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July 30, 2008

**MEMORANDUM**

**TO:** Commissioners

**FROM:** Ira W. Mintz  
General Counsel

**SUBJECT:** Monthly Report on Developments in the Counsel's Office Since June 26, 2008

**Commission Case**

\_\_\_\_\_ In an unpublished decision, the Appellate Division has reversed the Commission's decision in Toms River Tp. v. Teamsters Local 97, P.E.R.C. No. 2007-56, 33 NJPER 108 (¶37 2007).

The Township entered into a subcontract with a tree removal service to supplement the tree removal work of public works employees. The contract was for the removal of 124 trees within 120 days and prohibited Sunday work. Local 97 filed a grievance claiming that the Township had to first offer Saturday work to unit members as overtime. An arbitrator sustained the grievance.

Applying the lead case on subcontracting, Local 195, IFPTE v. State, 88 N.J. 393 (1982), the Court found no evidence to suggest that the purpose of the subcontract was to channel Saturday work to private employees and thus to avoid overtime expense. Local 195 had found subcontracting to be non-negotiable, but stated that the right was not unlimited, "[t]he State could not subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers."

The Court distinguished three cases the Commission had relied on, which the court characterized as ones in which only overtime hours were contractually transferred to private

employees. The Court found the Saturday work to be an incidental feature of the subcontract and thus did not accept what it characterized as the Commission's "implicit conclusion that the Township entered into the private contract in bad faith to avoid excess labor costs." The Court applied Local 195 and finding no predominant purpose to avoid excess labor costs, found the grievance to be non-arbitrable.

The Court declined to address the employer's contractual argument, but then briefly stated that the union's interpretation of the contract clause prohibiting non-unit employees from performing unit work as including subcontractor workers would violate Local 195.

### **Other Cases**

In Roa v. LAFE, \_\_\_ N.J. Super. \_\_\_ (App. Div. 2008) (7/7/08), the Appellate Division held that the anti-retaliation provisions of the LAD create a distinct cause of action that need not be related to the workplace. The LAD contains both "substantive" provisions and an anti-retaliation provision. While the former prohibits discriminatory conduct based upon a person's status as a member of a protected class, the latter makes it unlawful for any person to take reprisals against any person because that person has opposed any practices or acts forbidden under [the LAD] . . . or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [the LAD]. The "practices or acts forbidden" under the LAD include many things unrelated to one's employment.

In In re Flagg v. City of Newark, App. Div. Dkt. No. A-0788-05T5 (7/15/08), the Appellate Division held that a Merit System Board regulation did not bar a disciplined employee who was entitled to back pay from changing his secondary job during the period of removal or suspension. The regulation allows earnings from a secondary job to mitigate a back pay obligation when the new or substituted secondary job has duties or hours incompatible with the public position. In this case, the employee had a series of secondary jobs during the back pay period, but none had duties or hour incompatible with his city job.

In Mineer v. McGettigan, Atlantic Cty., Atlantic Cty. Sheriff's Dept., App. Div. Dkt. No. A-6560-05T3 (7/16/08), among other things, the Appellate Division held that a sheriff's officer had an interest in refraining from engaging in political activities on behalf of the sheriff that is protected by Article I, paragraph 6 of the New Jersey Constitution and that he could not be subject to retaliation, such as the denial of a promotion or other significant adverse employment actions for exercising that constitutional right.

In Peck v. City of Hoboken, App. Div. Dkt. No. A-4590-06T3 (7/21/08), the Appellate Division affirmed a decision of the trial court granting permanent relief to a plaintiff on the return date of an order to show cause on preliminary restraints. The trial court dismissed disciplinary charges against a police officer after finding that the charges were brought in retaliation for speaking out against procedures that would promote preferential treatment for the police chief's son. There was no basis for the court to find any materially disputed facts warranting a plenary hearing.

In Charapova v. Edison Bd. of Ed., App. Div. Dkt. No. A-0259-07T2 (7/21/08), the Appellate Division affirmed State Board of Education decision that a discrimination claim was untimely because it was filed more than 90 days after a non-tenured teacher received a RIF notice. The Acting Commission of Education had ruled that the petition was timely because it was filed within 90 days of the petitioner's becoming aware that similarly situated staff members were being recalled. Note that effective July 7, 2008, appeals of Commissioner of Education decisions go directly to the Appellate Division. P.L. 2008, c. 36.

In In the Matter of the Application of Robert L. Taylor, \_\_ N.J. \_\_ (2008) (A-30-07), the New Jersey Supreme Court addressed the standard to be applied in evaluating a prosecutor's application under N.J.S.A. 2A:158-7 to increase appropriations for staff and facilities beyond the amounts appropriated by the county, called a Bigley application. The Court held that the statute authorizes the Assignment Judge to approve expenses of the prosecutor that exceed the funds appropriated by the county only when the expenses are "reasonably necessary." The Prosecutor had sought to increase certain salaries beyond the levels in the collective negotiations agreements. The trial judge had expressly found that the "Prosecutor has not established that an increase in salary levels is somehow 'essential,' or that his office will not be able to fulfill some specific function entrusted to it without an increase in salaries." Also, the trial judge expressly found that an additional increase for assistant prosecutors beyond the amount previously agreed to in negotiations was not "essential." The trial court interpreted those findings to mean that the salary increases, although appropriate, were not "reasonably necessary" for the Prosecutor to fulfill his statutory responsibilities. In light of those findings, the Supreme Court held that it was error to approve the Prosecutor's request to increase the salaries for those positions.