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November 15, 2013

MEMORANDUM

TO: Commissioners

FROM: Counsel Staff

SUBJECT: Report on Developments in the Counsel's Office Since October 24, 2013

Commission Cases

The Appellate Division of the Superior Court, disagreeing with the Commission, remands an interest arbitration award, finding that the arbitrator "did not explain why his analysis of any of the statutory factors justified the award of step increments," for the first year of a three-year agreement he awarded. In the Matter of County of Morris, Morris County Sheriff's Office, and PBA Local 298, 2013 N.J. Super Unpub. LEXIS _____, rev'g and remand'g County of Morris, Morris County Sheriff's Office and PBA Local 298, P.E.R.C. No. 2013-27, 39 NJPER 200 (¶64 2012) (see attached). The Court said that the arbitrator, in awarding the increments, did so based on his interpretation of the expired agreement, thus improperly assuming the role of a grievance arbitrator. The Court held that the arbitrator should have instead considered the statutory criteria listed in the interest arbitration law in determining whether the increments should be awarded. As the interest arbitrator who issued the award has retired, a new arbitrator will be assigned to the case.

Appellate Division Appeals

Township of Montclair and PBA Local 53, P.E.R.C. No. 2012-74, 40 NJPER 37 (¶15 2013), appeal dismissed 10/17/13

County of Warren and Warren County Corrections FOP Lodge 171, P.E.R.C. No. 2014-23, 40 NJPER __ (¶__ 2013). On Nov 12, 2013, the FOP appealed the Commission's decision affirming an interest arbitration award.

Other Cases

Resignation to avoid tenure charges held not to be a “constructive discharge”

Lovett v. Flemington-Raritan Regional Board of Education, et al., 2013 N.J. Super. Unpub. LEXIS 2683

Lovett was a 57 year old math and science teacher, tenured since 1993, when she resigned on June 24, 2010. Her step-granddaughter was a student in the school, and her daughter (the student’s stepmother) had been banned from access to the school building due to a history of aggressive confrontations with school staff regarding custody issues related to the student. On June 23, 2010, the plaintiff allowed her daughter into the building to pick up the student, and an altercation with school staff ensued. The next day, the Principal had an investigatory meeting with the plaintiff in which she initially denied having knowledge that her daughter was barred from the building. The Principal called in union representatives, and the plaintiff admitted letting her daughter in but denied knowledge that she was not allowed in the building. The Principal raised the possibility of bringing tenure charges against the plaintiff. The plaintiff instead, after consultation with the Principal and her union representative, chose to sign a resignation letter which the Board accepted at its next meeting. A few days later, the plaintiff sought to rescind her resignation but was told that the Board’s formal acceptance was binding.

The plaintiff sued the Board, claiming that she was forced into retiring due to age discrimination in violation of the New Jersey Law Against Discrimination. The Appellate Division of the Superior Court affirms the motion court’s grant of summary judgment in favor of the Board, finding that her resignation was not constructive discharge and thus not an adverse employment action, and that she has not established a prima facie case of age discrimination.

DISSOLUTION OF CITY OF CAMDEN POLICE DEPARTMENT

Whether state law preempts initiative/referendum to maintain Camden City police department

Honorable Dana L. Redd, et al. v. Vance Bowman, et al. , 2013 N.J. Super. LEXIS 158

In response to resolutions passed by the City Council that would disband the Camden police department in favor of a County-wide police department, a committee of residents submitted a proposed ordinance, to be adopted through a referendum that would: (1) maintain the current City police department and its organizational and command structure; and (2) bar the City from disbanding its police department to participate in any County-wide or regional police force. A trial court restrained the processing of the initiative to adopt the proposed ordinance. After a comprehensive discussion of the parameters and application of the “Faulkner Act,” N.J.S.A. § 40:69A-1 et seq. The Appellate Division of the Superior Court, in a precedential (i.e. published) opinion reverses the trial court ruling and remands the case to the lower court for development of the record to consider whether the various statutory schemes at issue (the Municipal

Rehabilitation and Economic Recovery Act, N.J.S.A. 52:27BBB-1 to -75 (MRERA), and the Special Municipal Aid Act, N.J.S.A. 52:27D-118.24 to -118.31 (SMAA) have preempted the proposed ordinance.

Impact of dissolution on pre-existing claims

FOP v. City of Camden, 2013 U.S. Dist. LEXIS 138264 (D.N.J.)

The FOP sued the City of Camden under 42 U.S.C. § 1983 and under the New Jersey constitution and state law, claiming that the City imposed and continues to impose an unlawful policy on quotas for arrests and citations. The federal court denies the City's motion for summary judgment without prejudice, and orders the parties to file supplemental briefs on two issues. One issue to be further briefed is the effect on the FOP's claims of the May 1, 2013 disbanding of the Camden City Police Department and the creation of the Camden County Police Department, particularly with regard to those claims seeking injunctive and declaratory relief. In a footnote, the federal court noted that because the City's police department is now defunct, it is unclear whether the quota policies are still in effect, and it is also unclear whether a decision on the legality of the quota programs between the FOP and the City would bind the Camden County Police Department, which is not a defendant in the action.

CEPA claim that employee was fired for refusing to raise funds during work hours maintainable

Gomez v. Town of West New York, et al., 2013 U.S. Dist. LEXIS 157500

Gomez was an employee of the Town of West New York from 1998-2008, then was rehired as a data processing clerk and promoted to a Coordinator position in 2011. He alleges that the defendants harassed him and terminated him for: refusing to use public resources to fund-raise for Mayor Roque's private not-for-profit organization; making a complaint to PEOSHA; speaking about the misuse of public resources and other alleged abuses in Roque's government; and contributing to a website seeking the Mayor's recall. The plaintiff sued for alleged violations of various state and federal laws, including New Jersey's Conscientious Employee Protection Act (CEPA). The federal court denies the defendants' motion to dismiss the complaints. The court finds that the plaintiff successfully pleaded all of the elements of his CEPA complaint because he stated that he reasonably believed that Mayor Roque asked him to violate a law by misusing public resources, and he stated that his refusal to do so and/or his reporting of the issue to the Town Administrator and Commissioner resulted in his dismissal.

NJ State agency and union representing state employee may not be sued under LMRA

Kelly v. Simpson, et al., 2013 U.S. Dist. LEXIS 154141

Kelly was terminated from his position as a construction and maintenance technician with the New Jersey Department of Transportation as a result of disciplinary charges issued for

insubordination, conduct unbecoming of a public employee, and incompetence. The termination was upheld following departmental hearings. Plaintiff appealed the hearing officer's decision to the New Jersey Office of Administrative Law where they are pending. He sued for numerous alleged violations of state and federal laws, including retaliation for union activity under the New Jersey Employer-Employee Relations Act (N.J.S.A. 34:13A-5.3 and 5.4), and violation of the New Jersey Conscientious Employee Protection Act (N.J.S.A. 34:19-1).

The federal court applies the Younger Abstention Doctrine [Younger v. Harris, 401 U.S. 37, 43-54, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)] to stay and administratively terminate the plaintiff's first nine causes of action because: (1) there are state administrative proceedings that are related and pending; (2) the matter implicates important state interests concerning discipline of state employees; and (3) New Jersey's administrative proceedings provide a sufficient opportunity to litigate federal constitutional issues.

The federal court dismisses the plaintiff's tenth cause of action against IFPTE Local 195 pursuant to 29 U.S.C. § 185 of the federal Labor Management Relations Act (LMRA) because the New Jersey Department of Transportation is a state body and therefore not an "employer" under the LMRA depriving the court of subject matter jurisdiction over a duty of fair representation claim.