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M E M O R A N D U M

TO: Commissioners

FROM: Bob Anderson

RE: Developments in the Counsel's Office Since December 14, 2000

Commission Cases

In Council of New Jersey State College Locals, AFT, AFL-CIO and State of New Jersey, v. N.J. Super. (App. Div. 2000), aff'g P.E.R.C. No. 2000-12, 25 NJPER 402 (¶30174 1999), the Commission held mandatorily negotiable a proposal asking the employer to contribute monies to a union-administered health fund for adjunct faculty. The Commission ruled that the proposal was not preempted by the State Health Benefits Program or rendered invalid by public policy concerns against shifting public money to a private entity without accountability. The Appellate Division has affirmed that decision in a published opinion by Judge Axelrad. N.J. Super. (App. Div. 2001)(copy attached).

Other Cases

In Jersey City Police Superior Officers Ass'n v. City of Jersey City, App. Div. Dkt. No. _____ (12/13/00) (copy attached), an Appellate Division panel affirmed a trial court opinion vacating an arbitration award. The Court held that the arbitrator had based his decision on negotiability considerations, rather than contract interpretation, and that PERC had exclusive jurisdiction to make scope-of-negotiations determinations. The Commission subsequently ruled that the grievance (contesting the use of lieutenants to fill in for absent sergeants) was non-negotiable. Jersey City Police Superior Officers Ass'n and City of Jersey City, P.E.R.C. No. 2001-32.

In State v. Ercolano, ___ N.J. Super. ___ (App. Div. 2000), an Appellate Division panel upheld an order of forfeiture of public employment. A teacher was convicted of simple assault based on his picking a student up and pushing him against a wall. At the time he was convicted, the trial court did not order forfeiture, but that failure did not preclude the board from seeking a mandatory order of forfeiture based on N.J.S.A. 2C:51-2(g). The Appellate Division also held that a teacher's conviction for assault upon a student during the school day involved or touched upon his employment within the meaning of N.J.S.A. 2C:51-2(g) and thus a hearing was not necessary to determine that question.

In re Hall, 335 N.J. Super. 45 (App. Div. 2000), involved the dismissal of a police officer for offering money to impound lot employees to steal stereo system equipment from an owner's car; the officer wore his uniform pants and displayed his service revolver in an attempt to intimidate the employees to sell the equipment to him. Invoking progressive discipline concepts, the Merit System Board reduced the penalty to a 15-day suspension, but the Court upheld the officer's dismissal.

N.J.S.A. 40A:14-147 provides that a police officer has a right to waive a disciplinary hearing at the municipal level and to appeal the charges directly to "any available authority specified by law or regulation, or follow any other procedure recognized by contract, as permitted by law." This statute allows a police officer in a Civil Service community to bring a removal to the Merit System Board directly. But it does not permit an officer in a non-civil service community to contest a removal directly in Superior Court. Grubb v. Borough of Hightstown, 333 N.J. Super. 592 (Law Div. 2000). The municipal hearing must be held first and then the Superior Court will review a disciplinary determination "de novo on the record below." N.J.S.A. 40A:14-150.

Appellate Division Judges Stern and Rodriguez have confirmed two arbitration awards. One award held that a grievant was entitled to seniority retroactive to the date she began working at the employer's facility, albeit as an employee of a temporary personnel agency, rather than the date on which she was formally hired. Western Monmouth Utilities Auth. v. Highway and Local Motor Freight Drivers, Dockmen and Helpers Local Union No. 701, App. Div. Dkt. No. A-275-99T5 (11/30/00). The second award ordered the employer to pay four years of back overtime pay, based on a finding that there was a continuing violation of the overtime clause and thus the 30-day deadline for filing grievances did not limit the remedy. Trenton Bd. of Ed. v. Trenton Business & Technical Employees Ass'n, App. Div. Dkt. No. A-1634-99T3 (12/01/00). The Court held that issues of timeliness in the grievance process are to be determined by the arbitrator.

In Harrison v. Roxbury Tp., App. Div. Dkt. No. A-0247-99T3 (11/22/00), the Appellate Division held that the Township Manager was the appropriate authority under

N.J.S.A. 40A:14-118 for adopting a police duty manual and that a Township Council resolution approving the manual was invalid. The rules and regulations in the manual were not required to be adopted by ordinance and disciplinary action pursuant to the manual was valid.

In Marjarum v. Hamilton Tp., ___ N.J. Super. ___ (App. Div. 2000), the Appellate Division invalidated disciplinary regulations adopted by a Township Council, rather than a Director of Public Authority or other appropriate authority under N.J.S.A. 40A:14-155. Nevertheless, the Court upheld the suspension of a police officer for acting rudely at a public meeting; no validly adopted rule is necessary before punishing an officer for failure to comply with the implied standard of common courtesy. The Court also ruled that expungement of a disciplinary offense from a personnel record does not entitle a police officer to receive counsel fees under N.J.S.A. 40A:14-155.

In Miskowitz v. Union Cty. Utilities Auth., ___ N.J. Super. ___ (App. Div. 2001), the Court held the Authority lawfully terminated the five-year employment contracts of an assistant comptroller and a deputy executive director. While the contract terms appeared to prohibit abolition of the employees' positions, the Court found that the Authority acted in good faith and in response to an unprecedented fiscal crisis prompted by federal decisions declaring unconstitutional New Jersey's solid waste flow orders. The Court declined to endorse a broader principle that public employers may abrogate fixed term contracts in order to promote economy and efficiency.

Attached is an article from the New Jersey Law Journal (January 1, 2000) discussing fines imposed on teachers for striking.