the purposes of obtaining a controlled dangerous substance and received a one-year term of probation. The Assistant Prosecutor represented to the trial judge that this disorderly persons offense would not mandate forfeiture of the repairman's public employment, but the Board filed a civil action seeking to compel forfeiture pursuant to N.J.S.A. 2C:51-2. The Court held that the repairman should be given an opportunity to withdraw his guilty plea before the Board proceeds with its application to have defendant forfeit his employment on the basis that his conviction involves or touches his position .

In Yurick v. State of New Jersey, _____N.J. Super. _____(App. Div. 2004), a majority opinion joined by Judges Havey and Fall has declined to dismiss a CEPA claim brought by the former Gloucester County Prosecutor against the State, the Governor, the Attorney General, and the Gloucester County Board of Chosen Freeholders. Judge Hoens dissented, arguing that the former County prosecutor cannot be considered an employee for purposes of filing a CEPA claim and that his goal of seeking to remain in office after his term expired raised a private concern and interfered with the Governor's right to select his successor. The dissent also asserts that the Complaint did not allege a sufficient CEPA claim against the freeholders based on their failure to provide the budget requested by the Prosecutor or to fund raises for his certain individuals; the dissent would require such a claim for increased funding to be pursued before the Assignment Judge under N.J.S.A. 2A:158-7.

REA:aat
Attachments