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May 21, 2008

**MEMORANDUM**

**TO:** Commissioners

**FROM:** Ira W. Mintz  
General Counsel

**SUBJECT:** Monthly Report on Developments in the Counsel's Office Since April 24, 2008

**Commission Cases**

In an unpublished decision, the Appellate Division affirmed the Commission's decision in State of New Jersey (Dept. of Corrections), P.E.R.C. No. 2007-60, 33 NJPER 116 (¶41 2007), aff'd App. Div. Dkt. No. A- 004843-06T3 (5/15/08) (copy attached). In that decision, the Commission granted the request of the State for a restraint of binding arbitration of a grievance filed by P.B.A. Local 105. The grievance sought compensatory time off for essential employees who were required to work during the July 2006 State shutdown. The Commission restrained arbitration because Department of Personnel regulations limit the compensation for essential workers to regular pay.

The Association has withdrawn its appeal of Bergenfield Bd. of Ed., P.E.R.C. No. 2008-47, 34 NJPER 44 (¶13 2008). In that decision, the Commission found that a new law supersedes existing State Health Benefit Program regulations and allows local employers to negotiate over sharing the cost of employee coverage. That law also permits implementation of premium sharing clauses in existing agreements.

**Other Cases**

In Somerset Cty. Sheriff's Officers FOP Lodge #39 v. Somerset Cty. and Somerset Cty. Sheriff, App. Div. Dkt. No. A-5789-06T3 (4/29/08), the Appellate Division reversed the decision of a trial court that had denied the FOP's application for interest on an arbitration award plus

counsel fees for the cost of the FOP's action to enforce the award.

The County appealed an interest arbitration award to the Commission. That automatically stayed implementation of the award. The Commission then affirmed the award. Absent a stay, the County was then required to implement the award within 14 days.

The County appealed the Commission decision, but did not obtain a stay. The Commission denied the stay application and the FOP went to the Law Division seeking enforcement of the award. The County then sought a stay in the Appellate Division, but withdrew the request after the Law Division judge dismissed the enforcement action in the mistaken belief that she lacked jurisdiction to enforce the Commission's order pending appeal.

The FOP then demanded implementation of the award and the County filed another stay motion with the Appellate Division. The motion was denied, but the County still did not implement the award although it represented to the trial court judge that it would. The County finally paid.

In the meantime, the trial court judge entered an order enforcing the award, but denying the FOP's request for counsel fees and interest.

The Appellate Division reaffirmed that absent a stay, the County was required to implement the award within 14 days of the Commission decision. It stated that not only didn't the County pay, but it played a cat-and-mouse game with the stay application. "The record plainly demonstrates that the County had no intention of paying the award until it was forced to do so."

The Court also stated that once the Commission rendered its decision, the onus was on the County to implement the award; it should not have been the FOP's burden to move for enforcement.

The Court ruled that it was a mistaken exercise of discretion to deny the application for counsel fees and that interest should have been awarded.

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In Hawthorne PBA Local 200 v. Borough of Hawthorne, \_\_ N.J. Super. \_\_ (App. Div. 2008) (4/29/08), the Appellate Division held that under a mayor-council form of government, the governing body may, by ordinance, delegate to the mayor the authority to make appointments to and promotions within the police department. The Court rejected an argument by the police union that police officers may only be appointed and promoted by governing body ordinance.

In Wein v. Morris, \_\_ N.J. \_\_ (2008) (4/14/08), in a non-labor context, the New Jersey Supreme Court ruled that when a trial court orders parties to arbitration, the court's order is a final judgment for appeal purposes.

