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February 3, 2011

MEMORANDUM

TO: Commissioners

FROM: Counsel's Office

SUBJECT: Supplemental Report on Developments in the Counsel's Office Since January 20, 2011

Commission Cases

On January 26, 2011, in an unpublished opinion, the Appellate Division of the Superior Court affirmed Wall Tp. Bd. of Ed. and Wall Tp. Information Technology Ass'n, 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), aff'd, App. Div. Dkt. No. A-3764-09T1 (1/26/2011) (copy attached).

The Commission decided the case based on a stipulation of pertinent facts signed by counsel for the Board and the Association. The Commission held that the Board engaged in unfair practices by terminating a computer technician based on her exercise of conduct protected by the Act and ordered that the employee be reinstated with back pay. The Board sought reconsideration asserting that it had changed law firms and its former attorney had not been authorized to enter into that stipulation. The Court affirms the Commission's refusal to reconsider its decision and finds that the Superintendent was aware of the execution of the stipulation, that occurred before the Board changed law firms. The Court also rejects the Board's challenge to the reinstatement remedy. It holds that the argument was not made to the Commission and was improperly raised for the first time in the Board's arguments on appeal. However, the Court holds that the remedy was proper and that reinstatement would not insulate the employee from adverse personnel actions taken for "legitimate, non-retaliatory reasons."

The appeal of Tp. of South Orange Village and PBA Local No. 12 and PBA Local No. 12A Superior Officers Association, P.E.R.C. No. 2011-47, has been withdrawn.

Cases Related to Commission Jurisdiction

On January 20, 2011, Mercer County Superior Court Judge Linda Feinberg issued final decisions in two lawsuits, one involving State employees, the other involving school district and municipal employees, that had been brought by a coalition of public sector labor organizations challenging the validity and constitutionality of P.L. 2010, Ch. 2. The Court dismisses the complaints in both cases. The plaintiffs can appeal the rulings to the Appellate Division of the Superior Court.

In New Jersey State Firefighters' Mutual Benevolent Association, New Jersey State Policeman's Benevolent Association et als. v. State of New Jersey, New Jersey Department of the Treasury, New Jersey State Health Benefits Commission, et als MER-L-1004 (January 20, 2011), the plaintiffs attacked the validity of the law's mandate that requires employees to contribute 1.5% of base salary toward the cost of health care coverage. Judge Feinberg's 167-page opinion reviews each of the plaintiffs' claims and upholds the law. Pages 53 through 82 discuss the interrelationship of the law, the State constitutional rights of public employees under Article I, Par. 19, and the impact of the New Jersey Employer-Employee Relations Act, with emphasis on the extent to which negotiations and interest arbitration proposals that are inconsistent with the law's mandates have been preempted.

A preliminary decision issued May 21, 2010 in the same case denied an application for interim relief and temporary restraints in a challenge to P.L. 2010, c. 2 as it related to pending interest arbitration proceedings.

The companion case, Communications Workers of America v. State of New Jersey, Department of Treasury, Division of Pensions and Benefits and the State Health Benefits Commission MER-C-72-10 (January 20, 2011) focuses on Section 8 of P.L. 2010, c. 2 requiring that changes in the provision of health care benefits that are included in collective negotiations agreements between the State and its employees negotiated in the State Health Benefits Program will be imposed, without negotiation, to local government employees participating in the State Health Benefits Program or education employees covered by the School Employees Health Benefits Program at the same time and in the same manner as State employees;

Judge Feinberg, relying upon the reasoning contained in New Jersey State Firefighters' Mutual Benevolent Association, rejects the plaintiffs' challenge that Section 8 violates the State constitutional rights of public employees under Article I, Par. 19. The opinion also reviews and rejects the plaintiffs' argument that because negotiations between the State and unions representing its employees would automatically be passed onto local employees, Section 8 is an illegal parity clause because the state unions will be negotiating both for its employees and those in local jurisdictions, making it less likely the State would agree to modifications through negotiations. Judge Feinberg's opinion acknowledges the analogous impacts of Section 8 and parity clauses that the Commission has found to be illegal subjects for negotiations. However, the Court reasons (slip opinion at 35), that because the arrangement contained in Section 8 is the result of direct legislative action, it is not illegal as:

Whatever rights may have been granted by the Legislature with the passage of N.J.S.A. 34:13A-5.3, the Legislature has the authority to modify or eliminate through subsequent constitutional legislation, just as it has done here by enacting Chapter 2, Section 8.