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April 27, 2006

MEMORANDUM

TO: Commissioners

FROM: Robert E. Anderson
General Counsel

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

Commission Cases

Attached is an affirmance of Passaic Valley Water Commission and CWA Local 1032, P.E.R.C. No. 2005-66, 31 NJPER 121 (¶51 2005), aff'd __ NJPER __ (¶__ 2006), App. Div. Dkt. No. A-005195-04T1 (4/21/06). The Commission declined to restrain binding arbitration of a grievance seeking additional compensation for performing duties in a higher classification; it rejected an argument that DOP statutes and regulations preempted such a claim.

Other Cases

On May 2, the New Jersey Supreme Court will hear oral argument in New Jersey Transit Bus Operators v. ATU, App. Div. Dkt. No. A-0086-04T2 (9/30/05), certif. granted. The Appellate Division panel vacated two grievance arbitration awards concerning compensation due part-time bus operators, concluding that the arbitrator had exceeded the scope of his authority under the parties' contract. The Supreme Court will consider whether the appellate court applied the correct standard of review.

In FOP Middlesex Cty. Sheriff's Officers, Lodge 59 v. Sheriff Joseph C. Spicuzzo, Civ. 98-4907 (D.N.J. 3/31/06), a federal district court dismissed allegations in a Complaint that would have required the Court to review and overturn PERC findings and conclusions made in Middlesex Cty. Sheriff, P.E.R.C. No. 2003-4, 28 NJPER 308 (¶33115 2002), aff'd 30 NJPER 239 (¶89 App. Div. 2004), certif. den. 182 N.J. 151 (2004). The Court reasoned that it lacked jurisdiction to review final administrative and appellate adjudications made by New Jersey agencies and courts. The Court, however, did not dismiss constitutional claims made by a plaintiff who had proved before PERC and the courts that the sheriff retaliated against him for his FOP activity. That plaintiff could seek to prove violations of his rights of free speech and association that might entitle him to a separate and distinct remedy from that awarded by PERC.

In Williams v. State of New Jersey, 2006 N.J. LEXIS 389 (2006), the Supreme Court held that the Probation Officer Community Safety Act, N.J.S.A. 2B:10A-1 to -3, 2C:39-6(c) (17) unconstitutionally violated the separation of powers between the Legislature and the Judiciary. The Act sought to overrule Judiciary policies precluding probation officers from carrying firearms and enforcing warrants for the arrest of probation violators, policies the Judiciary believes preserve the appearance of the probation officers' impartiality and the Judiciary's independence. The Court also rejected an argument that the parties' collective bargaining agreement called for resolution of this question by an arbitrator; an arbitrator cannot decide the constitutionality of a statute. Finally, the Court held that the rule of necessity prohibited the disqualification of the entire Judiciary from hearing the case, even if there is some perception that the result may be tinged by self-interest.

In Stomel v. City of Camden, 383 N.J. Super. 615 (App. Div. 2006), the Court held that the City's former Public Defender could bring a CEPA claim against the City based on his allegation that the Mayor terminated him in retaliation for reporting an extortion attempt and for providing testimony that implicated the Mayor in unlawful activity. The trial court held that the Public Defender was not an "employee" under N.J.S.A. 34:19-3, but the appellate court disagreed. It cited D'Annunzio v. Prudential Ins. Co. of America, 383 N.J. Super. 270 (App. Div. 2006), and reasoned that CEPA does not necessarily exclude workers who might be classified at common law as independent contractors and that CEPA is social legislation that should be construed to protect workers reporting unlawful activities in the workplace.

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Attachment