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July 31, 2012

MEMORANDUM

TO: Commissioners

FROM: Counsel Staff

SUBJECT: Report on Developments in the Counsel's Office Since June 20, 2012

Commission Cases

In Monmouth County Layoffs, a consolidated case involving unfair practice charges filed with the Commission and a challenge to layoffs approved by the Civil Service Commission, two PBA Locals filed an appeal with the Appellate Division of Superior Court from the Civil Service Commission's decision.

In Township of West Caldwell, P.E.R.C. No 201-054, issued at its April, 2012 meeting, the Commission affirmed an interest arbitration award and directed the parties to brief a scope of negotiations issue that had arisen during interest arbitration. The PBA challenged the Township's right to appeal that ruling asserting that the case was not final until the scope issue was resolved. On July 16th, a panel of the Appellate Division of Superior Court ruled that the Township's Notice of Appeal was properly filed, but stayed the processing of the appeal until the earlier of September 7 or the issuance of a decision on the remaining scope issue. In Township of West Caldwell, P.E.R.C. No 2012-073, issued at its June 2012 meeting, the Commission ruled on the negotiability issue. The appeal can now proceed.

At the request of the public employer, the Appellate Division of Superior Court has dismissed the appeal from Borough of Milltown, P.E.R.C. No. 2012-33, a decision reviewing an interest arbitration award. The parties have resolved their contract impasse.

Other Cases

Grievance Arbitration–Arbitrability

The Ocean County Utilities Authority v. United Steel, Paper and Forrestry, et al., 2012 N.J. Super. Unpub. LEXIS 1473

The Appellate Division of Superior Court affirms a trial court ruling declining to set aside a grievance arbitration ruling. The dispute arose from the termination of an employee and union member. The Union grieved the discharge. The Utilities Authority disputed the arbitrability of the grievance on procedural grounds and the arbitration was bifurcated. After the arbitrator found the grievance procedurally arbitrable the Authority unsuccessfully challenged that ruling in the Chancery Division. The judge concluded that the arbitrator's award was reasonably debatable, and granted summary judgment, dismissing the complaint and confirming the award. The appeals court, quoting the arbitrator's award at length, affirms emphasizing, "We also take particular note of the admonition of the Supreme Court in New Jersey Turnpike Authority v. Local 196, I.F.P.T.E., 190 N.J. 283, 291 (2007), strongly restating the bedrock principle that New Jersey law encourages the use of arbitration to resolve labor-management disputes."

Warren County Tech. Sch. Bd. of Educ. v. Warren. County Tech. Sch. Educ. Ass'n., 2012 N.J. Super. Unpub. LEXIS 1539

The Appellate Division of Superior Court affirms a trial court ruling restraining arbitration over a grievance contesting the mid-year dismissal of a non-tenured teacher. The statement issued at the time of the dismissal listed the reasons as "insubordination, ineffective classroom performance, inappropriate behavior and demeanor dealing with students and faculty, chronic tardiness and violations of district policy." Although the agreement contains a just cause for discipline provision, the court held that the agreement did not provide for binding arbitration of the mid-year termination of a non-tenured teacher. It found that the agreement specifically excluded the termination of a non-tenured teacher from the grievance procedure, relying on language providing that requests by administrators to dismiss non-tenured employees would skip the initial steps of the grievance procedure and be considered directly by the Board. The court notes that the employee could contest her termination before the Commissioner of Education.

Employee Discipline/misconduct

Richard Greenberg v. New Jersey State Police Trooper Nicholas J. Prysylak, et al., 2012 N.J. Super. LEXIS 110, ____ N.J. Super. ____ (App. Div. 2012)

The Appellate Division of Superior Court overturns a trial court ruling dismissing the false arrest claims of the plaintiff made against a state trooper, the state police and a service station. The suit alleges that a state trooper falsely arrested him while helping a private oil-change business collect an unpaid, but disputed bill. A trial judge dismissed the case, finding the trooper had probable

cause to arrest. But the appeals court, in a ruling that will be published, reversed, finding evidence to support the plaintiff's theory that the business and its representative conspired with the State Police to arrest and imprison him. The record revealed that the business had called state police on numerous occasions before to deal with "unruly" customers, bad checks or rejected credit cards. Sometimes, a trooper would go to the customer's house and bring the customer back to the business, telling the customer to pay the bill or else be charged. The case deals with the charges brought against the customer, rather than discipline based on the conduct of the Trooper (who was serving his probationary period when the incident occurred) or by the State Police.

