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March 25, 2004

MEMORANDUM

TO: Commissioners

FROM: Robert E. Anderson  
General Counsel

SUBJECT: Supplemental Report on Developments in the Counsel's Office Since  
February 26, 2004

Commission Cases

The Appellate Division has scheduled oral argument for April 26 in Hunterdon Cty. and CWA Local 1034, P.E.R.C. No. 2003-24, 28 NJPER 433 (¶33159 2002), app. pending., App. Div. Dkt. No. A-001869-02T5. The main issue is the constitutionality of the amendment to N.J.S.A. 34:13A-5.5 requiring deductions of representation fees under certain conditions.

The Appellate Division has scheduled oral argument for April 27 in two companion cases. Morris Cty. and Morris Council No. 6, NJCSA, IFPTE, AFL-CIO, P.E.R.C. No. 2003-22, 28 NJPER 421 (¶33154 2002), app. pending, App. Div. Dkt. No. A-000837-02T1 and Morris Cty. and CWA Local 1040, AFL-CIO, P.E.R.C. No. 2003-32, 28 NJPER 456 (¶33168 2002), app. pending, App. Div. Dkt. No. A-001575-02T3. The issue in both cases is whether the employer must provide the majority representatives with the names and home addresses of employees in their negotiations units. The Commission required disclosure.

The Appellate Division has granted the Commission's motion to file a response to the appellant's reply brief in Franklin Tp. Bd. of Ed. and Franklin Tp. Ed. Ass'n, P.E.R.C. No. 2003-58, 29 NJPER 97 (¶27 2003), app. pending., App. Div. Dkt. No. A-004242-02T3. The Commission declined to restrain arbitration of a grievance asserting that the Board violated the

compensation provision of an emergency class coverage clause.

The Association has appealed the Commission's decision in Matawan-Aberdeen Reg. Bd. of Ed. and Matawan Reg. Teachers. Ass'n, P.E.R.C. No. 2004-47, \_\_ NJPER \_\_ (¶\_\_ 2004), app. pending, App. Div. Dkt. No. A-003703-03T3. The Commission restrained binding arbitration of a grievance contesting the withholding of a computer teacher's increments. The Board alleged that the teacher had not adequately supervised his students during class and that students hacked into the district's computer files during class time; the Commission concluded that these reasons were predominately based on an evaluation of teaching performance.

### **Other Cases**

By a 4-3 vote, the Supreme Court has affirmed an Appellate Division decision reinstating a verdict on compensatory damages in a CEPA case and remanding for a new trial on punitive damages. Hernandez v. Montville Tp. Bd. of Ed., 354 N.J. Super. 467 (App. Div. 2002), aff'd \_\_ N.J. \_\_ (2004). An elementary school custodian was terminated after he reported and attempted to discuss clogged toilets that were overflowing for prolonged periods, causing feces and urine to spill on the floor, and an exit sign that was unlit for seven days due to a burned out bulb. The trial court granted judgment for the school board, notwithstanding the verdict, because it believed the plaintiff's case was based on trivial incidents. The Appellate Division reinstated the verdict, concluding that the plaintiff reasonably believed the unsanitary bathroom conditions and unlit exit sign violated health and safety rules and a clear mandate of public policy and that the plaintiff was terminated for blowing the whistle on these violations rather than the pretextual reasons given by the board. The Supreme Court affirmed in a per curiam opinion voted for by Justices Long, Zazzali, and Albin and by Judge Conley, temporarily assigned. Justice LaVecchia wrote a dissenting opinion, joined by Chief Justice Poritz and Justice Verniero, in which she argued that the custodian's idiosyncratic responses to occasional operational problems did not constitute the type of "illegal activity, policy or practice" rendered actionable under N.J.S.A. 34:19-3a.

The New Jersey Supreme Court has denied a petition for certification in In re Alleged Improper Practice Under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction, IP 98-16, 17 & IP 99-2, aff'd App. Div. Dkt. No. A-1160-02T5 (10/31/03). The Appellate Division affirmed a decision of the Port Authority Employment Relations Panel dismissing an improper practice charge filed by the Union of Automotive Technicians Local 563. The charge alleged that the Port Authority committed an improper practice when it invoked a last chance agreement and fired an employee who tested positive for a third time.

In Division of State Police v. Schmidlin, App. Div. Dkt. No. A-6341-01T2 (3/16/04), the Court held that a state trooper was denied fair discovery in a disciplinary proceeding that led to his termination for allegedly trying to buy illegal steroids and then covering up that attempt. The trooper requested discovery of the investigation file of the Division of Criminal Justice; that file included material concerning a confidential informant whose hearsay statements provided critical

evidence against the trooper. The superintendent denied the trooper access to the file based on the assurance of the prosecutor investigating potential criminal charges that the file did not contain any exculpatory information. The Court held that this delegation of authority was an inadequate and unacceptable approach to the discovery request and remanded to allow the trooper to seek full discovery and to move either for a new hearing or the reopening of the previous hearing.

REA:aat