In Manzella v. Township of Rochelle Park, App. Div. Dkt. No. A-4534-06T1 (5/7/08), the Appellate Division upheld a decision of the PERS Board that disqualified a former public employee from eligibility for deferred retirement because he had been removed for cause from his positions as Tax Collector, Finance Officer and Town Administrator with the Township of Rochelle Park. Manzella was terminated after pleading guilty to theft by deception after he submitted a fraudulent financial voucher to the Township for attending a seminar that he did not attend. A deferred retirement allowance is available to those who have become vested after completing ten years of eligible service but who leave office before reaching retirement age. Under N.J.S.A. 43:15A-38, a deferred retirement is disallowed if the employee is removed for cause on a charge of misconduct. It does not require conviction of an indictable offense nor does it require any form of conviction.

In Hietanen v. Ramapo Indian Hills Bd. of Ed., App. Div. Dkt. No. A-2491-06T2 (5/12/08), the Appellate Division upheld a denial of counsel fees under the "frivolous litigation" statute, N.J.S.A. 2A:15-59.1. The brother of a high school student wrote to the school district asking that an advisor be removed from an extracurricular position. The Board did so at a public meeting during which the person with the complaint spoke out against the teacher during the public portion of the meeting. The teacher sued the Board and the person making the complaint for defamation and other civil wrongs. A trial court granted summary judgment for the individual but denied an application for counsel fees made under the "frivolous litigation" statute. The Appellate Division affirmed stating that its determination required the weighing of several countervailing policies, such as the principle that citizens should be free to address their public concerns in a public forum without fear of being sued and the principle that citizens should have "ready access to all branches of government, including the judiciary."

In Charles Leek v. New Jersey Department of Corrections, App. Div. Dkt. No.-A-2350-06T3 (5/14/08), the Court affirmed a Merit System Board finding of conduct unbecoming a public employee. The Court stated the determination of what constitutes conduct unbecoming a public employee is primarily a question of law, and thus the Court's scope of review is de novo or one allowing the court to take a fresh look at the case. In Payton v. City of Jersey City, App. Div. Dkt. No. A-3571-06T2, a case reported on last month, the Appellate Division reversed a determination of the Merit System Board that had rejected an ALJ's finding that an employee engaged in conduct unbecoming a public employee. The Court in that case stated that an ALJ's findings on the question of whether an employee engaged in unbecoming conduct were entitled to deference because a reviewing court must give deference to the factual findings of a trier of fact.

In Teamsters Local Union No. 177 v. UPS, Inc., App. Div. Dkt. No. 5814-06T1 (4/30/08), the Appellate Division precluded the use of expunged criminal records and the testimony of subpoenaed investigators in a disciplinary proceeding unless the grievant testifies and presents a defense that disputes that he possessed marijuana on a UPS truck on the date of his arrest.

## Legislation

On May 2, 2008, Governor Corzine signed a bill that extends the State's existing Temporary Disability Insurance program to provide insurance benefits to all New Jersey workers when they take time off to care for newborn and newly adopted children, or sick family members. P.L.2008, c.17. The new law:

Permits up to 6 weeks of leave for workers to provide care for a sick family member or care for a newborn or newly adopted child;

Allows workers to receive no more than two-thirds of their weekly pay, up to a maximum weekly benefit of \$524 in 2008. The employer may require the employee take up to two weeks of available sick or vacation pay and workers must provide as much as 30-days advance notice of leave;

Requires no contributions from employers. The program is 100% funded by employee contributions, through a payroll deduction on the first \$27,700 earned (in 2008). The deduction would amount to approximately \$33 a year, or 64 cents a week;

Provides small businesses, (50 or fewer employees), with the option to replace employees receiving FLI benefits. Small businesses do not have to hold jobs open and provisions in the law allow small businesses, to fill a worker's position with a permanent replacement without running the risk of being sued;

Prevents fraudulent claims by using measures contained in the Temporary Disability Benefits Law, including criminal penalties and increased fines for those who improperly claim benefits. Employers receive notice when benefits are claimed and have the right to appeal eligibility determinations;

Ensures benefits would run concurrently with any leave provided under the NJ Family Leave Act and the federal Family and Medical Leave Act - not consecutively; and

Offers employees the option to receive benefits intermittently creating a flexible arrangement to meet the needs of both employees and employers.