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March 24, 2011

MEMORANDUM

TO: Commissioners

FROM: Counsel Staff

SUBJECT: Report on Developments in the Counsel's Office Since February 24, 2011

Commission Cases

Bergen Community College has initiated a summary action in the Superior Court, Law Division, Mercer County seeking to quash a subpoena issued by a Hearing Examiner in an unfair practice case, (CO-2009-272). The complaint names the Commission as a defendant, but the Bergen Community College Support Staff Association has been permitted to intervene. Bergen Community College and Public Employment Relations Commission and Bergen Community College Support Staff Association, Docket No. MER-L-597-11. The Counsel's office and counsel for the Association have filed briefs opposing the College's application. The Hon. Thomas W. Sumners Jr., will hear the parties' arguments on April 11.

Other Cases

Lee v. NJ Transit, 2011 U.S. App. LEXIS 5423 (3d Cir. N.J., Mar. 17, 2011). This decision affirms a United States District Court ruling on summary judgment dismissing the discrimination and duty of fair representation claims of a terminated New Jersey Transit bus driver who was determined to have left the scene of an accident involving a bus he was driving. The driver claimed that his union, Amalgamated Transit Union Local 825, improperly refused to take his case contesting the termination to arbitration and withdrew an offer of reinstatement. The Court notes that issues as to whether there was just cause for his termination are not germane as the driver is appealing from dismissal of his racial discrimination claims.

Edward Jackus v. City of Elizabeth Board of Education, et al., 2011 N.J. Super. Unpub. LEXIS 619 (App. Div. 3/9/2011) determines what forums are appropriate to resolve a multi-faceted claim filed by an administrator holding a 12-month position he received as a result of a settlement of a federal lawsuit. In 2010, his position was among 500 jobs that were abolished by a reduction in force. He was transferred into a 10-month teaching position with a proportionate reduction in salary.

Since 1993 Jackus had been a City Council member. In 2001, following a 2000 election, the Board filed tenure charges against Jackus, then a vice-principal, and two other administrators, relating to whether sufficient fire drills had been held in their schools. The dismissal of those charges by the State Board of Education was upheld by the Appellate Division. In response, Jackus filed a multi-count federal civil rights action against the Board. To settle the case, the Board agreed to pay \$75,000.00 in counsel fees and to promote Jackus from his 10-month vice-principal position to a 12-month job, "Supervisor of Physical Education, Health, Safety and Athletics." The settlement agreement provided that as long as Jackus was serving, the position would not be abolished and that he could only be removed via the tenure charge process.

Following the RIF, Jackus filed an action in Superior Court seeking injunctive relief, alleging that his demotion violated the settlement and was also retaliation for his activities as a councilman. The trial court viewed the action as seeking to enforce a settlement and granted a temporary injunction ordering that Jackus be immediately restored to his position with back pay.

The Appellate Division granted leave to appeal and holds that before any decision can be made, the Commissioner of Education must review the propriety of the reduction in force, essentially performing a fact-finding function. Thereafter, the case would be returned to the trial court. It also finds that injunctive relief should not have been granted because monetary damages at the end of the case could fully remedy any of Jackus' claims. Thus there was no irreparable harm.

Joyce Tuck-Lynn v. State-Operated School District of the City of Newark, 2011 N.J. Super. Unpub. LEXIS 518 (App. Div. 3/3/11) holds that failure to strictly comply with statutory teacher evaluation procedures does not preclude a Board of Education from not renewing a non-tenured teacher's employment contract. The Court notes that the applicable statutes do not include a remedy for non-compliance. The Court upholds the determination of an Administrative Law Judge, adopted by the Commissioner of Education, finding that the non-renewal was based on performance. Both the Commission and the Courts have held, in the context of the Employer-Employee Relations Act, that evaluation procedures are negotiable and breaches of those procedures can be remedied through binding arbitration. See e.g., Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397 (App. Div. 1991), aff'd., 130 N.J. 312 (1992) (upholding arbitration award setting aside tenured teacher's evaluation because of non-compliance with evaluation procedures). However, those cases do not hold that a failure to follow evaluation procedures requires a Board to renew the contract of a non-tenured teacher.