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M E M O R A N D U M

TO: Commissioners

FROM: Ira W. Mintz
General Counsel

SUBJECT: Supplemental Report on Developments in the Counsel's Office Since June 26, 2008

Other Cases

In In the Matters of Herrick and Kostoplis, App. Div. Dkt. Nos. A-2590-06T1 and A-2734-06T1 (7/28/08), the Appellate Division affirmed decisions of the Merit System Board dismissing the appeals of two police superior officers who alleged disciplinary demotions when they were returned to their former positions after two other officers returned to their positions from military leave. The return of an officer to his or her permanent title upon expiration of the title holder's return from leave of absence is not "major discipline." It is an action required by regulation.

In Parker et al v. City of Trenton, App. Div. Dkt. No. A-3647-06T2, plaintiffs are or were employed by Trenton Water Works. In April 2000, they filed a complaint in which they alleged that their efforts to obtain promotions were frustrated and blocked by defendants due to their race, and that defendants created and perpetuated a hostile work environment. In an amended complaint, plaintiffs alleged that defendants engaged in retaliatory acts after plaintiffs commenced their court action. Plaintiffs appealed two orders granting summary judgment in favor of defendants and dismissing the entirety of their complaint. The Appellate Division reversed.

In CWA et al. v. State, App. Div. Dkt. Nos. A-2767-05T5, A-2803-05T5, A-0962-06T5 (8/1/08), CWA and the NJEA challenged an amendment to the retiree prescription drug card pilot program of the State Health Benefits Program that increased the maximum out-of-pocket expenditures. The Court held that the rule allowing adjustment of the cap on out-of-pocket expenditures is consistent with the statutory authority governing the prescription drug benefit plan and that the pilot plan, as adopted, is reasonable and necessary to preserve the fiscal integrity of the plan.

In In the Matter of Laquan Hudson, App. Div. Dkt. No. A-3646-06T1 (8/1/08), the Appellate Division held that a New Jersey Transit police officer was dismissed without administrative due process when he was dismissed from employment without a hearing, contrary to N.J.S.A. 27:25-15.1c and a provision of his collective bargaining agreement. NJT argued that the appellant was not terminated pursuant to the terms of the CBA, nor for disciplinary reasons, but rather by virtue of NJT's statutory requirement to comply with the Attorney General's Drug Policy. The Court found that the dismissal was disciplinary and that the AG's Guidelines did not authorize NJT to remove the officer without first affording him a fair hearing to contest the allegation. The Court also stated that under the CBA, appellant possessed a protectable interest in his continued employment with the department requiring it to proceed with due process before terminating his employment. The Court noted that no one had raised the appropriateness of appellant's right to a direct appeal from a disciplinary action, rather than challenging the decision through the grievance procedure in the CBA, which includes binding arbitration. Note, however, the Commission has held that under State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993), major discipline for NJT police officers is not subject to binding arbitration. New Jersey Transit, P.E.R.C. No. 96-64, 22 NJPER 133 (P27064 1996).

In Toto, et al. v. Sheriff's Officer Rolando Ensuar, et al., __ N.J. __ (2008) (8/4/08), the New Jersey Supreme Court held that when a public employee's actions constitute willful misconduct, the plaintiff need not satisfy the verbal threshold of the New Jersey Tort Claims Act and may instead recover the full measure of damages applicable to a person in the private sector. A public employee guilty of outrageous conduct cannot avail himself or herself of the limitations as to liability and damages contained in the Tort Claims Act. The case involved an expert witness who had a confrontation with Sheriff's officers at the courthouse and who was subsequently arrested and injured.

In Beth Godfrey, et al. v. Princeton Theological Seminary, __ N.J. __ (2008) (8/4/08), the New Jersey Supreme Court held that although socially inapt and, no doubt, annoying, an alleged harasser's conduct did not approach sexual harassment. Persons who are socially tone deaf are not, by that characteristic, necessarily the equivalent of sexual harassers. Noting that neither woman plaintiff used her own authority to tell the alleged harasser to go away, the Court explained that they cannot rely on the prospect of a damages award from the Seminary to replace their own obligation to tell the alleged harasser that they had no interest in him romantically or even as a casual acquaintance.