STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PO Box 429
TRENTON, NEW JERSEY 08625-0429

www.state.nj.us/perc

ADMINISTRATION/LEGAL
(609) 292-9830
CONCILIATION/ARBITRATION
(609 292-9898
UNFAIR PRACTICE/REPRESENTATION
(609) 292-6780

For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089
EMAIL: mail@perc.state.nj.us

May 19, 2010

M E M O R A N D U M

TO: Commissioners

FROM: Ira W. Mintz
General Counsel

SUBJECT: Report on Developments in the Counsel's Office Since March 18, 2010

Commission Cases

The Wall Township Board of Education has filed an appeal of P.E.R.C. No. 2010-24, 35 NJPER 373 (¶126 2009), recon. den. P.E.R.C. No. 2010-63, 36 NJPER 52 (¶24 2010). In its initial decision, the Commission found that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it terminated an employee after she tried to grieve her evaluation and enlisted the Wall Township Information Technology Association's assistance to have the Board review the contents of her evaluation and to negotiate with the Board concerning the evaluation process. The Commission also denied the Board's motion for reconsideration in which the Board contended that during a transition between former and present legal counsel, a hearing in this matter was waived without the Board's knowledge, participation or consent. The Commission denied the motion because at the time of its initial decision, the Board's former counsel was the counsel of record with the apparent authority to stipulate the facts and waive a hearing examiner's report.

Other Cases

In Stengart v. Loving Care Agency, Inc., __ N.J. __ (2010), the New Jersey Supreme Court held that an employee could reasonably expect that e-mail communications with her lawyer through her personal, password-protected, web-based e-mail account would remain

private, and that sending and receiving them using a company laptop did not eliminate the attorney-client privilege that protected them. By reading e-mails that were at least arguably privileged and failing to promptly notify the employee about them, Loving Care's counsel violated Rules of Professional Conduct, RPC 4.4(b).

In Besler v. West Windsor Plainsboro Reg. School Dist. Bd. of Ed., __ N.J. __ (2010), the New Jersey Supreme Court found, in part, that the board president gaveled a parent down at a public board meeting because the parent was attempting to expose the hypocrisy between words and reality, between the Board's strategic plan, which did "not tolerate behavior which diminishes the dignity, self-worth, or safety of any individual," and the Board's condoning foul-mouthed, abusive coaches who belittled and demeaned student-athletes. The Court held that the jury was free to find that the board president's warning comments, evidently directed at the parent, revealed impatience and antagonism toward a viewpoint he did not want to hear. The Court was satisfied that the jury rendered a verdict in favor of the parent that was sustainable on the evidence.

In the Matter of the Tenure Hearing of Gilbert Young, Jr., District of the Borough of Roselle, __ N.J. __ (2010), the New Jersey Supreme Court held that the determination by the Division of Children and Families that allegations of child abuse of a minor student by a teacher were unfounded did not preclude the school district from filing disciplinary charges seeking to terminate the teacher's employment.

In Point Pleasant Borough PBA Local #158 v. Borough of Point Pleasant, __ N.J. Super. __ (App. Div. 2010), the Appellate Division held ultra vires a municipal ordinance that required more than 25 years of service with the Borough for a retiree to be eligible for paid health benefits. See N.J.S.A. 40A:10-23. The Court ordered that the Borough assume the cost of medical expense benefits for the three individual plaintiffs, and ordered that they be reimbursed costs incurred in procuring equivalent coverage during the period after the complaint was filed.

In CWA v. Christie, __ N.J. Super. __ (App. Div. 2010), because paragraph 1 of Governor Christie's Executive Order 7 violates principles of separation of powers, the Appellate Division invalidated the Executive Order to the extent it is written or intended to apply pay-to-play restrictions to labor unions and collective bargaining agreements. The Court issued its decision without prejudice to the potential adoption of an appropriate statute that might enact pay-to-play reforms covering labor organizations, but in a manner consistent with existing statutes or which explicitly amends those existing laws.

In Burnett v. Gloucester Cty., __ N.J. Super. __ (App. Div. 2010), the Appellate Division held that settlement agreements executed by third parties on behalf of a governmental entity constitute government records as defined by OPRA and the County was not excused from its OPRA obligations because the requested documents were not in its possession.

In Burlington Cty. College Faculty Ass'n v. Burlington Cty. College, App. Div. Dkt. No. A-5049-08T2 (4/7/10), the Appellate Division upheld a ruling by the Burlington County College Board of Trustees that faculty employed for more than five years in the job title of Lecturer or in the job title of Lecturer and then Instructor are not tenure eligible.

In City of Clifton v. FMBA Local 21, App. Div. Dkt. No. A-4031-08T3 (4/14/10), the Appellate Division affirmed a trial court decision that had upheld an arbitration award that had found that the employer's conduct represented a waiver of the requirement of the union to adhere strictly to the time lines of the grievance procedure. The lower court examined the merits of the arbitrator's ruling on the procedural issues (the arbitration was bifurcated) and held the award was reasonably debatable.

In Medford Tp. Bd. of Ed. v. Medford Tp. Ed. Ass'n, App. Div. Dkt. No. A-A-5580-05T3 (5/18/10), the Appellate Division considered a matter that had been summarily remanded in light of Mount Holly Tp. Bd. of Ed. v. Mount Holly Tp. Ed. Ass'n, 199 N.J. 319 (2009). The case involved an untenured custodian terminated mid-year pursuant to a 14-day notice provision in an individual employment contract and covered by the just cause clause of a collective negotiations agreement. The Appellate Division held that an arbitrator could determine the significance of the omission of "discharge" from the list of employer actions that could not be taken without just cause.

In Policastro v. Tenafly Bd. of Ed., No. 09-1794 (D.N.J. May 7, 2010), a Federal District Court Judge ruled that a school's content-neutral mailbox policy was a valid time, place and manner limitation and did not violate a teacher's First Amendment rights. The policy required teachers to seek permission before distributing personal correspondence through the school mailboxes. In Cowan v. Carteret Bd. of Ed., No. 06-5459 (D. N.J. February 22, 2010), a Federal District Court Judge denied the school board's motion for summary judgment over a claim that the board violated a teacher/union president's claim that his First Amendment rights were violated when it suspended him for placing Jack London's one-page essay "The Scab" in the school mailboxes of three members of the Carteret Education Association who refused to participate in a job action. There were material facts in dispute concerning the reaction of the other teachers, any knowledge of the event by students, and whether the conduct proved to be disruptive to school activity.