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September 17, 2009

MEMORANDUM

TO: Commissioners
FROM: Ira W. Mintz
General Counsel

SUBJECT: Monthly Report on Developments in the Counsel's Office Since August 13, 2009

Commission Cases

_____ CWA has appealed the Commission's decision in New Jersey Administrative Office of the Courts (Judiciary), P.E.R.C. No. 2010-1, __ NJPER __ (¶__ 2009). In that decision, the Commission reversed a Hearing Examiner and dismissed CWA's unfair practice charge that alleged that the AOC violated the New Jersey Employer-Employee Relations Act when it unilaterally implemented a program requiring freelance interpreters ("FLIs") to sign professional service agreements ("PSAs") that eliminated their ability to become members of the collective negotiations unit currently representing FLIs that work more than 288 hours. The Commission found that FLIs who signed PSAs are independent contractors and therefore not public employees covered by the Act.

Other Cases

In Wyckoff Tp. v. PBA Local 261, __ N.J. Super. __ (App. Div. 2009) (8/26/09), the Appellate Division reversed a trial court decision that had vacated an arbitration award. The issue before the arbitrator was whether the Township violated the parties' contract when it required a police officer to work as a civilian dispatcher during her pregnancy. The arbitrator ordered the Township to cease and desist from discriminating against the officer by assigning her to duties and schedules outside of her job description and from circumventing the intent of

the negotiated sick leave provisions. The trial court vacated the award, in part because the officer had also filed a civil action claiming discrimination. The Appellate Division reversed. Finding that an arbitrator's award is entitled to a presumption of validity and the party opposing confirmation has the burden of establishing that the award should be vacated, the Appellate Division ruled that the trial court was mistaken in reversing the burden of proof, giving the Township as the challenger "the benefit of all favorable inferences" when determining that the arbitrator exceeded his powers. The Appellate Division also ruled that the trial court may not have used a deferential standard in reviewing the arbitrator's interpretation of the issue submitted to him. New Jersey precedent has held that there is a deferential standard of review of arbitrator's substantive decisions. This case extends that deference to a court's review of an arbitrator's interpretation of the issue submitted. Finally, the Appellate Division ruled that the existence of a pending discrimination lawsuit did not bar pursuit of the arbitration; and the trial court improperly held that the award violated public policy, especially as the only remedy was a cease and desist order.

In New Jersey Ass'n of School Business Officials v. Davy, ___ N.J. Super. ___ (App. Div. 2009) (9/2/09), the Appellate Division upheld Department of Education regulations that implement laws enacted to revise the school funding formula and reduce property taxes, in part, through oversight and limitation of government spending by school districts. Among the regulations upheld was one that restricts, prospectively, accumulation of vacation leave and payments for unused sick leave in conformity with the statutes applicable to State employees.

In Woods v. Irvington Tp., App. Div. Dkt. No. A-4972-07T2 (8/14/09), the Appellate Division affirmed the dismissal of many counts of a complaint filed by a police officer, but reversed and remanded as to plaintiff's CEPA retaliation claim, and for a ruling on the individual defendants' unresolved assertions of qualified immunity.

In In re Juan Melendez, App. Div. Dkt. No. A-4617-07T1 (8/17/09), the Appellate Division upheld a decision of the Merit System Board that had sustained the 15-day suspension of a corrections officer. The officer appealed, asserting that failing to stand up when a superior officer came in his presence was not a violation of a disciplinary rule and that a reduction from the initial penalty of 30 days entitled him to counsel fees. The Court found that the officer's failure to stand, though not an offense in itself, was evidence of his inattentiveness and supported neglect of duty charges. The Court rejected the counsel fees argument finding that the MSB did not abuse its discretion in finding that the officer had not prevailed substantially on all of the primary issues.

In Pleasantville Bd. of Ed. v. Pleasantville Ed. Ass'n, App. Div. Dkt. No. A-2123-08T3 (8/25/09), the Appellate Division affirmed a trial court decision that had vacated an arbitration award. A State monitor had ordered a RIF of 22 non-tenured school aides over the school board's objection. The board then agreed and the arbitrator found that the RIF was without just cause. The trial court overturned the arbitration award on public policy grounds. The Appellate Division held that the decision to implement a RIF involved a non-negotiable, non-arbitrable matter.

In In re Conway, App. Div. Dkt. No. A-6162-07T3 (9/8/09), the Appellate Division upheld a four-day suspension imposed against a New Jersey Transit police officer. The Court rejected claims that a three-year delay in hearing the charges violated due process, finding no constitutional violation and that the time frames in N.J.S.A. 40A:14-147 do not apply to NJ Transit police.

In State v. Mandi, App. Div. Dkt. No. A-5186-07T2 (9/9/09), the Merit System Board upheld a Rowan University police officer's termination for misconduct incompatible with service as a police officer. The officer had pled guilty to disorderly conduct in municipal court. Neither the municipal court nor the MSB ordered forfeiture of employment under N.J.S.A. 2C:51-2. The Appellate Division held that State properly sought an order of forfeiture because the municipal court had not ordered it.

In Dylnicky v. Port Authority of New York and New Jersey, App. Div. Dkt. No. A-0758-07T2 (9/8/09), the Appellate Division reversed significant monetary awards in a tort suit against the Port Authority. Five electricians were terminated for sleeping on the job and not doing their assigned work. Their terminations were upheld in arbitration. The arbitrator had rejected the argument that the former employees' conduct was appropriate or authorized. Accordingly, the Court found that the employees' suit for malicious prosecution could not be sustained.

In Medford Tp. Bd. of Ed. v. Medford Ed. Ass'n, the New Jersey Supreme Court has ordered that a petition for certification be granted, and the matter summarily remanded to the Appellate Division for reconsideration in light of Mt. Holly Tp. Bd. of Ed. v. Mt. Holly Tp. Ed. Ass'n, ___ N.J. ___ (2009). The Trial Court and Appellate Division had granted the Board's request for restraint of arbitration, finding that a custodian was properly terminated in accordance with the 14-day notice provision in his individual employment contract. The Association had sought arbitration under the just cause provision in the collective negotiations agreement. Mt. Holly held that to the extent provisions in an individual employment contract conflict or are inconsistent with terms in a collective negotiations agreement, and diminish or interfere with rights provided by the collective agreement, the language in the individual contract must yield to the collective agreement.