



**STATE OF NEW JERSEY
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November 15, 2005

MEMORANDUM

TO: Commissioners

FROM: Robert E. Anderson
General Counsel

SUBJECT: Monthly Report on Developments in the Counsel's Office Since October 27, 2005

Commission Cases

Nothing to report (yet).

Other Cases

In Jordan v. Harvey, ___ N.J. Super. ___ (App. Div. 2005), an Appellate Division panel (Judges Collester, Lisa, and Reisner) held that the City of Asbury Park could not authorize its police director to perform law enforcement duties. The police director position was a civilian one and the comprehensive State regulatory scheme concerning the qualifications and appointment of police officers and police chiefs precludes a municipality from conferring such powers on an employee in a manner other than that specifically authorized by statute. Permitting a civilian police director to engage in law enforcement activities could enable a municipality to circumvent training requirements and age restrictions applicable to police hires and the statutory requirement that police chiefs be appointed by promotion from within the police department.

In Dover Tp. v. Teamsters Local 97, App. Div. Dkt. No. A-6267-03T3 (10/31/05) (copy attached), an Appellate Division panel (Judges Skillman and Payne) transferred a grievance arbitration case centering on a negotiability question to the Commission. An arbitrator held that the employer violated the parties' collective negotiations agreement when it had a tree removal

service perform work previously done by negotiations unit employees on an overtime basis. The employer did not file a scope of negotiations petition, but at arbitration contended that it had a managerial prerogative to subcontract. The arbitrator rejected that defense, concluding that the Union did not oppose the subcontractor performing the tree cutting, but claimed a right to be afforded overtime work when the employer was using the outside contractor as a supplement for tree removal. The employer sought to have the award vacated and a trial court did so on the ground that the employer had a managerial prerogative to subcontract the tree removal work. The Union appealed.

The Appellate Division panel transferred the case to PERC to exercise its primary jurisdiction over the scope-of-negotiations question. It stated:

- *the employer should have filed a pre-arbitration scope of negotiations petition with PERC;
- *when a negotiability defense was raised at the arbitration, the arbitrator should have stayed the arbitration and required that the scope issue be submitted to PERC rather than deciding it himself; and
- *the trial court should have declined to consider the managerial prerogative claim and should have referred that dispute to PERC.

It also held that the employer was not estopped from raising its negotiability argument by its failure to file a pre-award petition. It contrasted interest arbitration cases, where a Commission regulation requires that scope petitions be filed within 14 days of the interest arbitration petition, with grievance arbitration cases, where no Commission regulation sets a deadline. It also contrasted Ocean Tp. Bd. of Ed., P.E.R.C. No.83-164, 9 NJPER 397 (¶14181 1983), in which PERC refused to entertain a petition when the issue of non-arbitrability was not raised until a grievance arbitration award had been issued and the time for filing a motion to vacate the award had expired.

Finally, it rejected the employer's argument that it should decide the negotiability issue rather than refer it to PERC. It noted that PERC had not decided the negotiability issue before it and that courts had allowed claims of non-arbitrability to be raised after an award.

In DeBenedictis v. State of New Jersey (Division of State Police), App. Div. Dkt. No. A-0311-04T2 (11/14/05), an Appellate Division panel declined to dismiss disciplinary charges that resulted in a one-day suspension of a State trooper. The Court held that the charges were timely filed under the provision in N.J.S.A. 53:1-33 allowing charges of unreasonable use of force to be filed within 120 days given a consent decree in a racial profiling case. It also held that the trooper waived his right under N.J.S.A. 53:1-33 to a hearing within 30 days by pursuing a grievance under the collective negotiations agreement. The Court identified but did not consider these two questions:

- (1) Whether troopers can ask for a minor disciplinary hearing and then pursue a grievance if the hearing does not result in exoneration; and
- (2) Whether minor disciplinary hearings are “contested cases” under the Administrative Procedure Act and must be referred to OAL.

REA:aat
Attachment