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August 3, 2011

MEMORANDUM

TO: Commissioners
FROM: Counsel Staff
SUBJECT: Report on Developments in the Counsel's Office Since June 30, 2011

Commission Cases

Appeals that have been withdrawn or dismissed by agreement

Atlantic County and FOP Lodge 34, P.E.R.C. No. 2011-076

Union City and PBA Local 8, P.E.R.C. No. 2011-073.

Edison Tp. and International Association of Fire Fighters, Local No. 1197, P.E.R.C. No. 2011-49, 36 NJPER 462_ (¶180 2010), decision stayed pending appeal, P.E.R.C. No. 2011-60, 37 NJPER 17 (¶7 2011).

Cases Related to Commission Cases

Borough of East Rutherford v. East Rutherford PBA Local 275, 2011 N.J. Super. Unpub. LEXIS 1921 (App. Div. 7/18/11) reverses the decision of a trial court, and reinstates a grievance arbitration award finding that the employer violated the parties' collective negotiations agreement when, during the term of the agreement, it increased co-pays for medical office visits. As noted in the Court's opinion, the employer had attempted to prevent the grievance from going to arbitration and filed a scope of negotiations petition. The Commission's ruling allowing arbitration was previously affirmed on appeal. Borough of East Rutherford and East Rutherford P.B.A. Local 275, P.E.R.C. No. 2009-15, 34 NJPER 289 (¶103 2008), aff'd 2010 N.J. Super. Unpub. LEXIS 452, 36 NJPER 33 (¶15 App. Div. 2010).

Harry Formica v. Atlantic City Board of Education, et al. 2011 N.J. Super. Unpub. LEXIS ___ (App. Div. 8/2/11) affirms a grant of summary judgment dismissing a Board of Education employee's Law Against Discrimination suit except for a claim that the Board improperly required the employee to repay a salary increase that he should not have been awarded. The increase was the subject of an unfair practice charge filed by the Union representing the employee's position which alleged that he was improperly advanced on the salary guide. The unfair practice charge was settled, but the settlement did not require that the employee repay the increase he received. The claim that the Board's repayment deductions from the employee's paychecks violated the LAD is remanded for trial.

Grievance Arbitration

Township of Saddle Brook v. PBA Local No. 102, et al., 2011 N.J. Super. Unpub. LEXIS 2032 (App. Div. 7/26/11) upholds a trial court ruling confirming two grievance arbitration awards involving changes in the benefits of already retired police officers. The same arbitrator presided in both cases. She sustained a grievance filed by the PBA challenging the employer's increase of co-pays for prescription and medical benefits and by requiring that retirees make Medicare Part B their primary source of coverage. She ordered the employer to reimburse the retirees for these costs. In a second grievance involving a disabled retiree, the arbitrator held that employer violated its pre-1985 practice by when it terminated the retiree's health coverage. The remedy was that the employer provide the retiree with full medical benefits as a disabled police officer once he ceases employment with an employer who is providing full medical benefits.

Trenton Business-Technical Employees Association v. Trenton Board of Education, 2011 N.J. Super. Unpub. LEXIS 1947 (App. Div. 7/20/11) affirms a trial court decision, confirming a grievance arbitration award holding that the Board failed to prove it had just cause to terminate a non-tenured youth development liaison whom it had accused of sexual harassment. The Court rejected challenges to evidentiary rulings by the arbitrator and the Board's newly raised contention that the arbitrator should not have awarded back pay to the grievant because the program under which he was employed was subsequently abolished. The opinion fully reviews the standards of proof in a disciplinary arbitration, the scope of judicial review and determines that the award was reasonably debatable and should not be set aside.

