



STATE OF NEW JERSEY
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June 21, 2001

MEMORANDUM

TO: Commissioners

FROM: Bob Anderson
General Counsel

RE: Report on Developments in the Counsel's Office
Since May 31, 2001

Commission Appeals

An Appellate Division panel has reversed the decision in Hillsborough Tp. v. Hillsborough PBA Local No. 205, PERC No. 2000-82, 26 NJPER 207 (¶31085 2000), aff'd App. Div. Dkt. No. A-5281-99T3 (6/20/01) (copy attached). The Commission held that the Township violated 5.4a(1) and (3) by singling out the PBA President for discipline as a result of a letter he sent on the PBA membership's behalf criticizing a police officer for ticketing the mother of a PBA officer in a neighboring community. The Court found no evidence to show that the PBA members had asked the president to include references to the "honor code" in the letter so it concluded that the president could be properly disciplined for including those references. The opinion approves of the legal principles applied by the Commission, but disagrees with their application to the facts. The opinion will not be published.

Other Cases

Don Horowitz is representing the Port Authority Employment Labor Relations Panel in a case contesting an unfair labor practice order it issued against the Port Authority for refusing to negotiate over a transfer of unit work at the World Trade Center. The Authority filed an action in a New Jersey trial court seeking to have the Panel's order vacated. The Panel then filed a motion to have that action dismissed since it belonged in a New York court rather than a New Jersey court or to have the case transferred to the Appellate Division since it involves an appeal of a final agency action. Judge Theodore Winard granted the motion to transfer the case to the Appellate

Division. He also found that the Panel had made a persuasive argument that the case belonged in a New York court, but he ruled that that issue must be addressed by the Appellate Division in the first instance.

The United States Supreme Court has issued a decision concerning the supervisory status of registered nurses at a residential care facility. National Labor Relations Board v. Kentucky River Community Care, Inc., ___ U.S. ___, 167 LRRM 2164 (5/29/01). The court agrees with the NLRB that the employer had the burden of proving that the nurses were supervisors excluded from the Act's coverage, but it rejects the NLRB's interpretation of the statutory definition of supervisor. That definition requires that an employee use "independent judgment," but the NLRB interpreted that phrase to exclude "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards." In an opinion written by Justice Scalia and joined by four other justices, the Court rejects that exclusion.

In Rahway Valley Sewerage Auth. v. Paper, Allied-Industrial, Chemical and Energy Workers Int. Union AFL-CIO, Local 2-149, App. Div. Dkt. No. A-5266-99T3 (05/03001), an Appellate Division panel upheld an arbitration award that overturned a reprimand because the employer waited too long to bring the disciplinary charge. The Court held that the arbitrator had the power to find that the employer had violated the equitable doctrine of laches, even though the arbitrator would not have had the power to establish a contractual deadline for bringing charges.

In Linden Bd. of Ed. v. International Brotherhood of Teamsters, Local 478, App. Div. Dkt. No. A-3177-99T1 (6/7/01), the Court reversed a lower court decision that held that a dispute was not contractually arbitrable. The arbitration clause was limited to certain subjects -- e.g. salary and employment procedures -- and the grievance asserted that the employer had diverted extra driving assignments to a supervisor rather than unit employees, thus decreasing the money they earned. The Appellate Division panel held that the arbitrator should resolve the issue of whether the arbitration clause covered this dispute. The Court also rejected a lower court ruling that the union could file an untimely unfair practice charge because the superintendent had agreed to go to arbitration; the Court reasoned that the superintendent did not "prevent" the union from going to arbitration.

In Ocean Cty. v. OPEIU, Local 14 (now Local 32), App. Div. A-4180-99T3 (5/24/01), an Appellate Division panel reversed a trial court decision vacating a grievance arbitration award. The arbitrator found that the county violated the parties' collective negotiations agreement when it did not pay non-essential employees who did not report to work on a snow day when Governor Whitman had ordered all roads closed to non-essential travel. The court held that the award was reasonably debatable, even though another arbitrator had rejected a similar grievance involving another negotiations unit. The Court also stated:

“Keeping people who were unlawfully banned from travel off the roads and not penalizing them for circumstances beyond their control during this statewide emergency does not contravene any public policy.” (Slip opin. at 13).

In Musicians’ Guild of Essex Cty., Local 16, American Fed. of Musicians v. Colonial Symphony Orchestra, Dkt. No. ESX-C-1Y-01 (4/26/01), Chancery Judge Kenneth Levy entered an order appointing the State Board of Mediation to determine whether the plaintiff union will be the majority representative of the defendants’ musicians. The National Labor Relations Board did not have jurisdiction so the court entertained this action to enforce Article I, Paragraph 19 of the New Jersey Constitution conferring collective bargaining rights on all private sector employees. The Court held that the musicians were not independent contractors.

In FOP, Garden State Lodge #3 v. Board of Trustees of the Police and Firemen's Retirement System, App. Div. A-0174-00T3 (6/01/01), an Appellate Division panel upheld a determination of the PFRS trustees denying pension credit for a negotiated salary increase for officers with 22 years experience -- so-called "senior status" pay. The FOP and Pennsauken Township negotiated an agreement to make such payments, apparently in exchange for the elimination of longevity payments and certain vacation benefits for officers in the "senior" category. The Court holds that the recent PFRS regulations exclude such salary increases from being credited for pension purposes and that the PFRS was not estopped from denying credit by a 1997 ruling approving credit.

In Garfinkel v. Morristown Obstetrics & Gynecology Associates, ____N.J.____(2001), the Supreme Court held that a doctor was not compelled to arbitrate his LAD claim against his former employer. The Court holds that an employment contract may require an employee to arbitrate anti-discrimination claims rather than sue in court, but any contractual waiver must be clear and unequivocal and the contractual language in this case was not. The Court also holds that the employee's common-law claims and LAD claims should all be tried in one judicial action instead of bifurcating the dispute between judicial resolution and arbitration.