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M E M O R A N D U M

TO: Commissioners

FROM: Ira W. Mintz
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SUBJECT: Monthly Report on Developments in the Counsel's Office Since March 26, 2009

New Jersey Cases

In In re Emergency Temporary Layoff Rule, App. Div. Dkt. No. A-3626-08T2, A-3627-08T2, A-3656-08T2, A-3657-08T2 (4/17/08) (copy attached), the Appellate Division ruled that given the economic crisis confronting the State and nation, the Civil Service Commission had met the imminent peril requirement to adopt an emergency regulation authorizing temporary layoffs. The Court found no basis to disturb the emergency regulation providing for temporary layoffs of an entire layoff unit for one or more work days over a defined period. However, as to "staggered layoffs," the Court found that the unions challenging the regulations had made a substantial showing that the emergency regulations may not adequately address statutory layoff rights and so the Court stayed enforcement of the emergency regulation as it relates to "staggered layoffs." The issues concerning "staggered layoffs" were transferred to PERC for a scope of negotiations determination. The Court noted that related proceedings had already been commenced at PERC.

In Education Law Center v. New Jersey Department of Education, __ N.J. __ (2009) (3/26/09), the New Jersey Supreme Court held that a government record, which contains factual components, is subject to the deliberative process privilege when it was used in the decision-making process and its disclosure would reveal the nature of the deliberations that occurred during that process.

In Ackermann v. Borough of Glen Rock, App. Div. Dkt. No. A-2947-07T2 (3/31/09), the Appellate Division affirmed a trial court order that had upheld the discipline of a police officer, but rejected the Borough's decision to demote him from detective sergeant to police officer. The trial court had the power to modify a disciplinary penalty and properly applied the principle of progressive discipline. The Court also rejected the detective's cross-appeal, which had alleged, in part, that an increase in sanctions, from the initial recommendation of a three-day suspension, to a ten-day suspension, to a sixty-day suspension with demotion, violated the forty-five day rule of N.J.S.A. 40A:14-147. The Court stated that notice of the prospective penalty is not a vital element of a statement of charges.

In Linden Bd. of Ed., App. Div. Dkt. No. A-1236-07T3 (4/17/09), the Appellate Division issued a split decision reversing a trial court order affirming an arbitration award that had set aside the termination of a school custodian. At an annual school dance, during which female students used several classrooms as changing rooms, a custodian entered at least one of the classrooms and began cleaning the glass on the door. The students, in various states of undress, asked him to leave, but he refused. Applying County College of Morris Staff Ass'n v. Morris Cty. College., 100 N.J. 383 (1985), the Court held that since the parties' contract did not provide for progressive discipline, the arbitrator exceeded his authority by finding just cause for the termination and then reducing the penalty. The Court distinguished a situation where an arbitrator finds an employee guilty of the specified charges of misconduct, but concludes that the offenses do not rise to the level of misconduct that constitutes just cause for termination. One judge dissented, which gives the Education Association a right of appeal to the New Jersey Supreme Court.

Other Cases

In a case of first impression that could have far-reaching implications, a bankruptcy judge in California recently determined that municipalities that file petitions under Chapter 9 of the Bankruptcy Code (reorganization for municipalities) can reject existing collective bargaining agreements with public employee unions. In re City of Vallejo, Case No. 08-26813-A-9 (E.D. Cal. Mar. 13, 2009). The Court stated that as established by the Supreme Court in N.L.R.B. v. Bildisco & Bildisco, 456 U.S. 513, 521-22, 526 (1984), a debtor may use section 365 of the bankruptcy code to reject an unexpired collective bargaining agreement if the debtor shows that: (1) the collective bargaining agreement burdens the estate; (2) after careful scrutiny, the equities balance in favor of contract rejection; and (3) "reasonable efforts to negotiate a voluntary modification have been made, and are not likely to produce a prompt and satisfactory solution." The debtor has the burden of establishing that these factors have been satisfied. Id. Despite having concluded that the City may potentially reject the remaining CBAs, the court deferred determining whether the City had satisfied the Bildisco standard for their rejection for two reasons, including the fact that negotiations between the City, IAFF and IBEW were ongoing. The court wished to give the parties every reasonable opportunity to settle the motion.

A divided panel of the U.S. Court of Appeals for the Fourth Circuit reversed the NLRB and held that a journeyman pressman for the Tampa Tribune who used profanity to describe a top executive in a conversation with two foremen during protracted bargaining for a new labor contract lost the protection of the Labor Management Relations Act. Media General Operations Inc. v. NLRB, 4th Cir., No. 08-1153, 3/13/09. Negotiations were lengthy and contentious. The company's vice president wrote a series of letters to the pressmen describing the negotiations from management's point of view and blaming the union for the slow pace. During a conversation with two shift foremen in the pressroom office after hearing about the vice president's most recent letter, an employee called him a "stupid fucking moron." He was subsequently discharged. Although the Fourth Circuit declined to overturn the NLRB's finding that the employee was engaged in concerted activity, it held that he lost the protection of the act "when he launched an ad hominem attack" against the vice-president. The dissenting judge stated that the panel majority overruled the Board and denied legal protection to an employee's one-time use of profane language concerning a supervisor.

In a 5 to 4 decision in 14 Penn Plaza v. Pyett, __ U.S. __ (2009) (4/1/09), the United States Supreme Court held that a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law. The dissenting opinions stated that the majority opinion was a departure from Supreme Court precedent with respect to arbitration clauses in collective bargaining agreements.

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Attachment