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M E M O R A N D U M

TO: Commissioners

FROM: Robert E. Anderson
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SUBJECT: Supplemental Report on Developments in the Counsel's Office Since July 17, 2007

Commission Cases

An Appellate Division panel has affirmed Rutgers, The State Univ. and FOP Lodge 62, P.E.R.C. No. 2007-5, 32 NJPER 274 (113 2006), aff'd App. Div. Dkt. No. A-0485-06T5 (8/3/07) (copy attached). Given State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993), police officers at Rutgers cannot arbitrate grievances asserting that they were discharged without just cause.

Other Cases

In New Jersey Transit Corp. v. New Jersey Transit Police Superior Officers Fraternal Order of Police Lodge #37, App. Div. Dkt. No. A-4486-05T2 (7/25/07), an Appellate Division panel affirmed a trial court decision holding that a grievance contesting a police sergeant's suspension was not contractually arbitrable. The panel concluded that the parties' collective

negotiations agreement recognized two avenues for contesting a disciplinary action: (1) submitting a grievance under the just cause clause to arbitration, and (2) going through an internal trial on disciplinary charges and obtaining a review of a conviction in the Superior Court. Because the grievance had already unsuccessfully invoked the second avenue, the FOP was barred from arbitrating the just cause grievance. The Court's opinion does not mention the new presumption of contractual arbitrability under N.J.S.A. 34:13A-5.3, but does cite a recent Supreme Court case applying that presumption, New Jersey Turnpike Auth. v. Local 196, IFPTE, 190 N.J. 283 (2007).

In Stomel v. Camden, 2007 N.J. LEXIS 909 (2007), a former Mayor of Camden, Milton Milan, removed Elliot Stomel from his position as Camden's municipal public defender after Stomel testified against Milan in a corruption trial that ended in a mistrial. Stomel then filed a CEPA action against the City, Milan, and the City Council and later added a claim under 42 U.S.C.A. section 1983 that his constitutional rights had been violated. The trial court dismissed the CEPA on the ground that Stomel was an independent contractor rather than an "employee" under CEPA and it dismissed the section 1983 claim against the City on the ground that it was not vicariously liable for Milan's actions since he was not the final policy-maker with regards to the public defender position. Stomel's section 1983 claim against Milan went to trial and Stomel won a jury verdict of $316,465 in damages.

An Appellate Division panel reinstated the CEPA claim, concluding that Stomel was an "employee" under that law, but affirmed the dismissal of the section 1983 claim against the City. The Supreme Court affirmed the Appellate division's ruling on Stomel's "employee" status under CEPA. But it reversed the ruling dismissing Stomel's civil rights claim against the City. The Court concluded that Milan had final policy-making authority to remove Stomel as the municipal public defender before a replacement had been authorized to assume that office and that the Council could have vetoed that removal but did not. The Court remanded for trial on the section 1983 claim against the City and found that a reasonable fact-finder could determine that Stomel was "terminated" or "removed" from office rather than simply not being reappointed to another term after his annual contract expired.

The same day the Court decided Stomel it decided D'Annunzio v. Prudential Ins. Co., 2007 N.J. LEXIS 910 (2007) and applied the same analysis for analyzing a CEPA plaintiff's alleged coverage as an "employee." There, Prudential invoked a 60-day termination provision in its contract with a chiropractic medical director in its Personal Injury Protection department. The doctor sued Prudential, asserting that he was fired because he had complained about the company's lack of regulatory and contractual compliance. The trial court granted summary judgment for Prudential, finding that the doctor was an independent contractor and relying on a provision in the parties' contract so designating the doctor.

An Appellate Division panel reversed that ruling and the Supreme Court in turn affirmed that reversal. Whether a professional person is an "employee" under CEPA hinges more on the degree of "control and direction" exercised by the employer over that person's work than upon

the financial arrangements between the parties. Further, CEPA's definition of "employee" includes "adjustment for the modern reality of a business world in which professionals and other workers perform regular or recurrent tasks that further the business interests of the employer's enterprise, notwithstanding that they may receive remuneration through contracts instead of through the provision of wages and benefits." (Slip opin. at 17). The Court concluded that D'Annunzio had presented sufficient evidence of the employer's control and direction over his day-to-day activities to preclude summary judgment for Prudential.

In Klawitter and Debonis, v City of Trenton, 2007 N.J. Super.LEXIS 280 __ (App. Div. July 31, 2007), the Appellate Division considered appeals from two employment-related trial court verdicts entered against the City.

Debonis was a police sergeant who retired, but then revoked his retirement within 30 days after his retirement date. The trial court held he was entitled to immediate reinstatement to his former position. The appellate panel reversed, stating that because the City had filled the position, the officer need not be reinstated and instead was entitled only to be placed on a re-employment list. Placing the sergeant on the re-employment list conformed to Merit System Board statutes and rules and did not conflict with any pension laws or regulations.

The other case involved a verdict finding that the City engaged in reverse discrimination against Klawitter, a female, Caucasian detective by appointing an African-American candidate to Detective Sergeant. Both candidates had identical scores on the promotional exam. The City had not adopted an affirmative action policy. In upholding the finding of reverse discrimination, the Court stated:

> We hold that race can be considered in an employment decision only pursuant to and in accordance with an established affirmative action plan. Without such a plan in place, an employer would be in violation of Title VII and the LAD.

In re Adoption of N.J.A.C. 12:17-9.6 __ N.J. Super. ___ (App. Div. 08/01/2007), invalidated a Department of Labor regulation granting unemployment benefits to employees who leave their employment to participate in "a written voluntary layoff and/or early retirement incentive policy or program . . . so that another employee may continue to work." The Court held that the regulation contravened the legislative policies underlying the Unemployment Compensation Act.

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