In the Matter of the Tenure Hearing of Edith Craft, School District of the Township of Franklin, Somerset County, 2012 N.J. Super. Unpub. LEXIS 1600

The Appellate Division of Superior Court upholds a lengthy suspension of a tenured teacher who struck a special education student. The Board also sought to have the teacher's increment withheld, but asked that the Commissioner of Education delay that sanction because the Board and the Education Association had reached an agreement freezing salaries for the 2011-2012 school year. The Appellate Court holds that the increment will not be withheld until the next school year in which teacher salaries are increased.

In the Matter of Scott Laban, Bergen County, 2012 N.J. Super. Unpub. LEXIS 1742

The Appellate Division of Superior Court upholds the decision of the Civil Service Commission to terminate a heavy equipment operator based upon his racially offensive comments toward a co-worker and his violation of County procedures regarding the reporting of an accident occurring while he was operating County-owned equipment. All of the facts alleged in the charges were not disputed by the employee. An Administrative Law Judge concluded that termination was too severe and recommended a 45-day suspension. The CSC modified the penalty to a termination, the sanction sought by the County. The opinion notes that the burden is on the appealing party to show the CSC's decision was arbitrary or capricious. It also observes that no issue regarding an agency head overturning an ALJ's credibility determinations was present.

Employer Retaliation (discrimination, "whistleblowing," pursuing statutory remedies)

Fernando Piniero, et al. v. New Jersey Division of State Police, et al., 2012 N.J. Super. Unpub. LEXIS 1705

The Appellate Division of Superior Court reverses the lower court's dismissal of the Conscientious Employee Protection Act (CEPA) claim filed by one of several troopers who alleged retaliation by supervisors and top state police officials. The lawsuit involves several other claims but this case deals only with the lower court's dismissal of CEPA claims. The lawsuit centers on the plaintiffs' experiences in the organized crime bureau, their complaints in the late 1990s through 2000, and the alleged retaliation they experienced for making complaints.

Milano v. Bd. of Educ. of Franklin Twp., 2012 U.S. Dist. LEXIS 71675

The Board originally hired Milano in October 2001 as a pre-school teacher, but later urged her to resign and accept a position with the Hunterdon County Education Services Commission ("HCESC"), assuring her that by taking the HCESC position, she would continue to discharge the same responsibilities at the same location, and would continue to enjoy the same salary and benefits. In the Fall of 2005 Milano was rehired by the Board as its employee, but the Board denied that Milano had acquired tenure. Milano successfully pursued a petition with the New Jersey Department of Education which held that she had acquired tenure and was entitled to reimbursement for health care costs incurred while she was treated as a non-tenured employee. She then pursued an action in federal court alleging that the Board retaliated against her in numerous ways (including the withholding of salary increments) for filing her NJDOE petition. The District Court Judge dismisses one federal claim and orders further briefing of the other.

Hahn et. al. v. Choi et. al., 2012 N.J. Super. Unpub. LEXIS 1327

A police detective, also a PBA official, alleged that senior managers in the Edison Police Department took several actions against him, including returning him to patrol duty despite his detective rank, in response to and retaliation for his complaints about certain actions taken by senior managers. Plaintiff filed a four count complaint seeking compensatory damages for violations of CEPA; the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49; intentional infliction of emotional distress; and loss of consortium. The Appellate Division of Superior Court held that the trial court improperly granted summary judgments to the defendant as the lower court failed to make the requisite findings of fact and conclusions of law noting that court rules specifically mandate that findings and conclusions by a trial judge must be made, particularly when there is an appeal filed.

