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January 20, 2011

M E M O R A N D U M

TO: Commissioners

FROM: Counsel Staff

SUBJECT: Report on Developments in the Counsel's Office Since December 16, 2010

Commission Cases

The Appellate Division has reversed the Commission's decision in Morris Cty. Sheriff's Office and Cty. of Morris, P.E.R.C. No. 2010-16, 35 NJPER 348 (¶117 2009), recon. den. P.E.R.C. No. 2010-52, 36 NJPER 24 (¶11 2010), rev'd __ N.J. Super. __ 2011 N.J. Super. LEXIS 6 (App. Div. 1/13/2011) (attached). The Commission held that the employer had engaged in unfair practices when, during the course of interest arbitration, it issued a directive providing that staff who are assigned to positions normally closed on the weekend will no longer be permitted to work those positions on a holiday. The Court determined that the employer did not violate the Act when it "sought a unilateral end to the long-standing employment practice that had permitted public employees who were assigned to posts that are normally nonoperational on weekends to nevertheless work those posts on nonoperational holidays and be paid a premium for the privilege."

The appeal of Town of Kearny, P.E.R.C. No. 2011-37, 36 NJPER 413 (¶160 2010) has been withdrawn by the Town. The Commission affirmed an interest arbitration award involving the Town and Kearny Firemen's Mutual Benevolent Association, Local No. 18.

An appeal has been filed by the employer in Franklin Township, P.E.R.C. No. 2011-37, __ NJPER __ (¶__ 2010) holding that existing contract language relating to work schedules of law enforcement officers is mandatorily negotiable.

Legislation

Assembly Bill 3383 which amends and supplements the "Police and Fire Interest Arbitration Reform Act," has been codified as P.L. 2010, Ch. 105**.** The new law, which took effect January 1, 2011, consists of four sections. Section 1 makes several changes to N.J.S.A. 34:13A-16. Sections 2, 3 and 4 contain new language. They have been designated as N.J.S.A. 34:13A-16.7, N.J.S.A. 34:13A-16.8, and N.J.S.A. 34:13A-16.9.

Cases related to Commission Cases

In Fort Lee PBA Local No. 245 v. Borough of Fort Lee, 2010 N.J. Super. Unpub. LEXIS 3144 Superior Ct. Ch. Div., Docket Nos. BER-C-330-09 & BER-C-330-09 (10/12/10), appeal pending, Judge Robert P. Contillo held that the employer had properly implemented P.L. 2010, Ch. 2, effective May 21, 2010. That law requires that employees begin contributing at least 1.5 per cent of their salaries toward the cost of health insurance. But, where a collective negotiations agreement is in place on the effective date, that statute provides that the contributions will not commence until that agreement expires.

An interest arbitration award setting the terms and conditions of employment for a contract that extended beyond May 21, 2010 had been confirmed by the Commission in Fort Lee and PBA Local No. 245, P.E.R.C. No. 2009-64, 35 NJPER 149 (¶55 2009), appeal of decision on remand P.E.R.C. No. 2010-17, 35 NJPER 352 (¶118 2009). Although the Commission's decision is presently on appeal, the interest arbitration award was not stayed and its terms have been almost entirely implemented; only one issue was unresolved at the time the Court issued its decision. Judge Contillo reasoned that the interest arbitration award "is neither tantamount to, nor the equivalent of, a binding collective negotiations agreement" and did not qualify for the exemption.

Gilleece v. Tp. of Union, 2010 U.S. Dist. LEXIS 129641 (12/8/2010), a federal civil rights action, involves events occurring just after the record closed in an unfair practice case decided by the Commission. Township of Union, P.E.R.C. No. 2008-20, 33 NJPER 255 (¶95 2007), held that the Township engaged in unfair practices when it refused to supply a list of "jobs-in-blue" program vendors to PBA Local 69 and when it conducted surveillance of off-duty PBA members in retaliation for their advocacy of continuing the jobs-in-blue program as well as their criticism of Township officials at a public meeting.

Subsequently, PBA members were passed over for promotion even though they scored high enough on Civil Service tests to be elevated in rank. The plaintiffs in the federal case asserted that, by failing to promote them, the Township violated their First Amendment rights, specifically, their right to engage in union activity. The Court dismisses the claim of one plaintiff who failed to show that he exercised any protected rights other than being a PBA member. The Court declines to dismiss the remaining claim of a sergeant who actively participated in the protest and provided testimony in the unfair practice hearing. The Court reasoned that a jury

could reasonably conclude that the anti-union views of one member of the interview committee might be known to the other two committee members (one of whom was the police chief) and could have affected the decision not to promote the officer who had engaged in protected activity. The ruling clears the way for a trial.

Other Cases

In Winthrop McGriff v. Bd. of Ed. of the Tp. of Orange, (Dkt No. A-3186-09, 1/12/2011), the Appellate Division, in an unpublished opinion, dismisses the appeal of a non-tenured, part-time athletic director who was terminated by the Board of Education. The Commissioner had held that the dispute did not arise under any provision of the Education Law and that the Department of Education lacked jurisdiction to rule on issues arising from employment contracts. The court's opinion does not indicate whether the position was represented by either the majority representative of the Board's teachers or administrators.