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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 29, 2006

Commission Cases

An Appellate Division panel has affirmed the Commission's decision in Old Bridge Tp. Bd. of Ed. and Old Bridge Tp. Ed. Ass'n, P.E.R.C. No. 2005-64, 31 NJPER 116 (¶49 2005), aff'd, 32 NJPER 201 (¶87 2006), App. Div. Dkt. No. A-5245-04T5 (6/30/06) (copy attached). The Commission dismissed a contested transfer petition. It found that the teacher was transferred to a work-alone position because he could not get along with other staff members. Don Horowitz argued the case.

An Appellate Division panel has affirmed the Commission's decision in Monmouth Univ. and West Long Branch PBA Local No. 141, P.E.R.C. No. 2005-72, 31 NJPER 142 (¶62 2005), aff'd, App. Div. Dkt. No. A-005635-04T2 (7/25/06) (copy attached). The Commission held that Monmouth University is a private sector employer and thus its supervisory police officers are not entitled to invoke interest arbitration. Don Horowitz represented the Commission.

Judges Conley and Cuff of the Appellate Division have denied the employer's motion for leave to file an interlocutory appeal from the interim relief order issued in Camden Cty. and Camden Council No. 10, I.R. No. 2006-18, 32 NJPER 114 (¶54 2006). Commission designee Stuart Reichman enjoined the employer from unilaterally changing its policy giving suspended employees the option of paying COBRA premiums to maintain health insurance during their

suspensions or having the County make such payments and then deduct the accrued premiums from the employees' paychecks after they resumed work.

Judges Parker and Sapp-Peterson of the Appellate Division denied the FOP's request for an emergency stay of the agency's order certifying the PBA as the majority representative of correction officers employed by the State of New Jersey. State of New Jersey and Policemen's Benevolent Ass'n, Local 105 and New Jersey State Corrections Ass'n, FOP Lodge 200, D.R. No. 2006-18, 32 NJPER 145 (¶66 2006), review denied P.E.R.C. No. 2006-92, 32 NJPER 223 (¶92 2006). The Court's order states:

> The intervenor's emergent application for a stay is denied. In essence, the intervenor argues that the PBA received the eligibility list on December 22, 2005 while the intervenor did not receive the list until January 9, 2006. The intervenor, however, had a list of employees and their home addresses by December 13, 2005 - - a week before the eligibility lists were due. Consequently, the intervenor has not demonstrated any prejudice or disadvantage in the delay. Moreover, the intervenor has not demonstrated sufficient grounds for emergent relief.

The appeal in Cherry Hill Tp. Bd. of Ed. and FOP Lodge 28, P.E.R.C. No. 2006-39, 31 NJPER 364 (¶146 2005), App. Div. Dkt. No. A-002262-05T5, has been dismissed. The Commission had held that the school district's police officers were entitled to invoke interest arbitration. The parties apparently resolved the underlying negotiations impasse.

Other Cases

In New Jersey Transit Bus Operations, Inc. v. ATU, 2006 N.J. LEXIS 1084 (2006) (copy attached), the New Jersey Supreme Court reversed an Appellate Division decision vacating two grievance arbitration awards. The employer required part-time bus operators to report to work five minutes before each shift started and to fill out accident reports, but did not pay these operators for these periods. The arbitration awards interpreted the parties' collective negotiations agreements to require compensation for these periods plus the time spent returning their vehicles post-shift, but an Appellate Division panel concluded that only full-time bus operators were contractually entitled to compensation. The Supreme Court reversed and remanded for reinstatement of the awards. The Court reaffirmed that an arbitrator's contractual interpretation must be enforced if it is a reasonably debatable one and the Court concluded that both interpretations were reasonably debatable.

In Lenape Reg. H.S. Dist. Bd. of Ed. v. Lenape Dist. Support Staff Ass'n, App. Div. Dkt. No. A-5095-04T1 (7/12/06) (copy attached), an Appellate Division panel held that a grievance contesting that non-renewal of a school board custodian's employment contract was contractually

arbitrable. The collective negotiations agreement contained a provision stating that "the Board has the right and responsibility to take any action deemed necessary in retention and/or non-retention in matters other than job performance" and the non-renewal was based on the custodian's alleged unbecoming conduct, including alleged racial slurs. The accusations had formed the basis of earlier disciplinary actions which were overturned by an arbitrator.

The Court applied the presumption of contractual arbitrability codified recently in N.J.S.A. 34:13A-5.3 and held that the arbitration clause was susceptible of an interpretation covering the asserted dispute. It also noted, however, that it was not determining whether the Board's power to non-renew was in fact contractually restricted and that the arbitrator was required to bar the grievance if the arbitrator determined there was no such restriction. It also stated that if the arbitrator did find that the power to non-renew was contractually restricted, the grievance would have to be considered in light of the previous resolution of the custodian's claims.

In County of Union (Runnells Specialized Hosp.) v. Hospital Professionals and Allied Employees Union, App. Div. Dkt. No. A-5450-04T1 (7/31/06) (copy attached), an Appellate Division panel reversed a trial court order vacating a grievance arbitration award. The arbitrator held that the employer was contractually obligated to permit an employee to collect disability benefits without first exhausting her sick leave benefits. The arbitrator and the Appellate Division panel reasoned that the employer was contractually estopped from requiring sick leave exhaustion because its representative had repeatedly said that exhaustion would not be required. The Court also reasoned that the award did not impose an affirmative obligation on the employer outside the contract so much as it estopped the employer from enforcing its FMLA policy against the grievant.

In State of New Jersey (Dept. of Corrections v. CWA Local 1040 (Bruce Bryant), App. Div. Dkt. No. A-6396-04T1 (7/20/06) (copy attached), an Appellate Division panel vacated a grievance arbitration award holding that the employer did not have just cause to suspend an employee for five days. The arbitrator stated that the parties had agreed that the issue to be resolved was whether the suspension was for just cause and if not what remedy was appropriate. Finding that a five day suspension was not appropriate since the employer had proved only two of the three grounds for the suspension, he concluded that he had no authority to substitute a lesser disciplinary sanction. The trial court and the Appellate Division, however, held that the arbitrator could not consider the just cause issue despite the parties' agreement on the issue to be resolved and a contractual provision requiring just cause for discipline. The Court reasoned that another contractual provision limited the scope of the arbitrator's authority to determining the employee's guilt or innocence of the charges.

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Attachments