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January 20 , 2005

MEMORANDUM

TO: Commissioners

FROM: Robert E. Anderson
General Counsel

SUBJECT: Monthly Report on Developments in the Counsel's Office Since December 16,
2004

Commission Cases

The Supreme Court has denied certification in two cases in which Morris County was required to supply the home addresses of negotiations unit employees to their majority representatives. Morris Cty. and Morris Council No. 6, NJCSA, IFPTE, AFL-CIO, P.E.R.C. No. 2003-22, 28 NJPER 421 (¶33154 2002) and Morris Cty. and CWA Local 1040, AFL-CIO, P.E.R.C. No. 2003-32, 28 NJPER 456 (¶33168 2002), consol. and aff'd 371 N.J. Super. 246 (App. Div. 2004), 30 NJPER 269 (¶93 App. Div. 2004), certif. den. __ N.J. ___ (2005).

An Appellate Division panel has affirmed the Commission's finding of an unfair practice in Irvington Bd. of Ed. and Irvington Ed. Ass'n, P.E.R.C. No. 2003-83, 29 NJPER 218 (¶65 2003), aff'd App. Div. Dkt. No. A-005244-02T3 (1/19/05) (copy attached). The Commission held that the Board discriminatorily refused to appoint an employee to a stipended position on a curriculum committee in retaliation for her Association leadership in several capacities. The Court accepted the Commission's findings and inferences and deferred to its evaluation of the evidence.

The Appellate Division has affirmed Piscataway Tp. and Piscataway Tp. PBA Local 93, P.E.R.C. No. 2004-72, 30 NJPER 143 (¶57 2004), aff'd App. Div. Dkt. No. A-005020-03T2 (copy attached). The Commission held mandatorily negotiable two successor contract proposals concerning the process for promoting police officers to sergeant. One proposal concerned the order in which the components of the promotional process would be administered - - e.g. would the oral interview precede the written exam? The other proposal postponed disclosure of the numerical scores on the written exam until after all components of the process had been

completed. The Court agreed with the Commission that these proposals bore on the employees' interest in safeguarding against perceived favoritism in the process and did not interfere with the employer's ultimate right to deny promotions to any officers who did not pass the written exam. The Court stressed the deference due the Commission in scope-of-negotiations cases.

An Appellate Division panel affirmed a PERC scope-of-negotiations ruling and confirmed a grievance arbitration award in City of Newark and Police Superior Officers Ass'n, App. Div. Dkt. No. A-4617-02T2 (12/17/04) (copy attached), pet. for certif. pending, aff'g P.E.R.C. No. 2003-68, 29 NJPER 121 (¶38 2003). The Commission declined to restrain arbitration over a claim that the City violated a contractual indemnification clause when it did not indemnify a police officer for a \$30,000 compensatory damages award based on an assault violating an inmate's civil rights. The arbitrator concluded that the City did in fact violate that clause. The Court agreed with the Commission that N.J.S.A. 40A:14-155 did not preempt the indemnification clause or dispute and that any public policy challenge to the award had to be raised in Court and not before the Commission. The Court also held that the arbitration award sustaining the grievance did not violate public policy. The employer has petitioned the Supreme Court to grant certification.

Other Cases

The same Appellate Division panel that affirmed the Commission's Newark decision and confirmed the related arbitration award issued another opinion the same day involving the same parties and confirming another grievance arbitration award. City of Newark v. FOP Lodge, No. 12, App. Div. Dkt. No. A-1129-03T3 (12/17/04). That award required the City to defray the costs of civil litigation against a police officer who injured two bystanders during a high-speed pursuit of a suspect. The Court held that the arbitrator carefully considered and properly rejected the City's claim that reimbursement of the costs would violate public policy. The officer was guilty of questionable judgment rather than misconduct based on an ulterior illegal goal.

In Paterson Police PBA Local 1 v. City of Paterson, App. Div. Dkt. No. A-4353-03T3 (12/22/04), the Court vacated a grievance arbitration award rescinding memoranda capping the amount of compensatory time off police officers and superior officers could accumulate in lieu of overtime payments. PBA and SOA contracts provided that "[t]he employee may request compensatory time in lieu of money" and the parties' pre-memoranda practice allowed employees to accumulate comp time up to the FLSA limit of 480 hours. The arbitrator held that a past practice clause entitled the employees to continue to accumulate comp time up to the FLSA limit and that the "request" language concerning compensatory time did not negate that right. The Court found the contract unambiguously empowered the City to deny any request for compensatory time and thus held that the arbitrator's contractual interpretation was not reasonably debatable.

In Hamilton Tp. Ed. Ass'n v. PERS Bd. of Trustees, App. Div. Dkt. No. A-3690-03T1 (12/27/04), the Court denied bus drivers pension credit for compensation they earned driving

special needs students during the middle of the school day. These “in-between” runs were not part of the drivers’ regularly scheduled work day and were thus considered to be “extracurricular duties” under N.J.S.A. 43A-15A-6(r).

In Epperson v. Wal-Mart Stores, 2004 N.J. Super. LEXIS 447 (App. Div. 2004), a plaintiff was allowed to recover lost wages after proving a malicious prosecution claim against a former employer who wrongfully terminated him.

REA:aat
Attachment