



**STATE OF NEW JERSEY
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December 16 , 2004

MEMORANDUM

TO: Commissioners

FROM: Robert E. Anderson
General Counsel

SUBJECT: Supplemental Report on Developments in the Counsel's Office Since November 23, 2004

Court Cases

The Third Circuit Court of Appeals will entertain an interlocutory appeal in Farber v. City of Paterson, Civ. 03-4535 (DRD) (D.N.J. 2004). Below, Judge Debevoise declined to dismiss a duty of fair representation suit brought by a public employee; he ruled that the six year statute of limitations for torts applied rather than the six month statute of limitations for unfair practices.

In Green v. State Health Benefits Commission, __ N.J. Super. __ (App. Div. 2004), the Court reversed a final determination of the State Health Benefits Commission and remanded the case to the SHBC for a hearing to be conducted by an Administrative Law Judge. The SHBC had determined that Mrs. Green, who suffered from multiple sclerosis, was no longer entitled to SHBP coverage for home health aide services. Green had received such coverage for five years based on a home health care plan created by a social worker and her doctor and approved by the insurance company then administering the SHBP. However, the new claims administrator informed Green that she would no longer be eligible for SHBP coverage because the home health care services were "custodial" and the SHBC upheld that denial. The Court remanded for a hearing because neither the claims administrator nor the SHBC had addressed Green's contentions that home health care is cost effective; that an exception had been permitted to allow payment for that reason; and that there had been no change in circumstances that would lead to a conclusion that it was not still cost effective to pay for this service. An agency's failure to address critical issues or to analyze evidence in light of these issues renders a decision arbitrary and capricious and is grounds for reversal.

In DelPiano v. Merrill Lynch, 372 N.J. Super. 503 (App. Div. 2004), the Court rejected a claim that an arbitrator's "evident partiality" required vacating an arbitration award conducted under the NASD Code of Arbitration Procedure. The Court held that the party claiming evident partiality had the burden of proving such partiality by a preponderance of the evidence rather than clear and convincing evidence. It found no evidence of actual but undisclosed dealings between the arbitrator who was an industry representative and Merrill Lynch nor any evidence that the arbitrator knew of any dealings between his employer (Deutsche Bank) and Merrill Lynch that would have created an appearance of bias. The Court also assumed that the arbitrator had a duty of making a "reasonable inquiry" to discover any potential conflicts of interest, but found that such an inquiry would not have disclosed any intent or bias that was "direct, definite, and capable of reasonable demonstration, rather than remote or speculative." Id. at 516.

Statutes

New legislation amends the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq., to require New Jersey employers to advise employees of their rights under that statute. Employers may do so by written or electronic notice, but not by posting.

REA:aat