



STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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September 19, 2002

MEMORANDUM

TO: Commissioners

FROM: Bob Anderson
General Counsel

SUBJECT: Report on Developments in the Counsel's Office Since July 25, 2002

The Employer-Employee Relations Act

On August 1, 2002, the Governor signed Assembly Bill No. 2372 amending sections 5.5 and 5.6 of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The bill (copy attached) provides that a majority representative can obtain the right to collect representation fees from non-members even if the employer does not agree in negotiations to permit such fees. The majority representative can now petition the Commission to investigate whether a majority of negotiations unit employees are voluntary dues paying members of the majority representative and whether the majority representative maintains a demand-and-return system for objecting to fees not attributable to representational duties of the majority representative. If these conditions are met, the Commission shall order the employer to institute a payroll deduction of representation fees from paychecks of non-member employees.

Commission Cases

Oral argument was held on September 11 in Tinton Falls Bd. of Ed. and Tinton Falls Ed. Ass'n, P.E.R.C. 2001-78, 27 NJPER 293 (¶32107 2001), app. pending App. Div. Dkt. No. A-6458-00T2. The Commission dismissed an unfair practice charge alleging that the Board terminated a library aide because she filed a grievance. The Commission found instead that the termination was based on the aide's absenteeism and refusal to acknowledge her contractual

obligation to work five days after the school year ended. Don Horowitz argued the case for the Commission.

Oral argument will be held on September 25 in Lumberton Ed Ass'n and Lumberton Tp. Bd. of Ed., P.E.R.C. No. 2002-13, 27 NJPER 372 (¶32136 2001), app. pending, App. Div. Dkt. No. A-001328-01T5. The Commission held that the Board committed an unfair practice when it unilaterally prohibited its employees from stacking FMLA leave and contractual leaves of absence.

The New Jersey State League of Municipalities has been granted leave to appear as an amicus curiae in Union Tp. and FMBA Local No. 46, FMBA Local No. 246 and PBA Local No. 69, I.R. No. 2002-7, 28 NJPER 86 (¶33031 2001), recon. den. P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002), app. pending.

Appeals have been filed in three cases.

The first is New Jersey Highway Authority and IFPTE Local 193 (Toll Supervisors of America), AFL-CIO, P.E.R.C. No. 2002-76, ___ NJPER ___ (¶_____ 2002), app. pending. The Commission declined to restrain arbitration of a grievance contesting the assignment of toll plaza supervisors to relieve toll booth attendants during their breaks.

The second is New Jersey Institute of Technology and NJIT Superior Officers Ass'n, P.E.R.C. No. 2003-9, ___ NJPER ___ (¶_____ 2002). The employees appealed the part of the Commission order declining to restrain arbitration over a claim that employees were entitled to legal representation in disciplinary proceedings. The Commission, however, restrained arbitration over a grievance contesting a decision to suspend a police officer.

The third case is Middlesex Cty. Sheriff and Joseph Kasha and Steven Eckel, P.E.R.C. No. 2003-4, ___ NJPER ___ (¶_____ 2002). The Commission held that the employer committed an unfair practice when it transferred a sheriff's officer in retaliation for his protected activity on behalf of the FOP. The employer has appealed the order requiring the employer to rescind the transfer and has also moved for a stay of that order.

Governor's Executive Orders

The Governor has issued Executive Order #26 under the Open Public Records Act reducing the number of confidential record exemptions. This order deleted all the confidential record exemptions proposed by the Department of Labor, except for the Commission's proposals regarding the need for confidentiality in connection with representation elections and with settlement efforts during negotiations, mediation, factfinding, and arbitration. The Commission's proposed exemptions will proceed through the rulemaking process.

Statutes

The Governor has signed a bill calling for project labor agreements on public works projects which will cost \$5,000,000 or more. P.L. 2002, c. 44.

Other Cases

In Martindale v. Sandvik, Inc., ___ N.J. ___ (2002), the New Jersey Supreme Court held, by a 4-3 vote, that an agreement to arbitrate statutory claims related to employment termination could be binding on an employee even though that agreement was contained in the job application form. The majority opinion relied on the national policy and New Jersey policy favoring arbitration and rejected an argument that the job application agreement was a contract of adhesion. The dissenting opinion would have held that a consent to arbitration in a job application form is unenforceable as a matter of public policy given the vast disparity in bargaining power between an employer and a job applicant.

In German v. Monmouth Cty., App. Div. Dkt. No. A-5307-00T2 (7/5/02), the Court held that a sheriff's officer who resigned after the effective date of a successor contract, but before the contract was executed was not entitled to be paid the retroactive salary increase. The Court distinguished State Troopers Fraternal Ass'n v. State, 149 N.J. 38 (1997), granting retroactive increases, on the ground that the parties' past practice in this case was that employees who retired before contract execution did not receive retroactive payments.

In Maltese v. North Brunswick Tp., ___ N.J. Super. ___, 2002 LEXIS 292 (App. Div. 2002), the Court held that a mayor had the power to appoint a Director of Public Safety, but not to establish his compensation and benefits. Only the Town Council could establish the compensation and benefits. The Court remanded the case for the trial court to consider whether the Council was equitably estopped or whether it had otherwise indicated an intention to ratify the mayor's agreement with the Director. That agreement called for the Director to receive the benefits provided by the superior officers' collective negotiations agreement, including payment upon retirement for unused vacation and sick leave.

In Caggiano v. Fontoura, ___ N.J. Super. ___ (App. Div. 2002), an Appellate Division panel held that a hostile work environment claim under the Law Against Discrimination will not be time-barred so long as the acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the statutory time period - - in the case of the LAD, a two year statute of limitations. The Court elected to follow the analysis and holding of National Railroad Passenger Corp. v. Morgan, ___ U.S. ___, 122 S.Ct. 2061 (2002), construing Title VII's statute of limitations.

Soon after Caggiano, the New Jersey Supreme Court also adopted Morgan's analysis and holding. Shepherd v. Hunterdon Developmental Center, ___ N.J. ___ (2002). A cause of action in a hostile work environment case accrues on the date of the last act in a pattern or series of allegedly hostile acts.

In Port Authority and Union of Automotive Technicians, Dkt. No. BER-L-3279-02, Judge Harris of the Bergen County Superior Court affirmed a decision of the Port Authority Employment Relations Panel dismissing an unfair labor practice charge. The charge had asserted that the employer unilaterally altered drug testing procedures, but the Panel found no changes in employment conditions. Don Horowitz represented the Panel.

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Attachment