



**STATE OF NEW JERSEY
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April 19, 2006

MEMORANDUM

TO: Commissioners

FROM: Robert E. Anderson
General Counsel

SUBJECT: Monthly Report on Developments in the Counsel's Office Since March 30, 2006

Supplement to My Annual Report

The conference packets included an annual report supplement covering cases decided between January 1 and March 31. A copy is attached.

Commission Cases

_____ Judge Ariel Rodriguez of the Appellate Division denied a request for a stay of a representation election in Hudson Cty. and United Workers of America, Local 322 and District 1199J, NUHHCE, AFSCME, AFL-CIO, P.E.R.C. No. 2006-76, NJPER (¶ 2006). A faction of United Workers of America, Local 322 claimed that it rather than another faction of the union should be considered the spokesperson for that union, but the Commission declined to stay an election that had been scheduled pursuant to a Consent Election Agreement signed by representatives of all parties, including a representative of the faction seeking a stay. The Commission noted that it does not normally decide internal union disputes and that any such dispute persisting after the election should be decided by a court of competent jurisdiction. The faction seeking a stay then asked Judge Gallipoli, Assignment Judge of Hudson County, to stay the election but he found that the trial court lacked jurisdiction over what was an appeal of an agency's interlocutory order and transferred the case to the Appellate Division. Judge Rodriguez then denied the requested stay and the election took place the next day.

Other Cases

In New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., __ N.J. Super. __ (App. Div. 2006), an Appellate Division panel upheld the constitutionality of a police department's annual medical examination program. That program called for disclosure of every officer's medical history and for blood and urine testing in order to determine whether an officer was fit for duty. The Court concluded that a bona-fide annual physical examination program conducted pursuant to a uniform, non-discriminatory policy in a well-regulated industry does not violate either the United States Constitution or the New Jersey Constitution. As part of its analysis, the Court cited management's prerogative to require physical fitness tests and medical examinations in order to determine that a police officer is able to work. Bridgewater Tp. v. PBA Local 174, 196 N.J. Super. 258 (App. Div. 1984). While upholding the program, the Court also ordered NJT (if it had not already done so) to develop and implement a policy expressly prohibiting unauthorized disclosure of confidential medical information.

In Ruiz v. Morris Cty. Sheriff's Dept., 2006 U. S. Dist. LEXIS 497 (D.N.J. 2006), Judge Debevoise granted a partial summary judgment in a case alleging that the sheriff's office retaliated against an employee for publicly expressing his opinions about protective vests and privatization of the county jail. The Court determined that the protective vest issue did not involve a matter of public concern triggering First Amendment protection; the question was not whether the employer would provide vests, but whether employees could be disciplined for failing to wear them. The privatization issue did involve a matter of public concern so that claim was not dismissed.

In re Forfeiture of Public Office of Nunez, __ N.J. Super. __ (App. Div. 2006), rejected an employer's attempt to enforce a forfeiture of employment based on an employee's conviction of a crime. The Court held that forfeiture was not appropriate given that the conviction had been expunged.

In D'Annunzio v. Prudential Ins. Co., 383 N.J. Super. 270 (App. Div. 2006), the Court held that the definition of "employee" in CEPA does not necessarily exclude workers who might be classified at common law as independent contractors. Given the absence in CEPA of an express exclusion of independent contractors and given CEPA's definition of "employees" and CEPA's purposes, the Court will focus on the employer's control and direction of the worker's performance in determining whether an employee is covered. The Court's analysis accords in spirit and substance with the Commission's analysis of the meaning of "employee" under the Employer-Employee Relations Act. See New Jersey State Judiciary, P.E.R.C. No. 2003-88, 29 NJPER 254 (¶76 2003).

In Perlowski v. Elson T. Killam Associates, Dkt. No. SOM-L-361-03 (Somerset Cty. L. Div. 2005), Judge Derman held that an in-house attorney was an independent contractor rather than an "employee" within the meaning of LAD or CEPA. The Court dismissed the attorney's whistleblower and discrimination claims except to the extent the plaintiff claimed the defendant

company had violated a LAD provision protecting independent contractors against a refusal to contract based on age discrimination. N.J.S.A. 10:5-121.

Miscellaneous

_____The United States Supreme Court has approved a rule change allowing lawyers to cite unpublished decisions in federal court briefs. Compare R. 1:36-3. The rule will apply to rulings issued on or after January 1, 2007.

REA:aat
Attachment