



STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PO Box 429
TRENTON, NEW JERSEY 08625-0429

www.state.nj.us/perc

ADMINISTRATION/LEGAL
(609) 292-9830
CONCILIATION/ARBITRATION
(609) 292-9898
UNFAIR PRACTICE/REPRESENTATION
(609) 292-6780

For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089
EMAIL: mail@perc.state.nj.us

August 10, 2006

MEMORANDUM

TO: Commissioners

FROM: Robert E. Anderson
General Counsel

SUBJECT: Supplemental Report on Developments in the Counsel's Office Since June 29, 2006

Executive Order

Governor Corzine has issued Executive Order No. 23 recognizing the Child Care Workers Union as the majority representative of home-based family child care providers and authorizing the State to enter a written agreement with CCWU. AFSCME and CWA entered into a joint partnership to form CCWU and the State Board of Mediation conducted a card-check before certifying CCWU as representing a majority of providers.

The order states that covered child care providers are not State employees. The subjects to be included in any agreement must be consistent with the scope of negotiations under the Employer-Employee Relations Act and may include payment of representation fees. The Executive Order does not provide a right to strike.

Court Cases

In Maimone v. City of Atlantic City, 2006 N.J. LEXIS 1136 (2006), the New Jersey Supreme Court held that a police officer could maintain a CEPA claim asserting that he was transferred from a detective position to patrol duty because he complained about the City's failure to enforce laws against prostitution. The Court reasoned that the transfer, although not a demotion, was an adverse employment action because it reduced his compensation and deprived him of overtime opportunities and the use of a vehicle to commute.

In Klusaritz v. Cape May Cty., 2006 N.J. Super. LEXIS 231 (App. Div. 2006), an Appellate Division panel reversed a Merit System Board determination substituting a six-month unpaid suspension for the termination of a principal accountant in the County Treasurer's office. The Court held that progressive discipline should not be applied in this case since the employee could not perform the duties of his higher-level job. Further, while he had not received written notice of his deficiencies, he had been repeatedly told of his superiors' dissatisfaction with his performance, especially his unsatisfactory bank reconciliations.

In Thurber v. City of Burlington, 2006 N.J. Super. LEXIS 226 (App. Div. 2006), an Appellate Division panel held that the Merit System Board, rather than the assignment judge of the vicinage, had the final say in determining whether and to what extent a deputy municipal court administrator should be disciplined for speeding, driving while under the influence of alcohol, and resisting arrest. The Court reviewed the case law concerning the Judiciary's willingness to allow other administrative agencies such as the MSB and PERC to resolve personnel and labor relations disputes and concluded that the Judiciary should defer to the MSB's administrative competence and expertise. The Court then upheld the six month unpaid suspension imposed by the MSB and rejected the City's argument that the employee should have been terminated as the assignment judge desired. The Court stated that serious circumstances may warrant a classified employee's immediate removal, but progressive discipline is the norm and this employee had not been disciplined before. Further, the Court found that the uncertainty and delay in the six years of legal proceedings following her arrest was a form of discipline that should not be ignored in reviewing the MSB's final determination. Finally, the Court reasoned that termination of a deputy court administrator for these offenses would not be appropriate when municipal judges had merely been reprimanded for similar misconduct.

In Schott v. State of New Jersey, App. Div. Dkt. No. A-Z612-04J1 (7/13/06), an Appellate Division panel dismissed a LAD action asserting that a Superior Court Judge was transferred from the Civil Division to the Criminal Division because she had complained that male judges received preferential treatment in her vicinage. The Court held that the judge's lateral transfer to the criminal division was not an adverse employment action under LAD. Although the judge lost her Executive Judge position in the civil division, that loss had no impact on her tangible benefits or employment opportunities. Further, the judge's subjective views about the desirability of working in the civil division and earning a reputation as a distinguished civil jurist could play no part in determining whether a reasonable woman would consider the transfer to be an adverse action.

In Roberts v. State of New Jersey, Div. of State Police, 2006 N.J. Super. LEXIS 208 (App. Div. 2006), an Appellate Division panel declined to dismiss disciplinary charges against a state trooper based on N.J.S.A. 53:1-33. That statute requires that charges of violating internal rules and regulations be filed within 45 days of the date the Superintendent obtained enough information to file the complaint. That statute does not apply if a related criminal investigation is proceeding concurrently, but the statute states that the time limit begins to run on the day after the criminal investigation ends. The Court holds, however, that the latter time period still will not begin running until the Superintendent obtains sufficient information to file the charge.

In Donvito v. Northern Valley Reg. H.S. Dist., ___ N.J. Super. LEXIS ___ (App. Div. 2006), the Court held that the time a teacher spends as a home instructor does not count towards the attainment of tenure. The Court reasoned that the employment in that position lacked the regularity, the consistency, and the demands of a regular full-time teaching staff position.

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