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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: Monthly Report on Developments in the Counsel's Office Since October 25, 2007

Commission Cases

Oral argument will be held on January 7, 2008 in Somerset Cty. Sheriff's Office and Somerset Cty. Sheriff FOP, Lodge No. 39, P.E.R.C. No. 2007-33, 32 NJPER 372 (¶156 2006), App. Div. Dkt. No. A-001899-06T3. The Commission affirmed an interest arbitration award in which the arbitrator gave significant weight to the County's internal settlement pattern with its law enforcement units in determining the salary increases to be awarded sheriffs' officers.

Other Cases

The New Jersey Supreme Court has issued two decisions addressing the contractual arbitrability of grievances contesting mid-year terminations of school board employees. Pascack Valley Reg. H.S. Bd. of Ed. v. Pascack Valley Reg. Support Staff Ass'n, 2007 N.J. LEXIS 1244 (2007); Northvale Bd. of Ed. v. Northvale Ed. Ass'n, 2007 N.J. LEXIS 1245 (2007). In Pascack, the Court held that the mid-year termination of a custodian was contractually arbitrable. In Northvale, the Court held that the mid-year termination of a part-time secretary/social studies teacher was not contractually arbitrable. A synopsis of each case follows.

In Pascack, the collective negotiations agreement provided that custodians would not be disciplined without just case and that any dismissals would be considered a disciplinary action subject to the grievance procedure. However, individual employment contracts signed by each custodian included a clause allowing either party to terminate that contract upon 15 days' notice. The board determined that a custodian had made racially offensive remarks and terminated him pursuant to the individual employment contract with 15 days' notice and pay. The Association grieved the dismissal under the just cause provision and an arbitrator ruled that the custodian's conduct warranted a sixty-day suspension, but not termination. The arbitrator also noted that his award would have no bearing on the board's decision to refuse to renew the custodian's contract for another year. The board then moved to vacate the award, arguing that the arbitrator exceeded his authority because he did not enforce the termination provision of the individual employment contract. The Chancery Division judge and an Appellate Division panel agreed.

By a 6-0 vote, the Supreme Court reversed the panel's decision and reinstated the award. It found that the board had used the notice provision only as a surrogate for a disciplinary proceeding. It held, "under the particular circumstances of this matter, where the parties have agreed that the non-tenured school employees may only be disciplined for just cause and have defined any dismissal as a disciplinary action subject to the grievance procedure at the employees' option, a mid-term contract termination imposed as punishment for behavior that would otherwise call for imposition of discipline falls within the collective agreement's definition of dismissal subject to the grievance procedures" (slip opin. at 3). It also stressed that this holding did not imply that the board "could not have waited until the end of the annual term and opted to not renew [the custodian's] contract" or that "a contract termination on 15 days' notice for reasons unrelated to discipline would not be both permissible and outside of the scope of the grievance clause" (slip opin. at 15-16).

In Northvale, the collective negotiations agreement provided that employees would not be discharged or disciplined without just cause and that any such action would be subject to the grievance procedure. The grievance procedure excluded refusals to renew the employment contracts of non-tenured employees. However, individual employment contracts signed by each employee included a clause allowing either party to terminate that contract upon 60 days' notice. The board determined that a part-time secretary/teacher had "serious deficiencies in [her] performance as a teacher and secretary" and terminated her pursuant to the individual employment contract with 60 days' notice and pay. The Association grieved the dismissal under the just cause clause and the board then obtained a trial court order restraining arbitration. An Appellate Division panel affirmed this order, concluding that the board had properly invoked its right to terminate the employee pursuant to the termination-on-notice provision in the individual employment contract and that invoking that right was neither a "discharge" nor a form of "discipline" under the collective negotiations agreement.