Ford v. County of Hudson, 2012 U.S. Dist. LEXIS 90552

A federal court judge denies summary judgment motions filed by Hudson County, its Department of Corrections, and two supervisory/managerial employees seeking dismissal of an action filed by a female corrections sergeant. The sergeant asserts that, after she was interviewed by a County attorney in connection with an investigation of sexual harassment of female employees by the then Director of Corrections, she suffered numerous retaliatory actions, including a suspension without pay, in response to the statements she had given during the interview. The court rules that Ford's multi-count complaint can proceed to trial.

Anderson v. Mercer County Sheriff's Dep't, 2012 U.S. Dist. LEXIS 83397

Anderson, employed for approximately 12 years as a Sheriff's Officer for the Child Support Hearing Officers at the Mercer County Courthouse in Trenton. Her *pro se* complaint alleged various incidents of racial discrimination and retaliation (including a transfer and harassment) in connection with her employment and asserts violations of civil rights and anti-discrimination

laws, the Conscientious Employee Protection Act and the collective bargaining agreement covering her job. In addition to the Sheriff's office, Anderson made allegations against several individuals and the State of New Jersey. The Court dismisses all claims against the state, which was never named as a defendant and the individual defendants. It declines to dismiss the CEPA claim, finding it is not clear that it was untimely. In addition, although the case involves a public sector agreement between the County, the Sheriff and PBA Local 187, the federal judge holds that Anderson's claim that the agreement was breached may be actionable under 29 U.S.C. §301 observing: "[S]uits for violation of collective bargaining agreements are governed by federal law, because Congress intended that the scope of obligation in labor contracts in or affecting interstate commerce be uniform."¹ The court finds that the 301 claim may not be summarily dismissed because the facts show that the Administrator failed to schedule a grievance hearing.

Employment Contract Disputes/Statutory terms of office--high level employees

Margaret Dolan v. Carmen M. Centuolo, et al. and Westfield Board of Education v. Carmen M. Centuolo, et al., 2012 N.J. Super. Unpub LEXIS 1627

In November, 2010, the Westfield Board of Education and its superintendent of schools (Dolan) agreed upon a new five-year employment agreement extending through 2015. Several times during the negotiations between the Superintendent and the Board, assurances were received from the County Superintendent that its terms did not violate then existent laws and regulations capping the compensation of superintendents of schools. After the contract was approved by the Board, the County Superintendent, based on a Department of Education Directive, issued to all districts five days after the contract was approved advised the district and the superintendent that the new agreement would violate proposed regulations that were to take effect in January 2011. Both the Board and the superintendent filed applications for emergent (i.e. interim) relief that were denied by the Department of Education. The Department advised that those rulings precluded any further administrative proceedings. The Appellate Division of Superior Court holds that the rulings did not dispose of all issues and thus the orders were interlocutory and not final. It remands the appeals without considering any substantive issues.

Costanzo v. Lebanon Borough Board of Education, 2012 N.J. Super. Unpub. LEXIS 1729

The Board brought tenure charges against Costanzo, its Superintendent of Schools. Costanzo filed an action in the Law Division of the Superior Court alleging that the Board violated his employment contract and the implied covenant of good faith and fair dealing. The Board filed a motion to dismiss Costanzo's complaint. The Court grants the motion holding that, where the Commissioner of Education is considering tenure charges, any contract claims relating to the employment dispute can be considered in the proceeding before the Department of Education.

¹However, Saginario v. Attorney General, 87 N.J. 480, 488 (1981) holds that the federal Labor Management Relations Act does not apply to New Jersey public employees (1981).

Anthony Cancro v. Township of Edison, 2012 N.J. Super. Unpub. LEXIS 1798

Cancro was Edison's business administrator from June 2006 through December 31, 2009. During his pre-hire interview, Cancro stated that he wanted his working conditions to include severance pay for three months if he was removed from office. No written contract reflected that term, but the Township passed an ordinance mirroring a state statute [N.J.S.A. 40:69A-43(c)], providing that a public employer "may" agree to make such a severance payment to a business administrator who is removed from office. The results of a June 2009 primary election made it clear to Cancro that he would not continue in his position beyond the end of the year. In December, he received an official request to submit his resignation. The Appellate Division of Superior Court affirms a lower court's order granting summary judgment and dismissing Cancro's claim for severance pay.

