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March 27, 2002

MEMORANDUM

TO: Commissioners

FROM: Bob Anderson
General Counsel

SUBJECT: Supplemental Report on Developments in the Counsel's Office Since February 28, 2002

Commission Cases

The Appellate Division has rescheduled oral argument in Teaneck Tp. and FMBA Local No. 42, P.E.R.C. No. 2000-33, 25 NJPER 450 (¶30199 1999), app. pending App. Div. Dkt. No. A-001850-99T1. The argument will be on April 30. Sue Galante will represent the Commission. This is the first appeal from a Commission decision reviewing an interest arbitration award.

Other Cases

In Rawitz v. Essex Cty., ___ N.J. Super. ___ (App. Div. 2002), the Court held that an assistant county counsel was not entitled to be paid under N.J.S.A. 40A:9-6 at the salary rate of a section chief even though he performed many of the duties of a section chief who had been terminated. The assistant county counsel did not meet the statutory requirement of having "held" the "office or position" on a de facto basis; neither he nor anyone else had held him out to be a section chief or an acting section chief.

In Ragsdale v. Wolverine World Wide, Inc., ___ U.S. ___ (2002), the United States Supreme Court invalidated a Department of Labor regulation issued to implement the Family Medical Leave Act of 1993. The regulation prohibits an employer from counting a leave of absence against the FMLA entitlement to 12 weeks of leave unless an employer timely notifies an employee it will be so counted. The Court reasoned that this regulation effectively required an employer to grant more than the 12 weeks of leave mandated by the FBLA as a minimum benefit.

In Communications Workers of America v. New Jersey Dept. of Personnel, ___ F.3d ___, 2002 U.S. App. LEXIS 2875 (3d Cir. 2002), the Third Circuit Court of Appeals enforced an agreement between CWA as a national union and DOP settling an EEOC charge that DOP's PAR program had a disparate impact upon African-American and Hispanic employees. The Court held that a CWA local that had not filed an EEOC charge itself could not contest the settlement agreement and that the national union was estopped from challenging the existence of the agreement.

In Constantino v. Borough of Berlin, ___ N.J. Super. ___, 2002 N.J. Super. LEXIS 117 (App. Div. 2002), the Court dismissed a lawsuit claiming that the employer discriminatorily refused to hire a police officer over the age of 35. N.J.S.A. 40A:14-127 prohibits the hiring of police officers under the age of 21 and over the age of 35. At the time the plaintiff applied for a position, however, the federal law against age discrimination overrode this state law. Subsequently, Congress revitalized a previous provision that had allowed states to enforce laws using age as a criterion in hiring police officers and firefighters. In this case, the Court ruled that this subsequent permission to apply an age criterion was entitled to retroactive effect covering plaintiff's situation.

In Gerard v. Camden Cty. Health Services Center, ___ N.J. Super. ___ 2002 LEXIS 115 (App. Div. 2002), an Appellate Division panel reversed a grant of summary judgment against a CEPA plaintiff. Plaintiff, an assistant director of nurses at a health center, refused a superior's request to serve disciplinary charges upon a nurse. The trial court found that the disciplinary charges did not actually violate a law, regulation or public policy; but the appellate court disapproved that standard and retreated from previous cases which had required a CEPA plaintiff to establish that an employer had in fact violated a law or regulation or clear mandate of public policy or engaged in fraudulent or criminal conduct. Instead, it suffices if a plaintiff can show that he or she had an objectively reasonable belief that the conduct complained of was fraudulent or criminal. The assistant director introduced sufficient evidence that she could have reasonably believed that the charges were fraudulent and violative of the proper quality of patient care under N.J.S.A. 34:19-3c(1).

Statutes

The Legislature has amended N.J.S.A. 11A:6-10, a statute determining which police officers and firefighters are entitled to take leaves of absence to attend union conventions. The Legislature has limited the statutory right to attend conventions to duly authorized representatives of majority representatives affiliated with the New Jersey Policemen's Benevolent Association, the Fraternal Order of Police, the Firemen's Mutual Benevolent Association, or the Professional Fire Fighters Association of New Jersey. The amendment deletes several other organizations from the approved list. It also limits the number of employees entitled to take leaves and the number of days (seven) for such leaves. This amendment was apparently enacted in response to New Jersey State FMBA v. North Hudson Reg. Fire & Rescue, 340 N.J. Super. 577 (App. Div. 2001), certif. den. 170 N.J. 88 (2001), which had declared that N.J.S.A. 11A:6-10 was constitutional because it constituted special legislation and unduly delegated too much power to unions to determine how many employees would take leaves.

REA:aat