



STATE OF NEW JERSEY
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January 24, 2002

MEMORANDUM

TO: Commissioners

FROM: Bob Anderson
General Counsel

RE: Report on Developments in the Counsel's Office Since December 20, 2001

Commission Appeals

We recently received three affirmances from the Appellate Division.

The first is in Irvington Bd. of Ed. and Irvington Ed. Ass'n., H.E. No. 2001-11, 27 NJPER 105 (¶32041 2001), aff'd App. Div. Dkt. No. A-3231-00T5 (12/27/01). The Court agrees with Hearing Examiner St. Onge that the Association did not prove that two memoranda written by a principal and criticizing a teacher's conduct violated N.J.S.A. 34:13A-5.4a(1) or (3). (The Commission did not review the Hearing Examiner's decision since timely exceptions were not filed).

The second is in FMBA, Local No. 51 v. City of Gloucester City, P.E.R.C. No. 2001-22, 27 NJPER 2 (¶32002 2000), aff'd App. Div. Dkt. No. A-1983-00T2 (12/27/01). The Commission restrained binding arbitration of a grievance contesting the City's decisions to abolish the position of Emergency Medical Technician and lay off three employees holding that title. After reciting the facts and articulating very deferential standards of review, the Court summarily affirmed the Commission's ruling.

The third is in City of Newark and Association of Government Attorneys, D.R. 2000-11, review den. P.E.R.C. No. 2000-100, 26 NJPER 289, aff'd App. Div. Dkt. No. A-6106-99T2 (1/14/02). The Court affirmed an order certifying a negotiations unit of the City's lower-level staff attorneys. It upheld the agency's showing of interest rules and practice and rejected claims that attorneys cannot organize because of the Rules of Professional Conduct and because they are confidential employees or managerial executives. This decision, written by Judge Baime, will be published.

An appeal has been filed in Franklin Tp. and IBT Local 575, D.R. No. 2002-5, 27 NJPER 387 (¶32143 2001). An election was directed in a negotiations unit of nonsupervisory blue collar employees, including the road supervisor and the road repairers. The Township did not seek Commission review of the direction of election and instead appealed directly to the Appellate Division. The Court denied a stay of the election.

Arbitration Cases

In City of Hoboken v. Hoboken Police Superior Officers Ass'n, App. Div. Dkt. No. A-1184-99T5 (11/8/01), the Court confirmed a grievance arbitration award awarding back pay and benefits to police officers who worked two additional days in 1997 and 1998. The arbitrator found that the contract permitted the City to require extra work days in 1995 and 1996, but not in subsequent years after the contract covering 1995 and 1996 expired. The Court found that the dispute was contractually arbitrable and that the contractual language supported the arbitrator's interpretation.

In International Brotherhood of Teamsters, Local 560 v. Garfield Bd. of Ed., App. Div. Dkt. No. A-919-00T2 (12/20/01), an Appellate Division panel affirmed a trial court decision vacating a grievance arbitration award. The arbitrator held that the employer violated a contractual provision precluding it from using substitute custodians for more than 30 days without the union's consent. The arbitrator found that three custodians worked almost full time to replace sick or injured full-time custodians, including one custodian out for one year with a torn rotator cuff, even though they did not work 30 consecutive days at any point; he ordered that the custodians be awarded back pay after the 31st day of employment plus contractual benefits from the date of the award. The lower court and Appellate Division, however, held that the award was based on a mistake in law because N.J.S.A. 18A:27-4.1 required the superintendent's recommendation before a full-time appointment is made and because public policy required the arbitrator to consider the fiscal impact of employing additional full-time custodians if the employee who had been out had returned to work.

In Pennsylvania Power Co. v. Local Union No. 272, ___ F. 3d ___, ___ LRRM ___ (3d. Cir. 2001), the Third Circuit Court of Appeals vacated an award in which the arbitrator found that the employer violated an anti-discrimination clause by providing early-retirement benefits to supervisors. The arbitrator exceeded his contractual authority by reading the non-discrimination clause to apply to this type of supervisor/non-supervisor difference and by ordering the company to provide voluntary retirement program benefits to union member employees.

In Gras v. Associates First Capital Corp., ___ N.J. Super. ___ (App. Div. 2001), an Appellate Division panel upheld an agreement requiring that claims under the Consumer Fraud Act be arbitrated. The fraud act did not create a private cause of action and plaintiffs could vindicate their statutory rights in arbitration even if that agreement precluded a class action.

In Leodori v. Cigma Corp., App. Div. Dkt. No. ___ (12/27/01), the Court held that an in-house lawyer was not required to arbitrate his CEPA claims. The employer had not established a knowing and voluntary waiver of the employee's right to a jury trial.

In EEOC v. Waffle House, Inc., ___ U.S. ___, ___ LRRM ___ (2002), the United States Supreme Court held that an arbitration agreement did not bar a grill operator from filing a discrimination claim under the Americans with Disabilities Act with EEOC. The EEOC was not a party to that agreement so the agreement does not bar it from seeking victim-specific relief such as backpay, reinstatement, and damages.

Other Cases

In Coyle v. Warren Cty. Freeholder Bd., ___ N.J. ___ (2002), our Supreme Court held that the Rule of Professional Conduct requiring attorneys to withdraw from representation when discharged by a client does not apply to a County counsel who has a statutory term of office and statutory protection against termination without good cause. The Court stated that the rule does not apply to government lawyers and it cited a California Supreme Court case upholding the right of government attorneys to join unions. The Court's analysis is consistent with the Appellate Division's decision in City of Newark v. Association of Government Attorneys, described on p. 2.

In Falusi v. Bd. of Review, App. Div. Dkt. No. _____ (12/31/01), the Court considered claims under the federal and state family leave acts. The Court held that the federal statute covers both personal sickness and childbirth while the New Jersey statute does not cover personal illness.

In Monmouth Cty. Corrections Officers Ass'n, Inc., PBA Local 314 v. Monmouth Cty. Freeholders Bd., App. Div. Dkt. No. A-0104-00T2 (11/13/01), the Court held that the County did not violate N.J.S.A. 40A:10-23 when it agreed to pay the costs of retiree healthcare benefits for four employees pursuant to their individual employment contracts but did not pay the cost of benefits for employees in negotiations units. N.J.S.A. 40A:10-23 requires that payments be made "under uniform conditions as the governing body of the local unit shall prescribe"; but the Court held that this statute does not apply to individual employees who are uniquely qualified or specially situated. The Court agreed with the County that "its ability to hire and retain highly qualified and specialized employees would be hamstrung by the interpretation of the statute advanced by plaintiff."

In Price v. New Jersey Dept. of Corrections, App. Div. Dkt. No. A-3218-99T3 (11/14/01), the Court agreed with the Merit System Board that a central transportation unit employee was properly discharged based on the loss of his license - - a job requirement - - due to a DWI suspension. While a collective negotiations agreement required that disciplinary charges be brought within 30 days of the

employer's reasonably becoming aware of the offense, that time period did not begin to run until the employee actually lost his license even though the employee had informed the employer a month earlier that he had entered a guilty plea.

In Hughes v. PFRS Bd. of Trustees, App. Div. Dkt. No. _____ (12/27/01), the Court estopped the PFRS from denying a widow's pension on the ground that her husband died within 30 days of retirement and was thus considered an "active" employee under the statute. The PFRS had told the widow that the retirement was effective and the widow had authorized the withdrawal of life support given that information. New legislation has prospectively eliminated the 30-day period.

REA:aat