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September 23 , 2004

MEMORANDUM

TO: Commissioners

FROM: Robert E. Anderson  
General Counsel

SUBJECT: Monthly Report on Developments in the Counsel's Office Since August 12, 2004

Commission Cases

Oral argument has been scheduled for October 14 in City of Newark and Police Superior Officers Ass'n, P.E.R.C. No. 2003-68, 29 NJPER 121 (¶38 2003), App. Div. Dkt. No. A-004617-02T2. The Commission held that a grievance seeking indemnification for a civil judgment against a police officer was within the scope of negotiations. The arbitrator sustained the grievance so the Court will consider both the validity of the arbitration award and the negotiability of the grievance.

Appeals have been withdrawn in two cases: (1) Camden Cty. Sheriff. and Camden Cty. Sheriff. Officers and Camden Cty. SOA, PBA Local 277, P.E.R.C. No. 2004-65, 30 NJPER 33 (¶10 2004), App. Div. Dkt. No. A-5214-03T5, and (2) Borough of Surf City and PBA Local 175, P.E.R.C. No. 2004-80, 30 NJPER 214 (¶81 2004), App. Div. Dkt. No. A-005955-03T2.

Other Cases

Attached are copies of the majority and dissenting opinions in Camden Bd. of Ed. v. Alexander, \_\_\_ N.J. \_\_\_ (2004). By a 4-3 vote, the New Jersey Supreme Court restrained arbitration of grievances asserting that the Board violated a clause requiring just cause for discipline when it did not renew the annual employment contracts of 15 non-tenured custodians. The Court held that the grievances were not contractually arbitrable absent clear language making non-renewal decisions subject to the just cause and arbitration provisions.

Both opinions agreed that the grievances are within the scope of negotiations – that is, the parties could have agreed that custodians would be protected against disciplinary non-renewals without just cause and could arbitrate their allegedly unjust non-renewals. But they disagreed over whether specific language in the contracts must include non-renewals in the just cause and arbitration provisions or whether specific language must exclude non-renewals from these provisions. The majority placed the burden on unions to gain specific language permitting arbitration; the dissent placed the burden on school boards to gain specific language excluding such disputes from arbitration.

The majority and dissenting opinions are far apart in the way they approach this problem and that difference in approach leads to the difference in results. Here's the backdrop to this contractual arbitrability dispute and a brief description of the different views.

### **Backdrop**

The parties' grievance procedure covered "a complaint that there has been to him/her a personal loss, injury or inconvenience because of a violation, misinterpretation, or misapplication of the Agreement" and ended in binding arbitration. The arbitrator was limited to the issue submitted and could not consider anything else or add anything to the contract. The contract also contained an Employee Rights clause stating that "[n]o employee shall be disciplined or reprimanded without just cause." It also contained a clause recognizing the Board's authority, subject only to the language of the Agreement, to take disciplinary action against employees.

N.J.S.A. 18A:27-4.1 sets forth the procedure by which a school board determines whether to renew an employment contract. The superintendent must make a recommendation as to whether or not to renew a contract. The employee whose contract is not to be renewed is given a written statement of reasons for non-renewal and a right to appear informally and try to convince the board to offer reemployment. If the superintendent recommends reemployment, the board cannot withhold its approval for arbitrary or capricious reasons.

In this case, 15 custodians received letters from their supervisors warning them that due to excessive absenteeism, disciplinary action might be taken against them, including non-renewals of their contracts for the next school year. The superintendent thereafter recommended non-renewal and the Board approved those recommendations. The majority representative (CWA) asserted that the non-renewals violated the just cause clause and demanded binding arbitration. The Board sought a restraint of arbitration asserting that it hadn't agreed to arbitrate disputes over non-renewals. The trial court declined to restrain arbitration and the Board appealed. In the meantime, one of the grievances was arbitrated and the arbitrator ruled that the non-renewal before him was disciplinary and lacked just cause. The Appellate Division panel then held that the grievances were contractually arbitrable and the Supreme Court then reversed that decision. (Justice Wallace heard oral argument, but did not participate in the decision. He was replaced by Judge Petrella from the Appellate Division).

### **The Majority Opinion**

This opinion started with the premise that public sector arbitration is much different from private sector arbitration and warrants greater judicial review both before and after arbitration. Even though the school board statute does not preempt negotiations over the protections claimed by the employees in this case, it does confer a “prerogative” on school boards that cannot be waived absent clear and unmistakable language entitling employees to just cause protection and arbitration. The majority rejected the presumption of contractual arbitrability established by the Steelworkers’ Trilogy in the private sector.

### **The Dissenting Opinion**

This opinion started with the premise that once a matter is found to be within the scope of negotiations, public sector arbitration is not different from private sector arbitration and the courts should take a hands-off approach before and after arbitration so as to encourage that process to work. In particular, the Steelworkers’ Trilogy should apply with full force in allowing arbitration of disputes unless a presumption of arbitrability has been overcome and in sustaining awards based on the arbitrator’s contractual interpretation instead of the arbitrator’s own brand of industrial justice. Under those principles, the dissenting opinion found this case to be an easy one because the grievance procedure made arbitrable any dispute over any other contractual clause and the parties had a dispute over the meaning of the just cause clause. An arbitrator could consider the backdrop of education statutes in deciding what the parties agreed to under the just cause clause, but the interrelationship of that statute and the wording of the contract bore on the merits of the contractual dispute, not its arbitrability, and the contractual merits were for the arbitrator alone.

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Attachments