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November 14, 2006

MEMORANDUM

TO: Commissioners

FROM: Robert E. Anderson  
General Counsel

SUBJECT: Monthly Report on Developments in the Counsel's Office Since October 26, 2006

Commission Cases

\_\_\_\_\_ An appeal has been filed in Union Cty. Prosecutor and Union Cty. Asst. Prosecutor's Ass'n, P.E.R.C. No. 2007-10, 32 NJPER 286 (¶118 2006), App. Div. Dkt. No. A-000593-06T5. The Commission held that assistant prosecutors were not police employees entitled to invoke interest arbitration. It relied on a companion case, Camden Cty. Prosecutor and Camden Cty. Assistant Prosecutors Ass'n, P.E.R.C. No. 2007-9, 32 NJPER 283 (¶117 2006), App. Div. Dkt. No. A-6631-05T5, which is also on appeal.

Other Cases

In Prado v. State of New Jersey, 2006 N.J. Super. LEXIS 288 (App. Div. 2006), the Court held that the State was required to indemnify a Special Assistant to the Commissioner of the Department of Labor and Workforce Development for costs that employee incurred in defending several lawsuits against him. The lawsuit asserted that the Assistant Commissioner had violated the Law Against Discrimination, N.J.S.A. 10:5-1 et seq., and specifically alleged that he had used ethnically and sexually offensive language at a staff meeting of the Office of Wage and Hour Compliance. The Court held that the Assistant Commissioner was entitled to indemnification under N.J.S.A. 59:10-2 because the alleged conduct occurred within the scope of his employment and the State had not shown that he acted because of willful misconduct.

The New Jersey Supreme Court has granted certification in New Jersey Turnpike Auth. v. Local 196, IFPTE, App. Div. Dkt. No. A-6282-04T5 (5/3/06), to consider whether a clear mandate of public policy authorized vacating an arbitrator's decision suspending a toll collector and enforcing the employer's decision to terminate the employee instead.

The toll collector was discharged for firing a paintball gun at the window and windshield of a van traveling on the Garden State Parkway; at the time the employee was driving home from work and still in uniform. The arbitrator found a sufficient nexus between the toll collector's employment and misconduct to warrant disciplining him, but the arbitrator found that the "competing equities" and the "nature of what occurred in the context of the grievant's mental state" (he had been diagnosed as a "manic depressive" and was under personal stress that day) made termination unjust and a 14-month unpaid suspension the appropriate penalty. The arbitrator conditioned reinstatement on passing a physical and psychological fitness for duty examination and continued monitoring of his mental fitness thereafter.

The trial court confirmed the award, but the Appellate Division vacated it as against public policy. It stated: "A decision by NJTA to continue his employment would have an impact on the motoring public's perception of the importance of the prohibition against such conduct that is too obvious to require elaboration. The arbitrator's award does not account for impact on safety of the roadway for which NJTA is responsible."

In Kimm v. Blisset, LLC, 388 N.J. Super. 14 (App. Div. 2006), then Judge (and now Justice) Hoens authored an opinion applying the *functus ex officio* doctrine and holding that an arbitrator in an attorney fee dispute was not authorized to issue a supplemental award modifying or correcting an earlier award. The opinion analyzes the doctrine and its exceptions at length and applies the Uniform Arbitration Act of 2000, N.J.S.A. 2A:23B-1 to -32, to this case outside the collective bargaining context.

REA:aat