



**STATE OF NEW JERSEY
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November 18, 2008

MEMORANDUM

TO: Commissioners
FROM: Ira W. Mintz
General Counsel
SUBJECT: Monthly Report on Developments in the Counsel's Office Since October 30, 2008

Commission Cases

_____ The CWA has filed an appeal of Burlington Cty., P.E.R.C. No. 2009-10, 34 NJPER 247 (¶85 2008). In that decision, the Commission held that under Warren Cty., P.E.R.C. No. 86-111, 12 NJPER 357 (¶46 1986), given their statutory power to arrest, weights and measures employees are police within the meaning of the Act. Accordingly, the Commission held that the Director properly directed an election to sever weights and measures employees from an existing non-law enforcement unit represented by the CWA. The case became final and appealable when an election was held and the Director certified PBA Local 203 as the majority representative.

The Borough of East Rutherford has filed an appeal of P.E.R.C. No. 2009-15, 34 NJPER 289 (¶103 2008). In that decision, the Commission declined to restrain binding arbitration of a grievance filed by East Rutherford P.B.A. Local 275. The grievance challenged increases in co-payments for NJPLUS and HMO office visits under the State Health Benefits Program and seeks reimbursement of additional co-pay costs and a return to negotiated co-pay levels. The Commission held that the level of health benefits is generally negotiable and declined to restrain arbitration over the reimbursement issue, but permitted the Borough to refile its petition should the arbitrator find a contractual violation and a dispute arise over the negotiability of any remedy issued. The same issue is before the Appellate Division in a case involving Rockaway Township and FOP Lodge 31.

The New Jersey Supreme Court has granted certification in Manalapan-Englishtown Regional School Dist. v. Klumb, Sup. Ct. Dkt. No. 63,009. The Appellate Division had affirmed the decision by the New Jersey State Board of Education to reinstate Klumb to her former position with back pay and emoluments. The Court will review that decision. A related Commission decision found that the compensation to be paid to Klumb upon her return to teaching was negotiable and arbitrable and is currently on appeal before the Appellate Division (App. Div. Dkt. No. A-3515-06T1). The Commission is involved only in the latter appeal, not the reinstatement case before the Supreme Court.

Other Cases

In Borough of Glassboro v. FOP Lodge No. 108, __ N.J. __ (2008) (11/17/08), the Supreme Court affirmed in part and reversed in part a decision of the Appellate Division that had confirmed an arbitration award that had concluded that a police sergeant was improperly deprived of a promotion and that he should be promoted with full back pay. The Supreme Court agreed with the arbitrator's conclusion that the record showed no reasoning by the Borough for elevating another sergeant over the grievant at Phase III of a three-phase promotion process. The Court stated that this case stands for the unremarkable proposition that, should a grievant make the type of showing made here, and should the municipality not provide even the simplest explanation on the record for some kind of rational reason for its decision, the decision cannot stand. However, the Court also held that if the record was inadequate regarding how the other sergeant passed the grievant during Phase III, it was equally deficient in respect of the grievant's leadership skills and how, upon testing, he lost his lead. Thus, it was beyond the arbitrator's power to fashion a remedy that promoted the grievant, and the affirmance of that award must be reversed. The matter was remanded to the Borough to conduct a new Phase III proceeding, unless the parties can amicably resolve the case among themselves.

In O'Rourke v. Lambertville, __ N.J. Super. __ (App. Div. 2008) (10/31/08), the Appellate Division affirmed a trial court decision that had reversed the City Council's decision removing plaintiff from his position as a police officer. The Court held that when a law enforcement agency adopts rules pursuant to N.J.S.A. 40A:14-181 to implement the Attorney General's Guidelines, the agency has an obligation to comply with those rules. Because it failed to do so, and because the deficiencies tainted the disciplinary process, the City's decision to remove plaintiff from his position cannot stand.

In Maslow v. Latorre et al, App. Div. Dkt. No. A-3489-07T1 (11/17/08), the Court held that alleged retaliation for filing an individual grievance under a collective negotiations agreement is not grounds for a claim under the Conscientious Employee Protection Act ("CEPA"). Because the trial court dismissed the plaintiff's complaint, it did not address the defendant's argument that plaintiff's claim was within PERC's exclusive jurisdiction.