



**STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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October 23, 2003

MEMORANDUM

TO: Commissioners

FROM: Robert E. Anderson
General Counsel

SUBJECT: Report on Developments in the Counsel's Office Since September 25, 2003

Commission Cases

The Supreme Court has affirmed Teaneck Tp. and FMBA Local No. 42, 353 N.J. Super. 289 (App. Div. 2002), aff'd __ N.J. __ 2003. The Supreme Court issued a one sentence per curiam opinion affirming substantially for the reasons stated below.

The Appellate Division has affirmed NJIT and NJIT Superior Officers Ass'n, P.E.R.C. No. 2003-9, 29 NJPER 343 (¶33120 2002), aff'd __ NJPER __ (____ 2003), App. Div. Dkt. No. A-000222-02T2 (copy of opinion attached). The Commission declined to restrain arbitration of a grievance asserting that a police sergeant was entitled to have a lawyer represent him at a disciplinary hearing.

Judge Sapp-Peterson of the Mercer County Superior Court has enforced the agency's order in Irvington Bd. of Ed. and Irvington Ed. Ass'n, H.E. No. 2003-9, 27 NJPER 560 (¶33174 2002), enforced MER-L-1076-03 (9/23/03) (copy of opinion attached). A Hearing Examiner found that the Board violated the Act by refusing to supply certain information and ordered the Board to turn over certain documents to the Association. The Board did not file exceptions so the Hearing Examiner's decision became a final agency order. When the Board did not comply with that order, enforcement proceedings were begun.

Judge Passero of the Passaic County Superior Court has enforced the interim relief order of a Commission designee in Passaic City PBA Local No. 14 v. City of Passaic, I.R. No. 2004-2, 29 NJPER 310 (¶96 2003), enforced L-3673-03 (copy of order attached). The order required the City to restore a police officer work schedule it had unilaterally changed.

Don Horowitz represented the Commission in both enforcement actions.

Oral argument has been scheduled for November 19 in City of Trenton and Trenton Superior Officers Association, P.E.R.C. No. 2002-70, 28 NJPER 243 (¶33092 2002), app. pending, App. Div. Dkt. No. A-5865-01T3. The Commission dismissed three unfair practice charges alleging that: the City discriminatorily refused to promote Joseph Constance, a deputy police chief and the president of the Trenton Superior Officers Association, to police chief; unlawfully refused to buy back Constance's unused vacation days; and unlawfully placed Constance on unpaid leave during an approved vacation.

Other Cases

In Lockley v. State of New Jersey (DOC), 177 N.J. 413 (2003), the Court considered a jury's award of punitive damages against the Department of Corrections in a sexual harassment lawsuit. Such damages can be awarded "only in the event of actual participation by upper management or willful indifference." Defining upper management requires a fact-sensitive inquiry under the same standards used to determine who is a managerial executive under the Employer-Employee Relations Act, N.J.S.A. 34:13A-3(e). See New Jersey Turnpike Auth. v. AFSCME Council 73, 150 N.J. 331 (1997). The trial court instructed the jury to consider "whether upper management had been involved"; but the Supreme Court held that this instruction was defective because it was not tailored to the facts of the case, especially the consistent testimony that DOP operated through an almost "paramilitary" structure. The Supreme Court also established the standards for determining the amount of punitive damages against public sector defendants, and held that the financial condition of a public employer is irrelevant to that inquiry since the profit motive is absent.

In Dzwonar v. McDevitt, 177 N.J. 451 (2003), the Supreme Court dismissed an CEPA claim filed by a former employee of Local 4 of the Hotel and Restaurant Employees International Union. The employee alleged that she was discharged because she repeatedly criticized the Executive Board's failure to read or distribute its minutes at general membership meetings. The Supreme Court concluded that the employee's asserted belief that this conduct violated federal labor law or public policy was not objectively reasonable. However, the Court also concluded that CEPA does not require a plaintiff to show that in law, rule, regulation or clear mandate of public policy actually would be violated if all the facts alleged are true; instead a plaintiff need only show that her or she actually believed that a violation had occurred and that such belief was objectively reasonable. The plaintiff in this case did not meet that burden because she did not show an objectively reasonable belief that any federal labor laws had been violated and her claims simply involved alleged violations of union by-laws and alleged inadequacies in internal union procedures.

REA:aat
Attachments