Seel v. Langford and City of Atlantic City, 2012 N.J. Super. Unpub. LEXIS 1767

Seel was appointed Atlantic City's Emergency Management Coordinator (EMC), a statutory position which carries a three-year term, during which the EMC may only be removed by the Governor "for cause." Shortly after Lorenzo was elected mayor, he demoted Seel to deputy EMC. Seel filed a lawsuit alleging that the mayor had no authority to remove him prior to the end of his term and that the removal violated his civil rights, asserting he had a property interest in his position. A trial court voided his removal as EMC but denied his claim that his civil rights had been violated. The Appellate Division of the Superior Court affirms the dismissal of the civil rights claim. By the time the appeal was decided both Seel and Lorenzo had left their positions.

Layoffs, Promotions, alternative work schedules

Vincent J. Cuozzo, et al. v. Robert J. Cimino, et al., 2012 N.J. Super. Unpub. LEXIS

Dispute over adherence to promotional procedures and criteria in non-civil service jurisdiction. Candidates who alleged that they were passed over in violation of public employer's promotional policy filed a lawsuit. The Appellate Division of the Superior Court affirms the lower court's dismissal of the case. Court opinion seems to rely on non-civil service status of promotional candidates.

In the Matter of the New Jersey Department of Environmental Protection Alternative Workweek Program for 2011, 2012 N.J. Super. Unpub. LEXIS 1758

The Appellate Division of Superior Court affirms the Civil Service Commission's approval of changes in the alternate workweek program established by the Department of Environmental Protection. The Communications Workers of America asserted that the changes were subject to arbitration.

Francine Kaplan v. State of New Jersey, et al., 2012 N.J. Super. Unpub. LEXIS 1802

To meet a budget shortfall, in 2006 the Division of Law laid off Deputy Attorneys General (DAGs). After retirements and layoffs of DAGs whose most recent evaluations had been either “unsatisfactory” or “needs improvement”, the Division still had to make 26 layoffs from among DAGs who had received a rating of “Meets Expectations.” However, the Division excluded from this pool DAGs who had received that rating, but who had been admitted to the bar for three years or less at the time of their most recent evaluation, reasoning that those attorneys “need time to acquire basic lawyering skills while experienced attorneys do not.” The plaintiff, a 43-year old DAG, was among those laid off. She filed suit under the Law Against Discrimination asserting claims of age discrimination based on theories of disparate treatment and disparate impact. The Appellate Division of Superior Court affirms the lower courts decision granting summary judgment and dismissing the DAG’s lawsuit.

Duty of Fair Representation

Snowden v. Univ. of Med. & Dentistry of N.J., 2012 N.J. Super. Unpub. LEXIS 1567

Snowden was terminated for unsatisfactory performance from her position as a Mental Health Specialist assigned to a residential unit for children ages four to eighteen who suffered from psychiatric illness and required twenty-four-hour in-patient care. The discharge was upheld in an arbitration proceeding. Snowden filed suit against UMDNJ citing several state and federal statutes. After the arbitration award was upheld, she also filed a duty of fair representation (DFR) claim against the union. The court grants summary judgment in favor of the union on the DFR count. The opinion of the Appellate Division of Superior Court notes:

The employee's burden in proving unfair representation is not light. Maher v. N.J. Transit Rail Operations, 125 N.J. 455 478 (1991).

[A] plaintiff must "adduce substantial evidence of [bias] that is intentional, severe, and unrelated to legitimate union objectives." The court must be careful to distinguish "between honest, mistaken conduct . . . and deliberate and severely hostile and irrational treatment."

* * *

Proof that the union "may have acted negligently or exercised poor judgment is not enough[.]" Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3d Cir. 1970). The employee must present proof of bad faith or arbitrary conduct. Ibid. "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S. Ct. 681, 97 L. Ed. 1048 (1953), as to be irrational." Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 67, 111 S. Ct. 1127, 1130, 113 L. Ed. 2d 51, 58 (1991).