By a 3-3 vote, the Supreme Court issued a one-sentence opinion affirming the panel's judgment by an equally-divided court. Justice Hoens wrote a concurring opinion which Justices LaVecchia and Rivera-Soto joined. In the view of these justices, unless a provision in a

collective agreement clearly vests an employee with a right to grieve and arbitrate a mid-year termination notice, the terms of the individual employment contract allowing a termination on notice are enforceable as written. Justice Long wrote a dissenting opinion in which Justices Albin and Wallace joined. In the view of these justices, the presumption of arbitrability codified in N.J.S.A. 34:13A-5.3 controls the case given that the collective negotiations agreement could fairly be read to require arbitration. At the very least, doubt had arisen regarding the scope of arbitrability and that doubt must be resolved in favor of arbitration.

In Skoorka v. Kean Univ. , 2007 U.S. Dist. LEXIS 74214 (D. N.J. 2007), federal district court judge William J. Martini granted the AFT's motion to dismiss a professor's employment discrimination claims. The professor alleged that the University refused to promote him and gave him undesirable work assignments because he is Jewish and that the AFT was liable for the University's violations because it failed to remedy them. The Court ruled that the employment discrimination statutes do not impose affirmative duties upon unions to protect the employees they represent from their employer's illegal discrimination.

In Horsnall v. Washington Tp. (Mercer Cty.), Dkt. No. MER-L-418-07 (2007), Judge Linda Feinberg of the Superior Court in Mercer County held that the Township violated N.J.S.A. 40A:14-19 and 25 when it terminated a Fire Captain after it dissolved the Township's Fire District and created a Fire Division. The Court reasoned that neither the fire department nor the plaintiff's position was abolished and that the only difference resulting from the dissolution of the Fire District and the creation of the Fire Division was that the chief would now report to the mayor rather than the fire commissioners. The Township was thus not hiring a new employee, but removing an employee and having to comply with statutory requirements that it provide notice and charges establish good cause for removal, and terminate employees in inverse order of seniority. The Court also ruled that the Fiscal Control Law did not supersede these protections and that the plaintiff had timely filed his court action within 45 days of his official date of termination.

In Lourdes Medical Center of Burlington v. JNESO, 2007 U.S.Dist. LEXIS 25458 (D. N.J. 2007), federal district court judge John Lifland vacated an arbitration award holding that the employer violated the layoff provisions of the collective bargaining agreement when it reduced its employees' work hours. Even though the parties had treated reductions in work force like layoffs, the contract's zipper clause and its definition of layoff made it clear the clause did not apply to work hour reductions. The Court also rejected claims that the arbitrator (appointed by the New Jersey State Board of Mediation) was biased against the company because of pressure State officials had allegedly brought against the company to accede to union demands.

In Galli v. New Jersey Meadowlands Commission, 2007 U.S. App. LEXIS 14473 (3d. Cir. 2007), the Court ruled that a former director of the Environmental Education for New Jersey Meadowlands Commission established a prima facie case that she was not a policymaker and thus could bring a First Amendment claim that she had been illegally discharged for political reasons. While the former director had been a high-level supervisor, she provided evidence that

she had only a low-level budgetary role and could not independently make personnel decisions, implement policies, or enter into contracts.

In City of Newark v. Newark Firefighter's Union, App. Div. Dkt. No. A-0475-06T3, an arbitrator ordered the City to grant a Fire Prevention Specialist a provisional promotion to the position of Supervising Fire Prevention Specialist. The City moved to vacate the award. Two months later, it filled the supervising position permanently and removed the grievant from the promotional list. The grievant appealed that removal to the NJDOP. A Chancery Division judge initially confirmed the award ordering a provisional appointment, but on reconsideration modified the order to require the City to grant the grievant a permanent promotion. The Appellate Division ruled that the trial court properly found that the dispute over the provisional promotion was moot once the NJDOP created a promotional list. But it also ruled that the court had no authority to modify the award to grant a permanent promotion. The dispute involved a challenge to appointment and removal from the Civil Service promotional list and NJDOP was the proper venue for resolving that dispute initially.

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