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May 21, 2009

**M E M O R A N D U M**

**TO:** Commissioners

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

**SUBJECT:** Monthly Report on Developments in the Counsel's Office Since April 30, 2009

## Commission Cases

In Rockaway Tp. v. FOP Lodge 31, App. Div. Dkt. No. A-1628-07 (5/7/09), the Appellate Division dismissed an appeal of a Commission decision as moot. The Court noted that the Commission had stated that the Township could present its arguments to the Commission in the event that the arbitrator concluded that complying with the State Health Benefits Commission's mandate to increase co-payments for HMO and NJPLUS constituted a breach of the collective bargaining agreement. The Court stated that it was informed at oral argument that in the interim, the arbitration had been concluded. The Court found that the appeal was thus moot because no effective relief could be granted. It declined to consider the issues presented in the absence of a justiciable controversy.

## New Jersey Cases

In Klumb v. Manalapan-Englishtown Bd. of Ed., __ N.J. __ (2009), the New Jersey Supreme Court held that under N.J.S.A. 18A:66-40(a), a school district must return a formerly disabled teacher to the next available opening in the position that he or she held at the time of the disability retirement, so long as the teacher meets the standards set by the State Board of Education for that position, i.e., a valid teaching certificate and endorsements. A related appeal of a Commission decision is awaiting a decision of the Appellate Division. In that case, the

Commission held that the salary guide placement of the returning teacher was legally arbitrable. Manalapan-Englishtown Regional Bd. of Ed., P.E.R.C. No. 2007-42, 33 NJPER 3 (¶3 2007), app. pend. App. Div. Dkt. No. A-3515-06T1.

In Berlin Borough Bd. of Ed. v. Berlin Teachers' Ass'n, App. Div. Dkt. No. A-4715-07T2 (5/13/09), the Appellate Division applied the presumption in favor of arbitration and vacated a trial court order restraining advisory arbitration of a grievance challenging the denial of health benefits to certain part-time employees.

In Freehold Reg. H.S. Bd. of Ed. v. New Jersey Education Ass'n, App. Div. Dkt. No. A-4130-06T1 (5/8/09), the Appellate Division affirmed a decision of the trial court that had restrained arbitration over the non-renewal of a school bus driver. Applying the presumption in favor of arbitration, the Court found no provision in the collective negotiations agreement regarding the nonrenewal of non-tenured employees. The Court further found that a nonrenewal is not a disciplinary action subject to arbitration under N.J.S.A. 34:13A-29(a). Contrast Nini v. Mercer Cty. Community College, __ N.J. Super. __ (App. Div. 2009) (if decision not to renew was based on plaintiff's age, then no difference under Law Against Discrimination between nonrenewal and termination).

In City of Clifton v. Clifton PBA Local #36, App. Div. Dkt. No. A-4806-07T3 (5/4/09), the Appellate Division reversed the decision of a trial court that had vacated an arbitration award on the ground that the arbitrator had exceeded his authority under the contract when he said that he had waived the 20-day time limit to file a grievance. The union argued that the grievance was timely under the continuing violation doctrine. The Court remanded to the case to the arbitrator for clarification of the basis for his decision.

In Frizalone v. NJ Transit, an Essex County jury awarded $1.54 million to a NJ Transit police lieutenant who was passed over for promotion and given bad assignments after complaining about gender discrimination.

In Stengart v. Loving Care Agency, Dkt. No. BER-L-858-08 (2/5/09), a trial court judge held that an email sent by the plaintiff to her lawyer from a company-issued laptop was not protected by the attorney-client privilege. The plaintiff had used her personal web-based Yahoo email account, but a copy of the message was automatically saved on the laptop's hard drive as a temporary file. The employer had a policy specifying that email and voice-mail messages are considered part of the company's business and are not to be considered private or personal to any employee.

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