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March 23, 2005

MEMORANDUM

TO: Commissioners

FROM: Robert E. Anderson  
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SUBJECT: Monthly Report on Developments in the Counsel's Office Since February 24, 2005

Commission Cases

\_\_\_\_\_ An Appellate Division panel has affirmed the Commission's decision in Waldwick Bd. of Ed. and Waldwick Ed. Ass'n, P.E.R.C. No. 2004-61, 30 NJPER 104 (¶41 2004), aff'd \_\_\_ NJPER \_\_\_ (¶\_\_ 2005), App. Div. Dkt. No. A-004477-03T5 (3/17/05) (copy attached). The Court agreed with the Commission that negotiation over extended sick leave for school board employees is preempted by N.J.S.A. 18A:30-6, a statute requiring that extended sick leave be granted "for such length of time as may be determined by the board of education in each individual case." Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977), held this statute to require case-by-case determinations and prohibit a negotiated rule and the Court rejected the Association's arguments seeking to have Piscataway overruled.

The Appellate Division has stayed pending appeal the Commission's order in Warren Hills Reg. Bd. of Ed. and Warren Hills Reg. H.S. Ed. Ass'n, P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), app. pend., App. Div. Dkt. No. A- 001747-04T5. The Commission held that the employer violated the Act when it terminated its bus drivers and subcontracted the bus runs in retaliation for the bus drivers electing the Association as their majority representative.

\_\_\_\_\_The City of Newark has decided not to petition for certification in City of Newark and Police Superior Officers Ass'n, P.E.R.C. No. 2003-68, 29 NJPER 121 (¶38 2003), aff'd NJPER    (¶\_\_\_\_\_ 2005), aff'd App. Div. Dkt. No. A-004617-02T2 (12/17/04). The Appellate Division affirmed the Commission's decision declining to restrain arbitration of a grievance seeking indemnification for a civil damages award against a police officer.

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### **Other Cases**

In the City of Paterson v. Paterson Police PBA Local 1, App. Div. Dkt. No. A-5759-03T5 (3/16/05), the Court affirmed a trial court decision vacating a grievance arbitration award. The arbitrator found that the City violated the parties' past practice clause and contractual duty to discuss major changes when it stopped paying police officers holding certain positions as if they were detectives and when it stopped paying night shift premiums to officers who did not engage in night shift work. The trial and appellate courts concluded, however, that the contractual provisions relating to detectives and night differential pay clearly prohibited payments to officers who were not detectives or did not work on the night shift.

The Port Authority has appealed a trial court order upholding the unfair practice decision of the Port Authority Employment Relations Panel in I/M/O The Alleged Improper Practice Under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction; IP 97-28, Final Decision and Order of the Port Authority Employment Relations Panel; Port Authority of New York and New Jersey v. Port Authority Employment Relations Panel, Dkt. No. ESX-L-1897-01. The Panel held that the Authority committed an improper practice when it shifted unit work from police officers represented by the majority representative to a subcontractor retaining private security guards.

Judge Pisano of the United States District Court has dismissed a Complaint filed by a former court reporter employed by the Administrative Office of the Courts against 44 named defendants, including several unions and union attorneys, several judges, the Commission and the Attorney General. Yuhasz v. Leder, Civ. Action No. 04-1508 (JAP). The 332-paragraph Complaint contested a 1995 job transfer and subsequent termination from employment and was the eighth lawsuit Yuhasz had filed contesting these events. The Court concluded that the Complaint was barred on several grounds, including res judicata, the entire controversy doctrine, timeliness, and failure to state a claim upon which relief could be granted. The Court specifically held that the Eleventh Amendment to the United States Constitution barred a federal court action against the Commission absent the State's consent and that in any event, her claims lacked a factual basis and were untimely. The Court also issued an order requiring Yuhasz to show cause why she should not be barred from filing future Complaints based on the same matters without first obtaining leave of court.

An Appellate Division panel has declared unconstitutional a statute establishing a "Probation Officer Community Safety Unit" and authorizing probation officers in that unit to carry firearms; arrest, detain and transport probationers; and enforce the criminal laws of New

Jersey. In re P.L. 2001, Chapter 362, 2005 N.J. Super. LEXIS 59 (App. Div. 2005). Applying principles set forth in Passaic Cty. Probation Officers' Ass'n v. Passaic Cty., 73 N.J. 247 (1977), the Court held that the Act infringes on the plenary constitutional authority of the Supreme Court to make rules concerning the administration of the courts. The Court rejected an argument that the Judicial Employees Unification Act, N.J.S.A. 2B:11-1, vitiated Passaic Cty.; that Act permitted negotiations over grievance procedures and health and safety issues, but did not sanction statutes directly interfering with the Supreme Court's plenary constitutional prerogatives. The Court also rejected an argument that the Judiciary was required to arbitrate its constitutional arguments pursuant to the parties' collective negotiations agreement. It reasoned that arbitrators lack the power to determine that statutes are unconstitutional; the dispute was not contractually arbitrable; and the Judiciary had a managerial prerogative to make policy concerning the arming of probation officers, their law enforcement status, and their training.

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Attachment