Township of East Windsor v. Teamsters Local Union No. 676, 2011 N.J. Super. Unpub. LEXIS ___ (App. Div. 8/3/11) reinstates an award sustaining a grievance filed by the Teamsters that had been set aside by a trial judge. The grievance alleged that the Township had improperly reduced salaries by adjusting employee paychecks in 2009 because 27 (rather than the normal 26) pay dates occurred in that year. The Teamsters argued that the workers it represented were hourly employees, rather than employees who received an annual salary as argued by the Township. The Court holds that because an argument could be made for either position, the decision of the arbitrator, accepting the position of the Teamsters was "reasonably debatable" and should not have been set aside.

Other Cases

In the Matter of Nicholas R. Foglio, Fire Fighter, Ocean City, ___ N.J. ___ 2011 N.J. LEXIS 707 (7/19/11). The Supreme Court, reversing the Appellate Division of the Superior Court and the Civil Service Commission, holds that the “Rule of Three” [N.J.A.C. 4A:4-4.8(a)(3)], does not allow a civil service employer to avoid giving a rational explanation to a highly-ranked promotional candidate who was by-passed in favor of lower ranked candidates. The City had a promotional process to fill three vacant fire fighter positions and appointed the candidates ranked first, third and fourth and the CSC list. The CSC and the Appellate Division held that the City’s explanation that it bypassed Foglio, ranked second and the only candidate with fire-fighting experience and related certifications, because appointing the third and fourth ranked candidates “best met” the department’s needs” met the statement of reasons rule, N.J.A.C. 4A:4-4.8(b).

The Supreme Court describes the statement as “boilerplate, equally applicable to any bypass case and utterly lacking in specific explanatory language, it was not sufficient to satisfy the appointing authority’s reporting obligation.” The Court holds that requiring an explanation is essential to make sure that promotions are based on merit and fitness. The Appellate Division had held that, unless discriminatory motives are alleged, an appointing authority may base its decision on the Rule of Three without further explanation. The Supreme Court holds that a reasoned explanation is required in all bypass cases, whether or not discriminatory motives are alleged.

Brian Green v. Township of Deptford, 2011 N.J. Super. Unpub. LEXIS 1983 (App. Div. 7/21/11) interprets N.J.S.A. 40A:14-155 addressing a municipality’s obligation to reimburse a police officer for the cost of successfully defending disciplinary charges.¹ After an investigation by the County prosecutor, Green was indicted on a charge of false swearing related to a statement he gave concerning another officer’s alleged assault on a prisoner in police custody. The attorney assigned by the FOP to defend Green had to withdraw because of a conflict and a second attorney

¹ That statute provides:

Whenever a member or officer of a municipal police department or force is a defendant in any action or legal proceeding arising out of and directly related to the lawful exercise of police powers in the furtherance of his official duties, the governing body of the municipality shall provide said member or officer with necessary means for the defense of such action or proceeding, but not for his defense in a disciplinary proceeding instituted against him by the municipality or in criminal proceeding instituted as a result of a complaint on behalf of the municipality. If any such disciplinary or criminal proceeding instituted by or on complaint of the municipality shall be dismissed or finally determined in favor of the member or officer, he shall be reimbursed for the expense of his defense.

was offered at no cost to Green. However, Green decided to retain a third attorney and signed a retainer agreement acknowledging responsibility to pay the attorney's fees. That firm advised the employer of the arrangement and stated that, if representation was approved, the firm would be compensated in accordance with the Township's fee schedule. Although the Township did not approve the representation the firm successfully defended Green (he was acquitted in a jury trial) and sent the Township a letter demanding Green be reinstated and that the firm be reimbursed for the cost of defending the officer. After the trial, disciplinary charges were brought against Green but were settled after the officer pleaded guilty to one count of neglect of duty. He was then reinstated with back pay. The Appellate Division affirms the trial court's ruling holding the Township was not obligated to pay the attorney's bill because:

1. Although the interview was taken during the course of the performance of plaintiff's duties as a police officer, the false statement given was not in furtherance of his official duties but a perversion of those duties.
2. Representation of Green by the law firm had not been approved by the Township.

Louise Stewart v. County of Hudson, 2011 N.J. Super. Unpub. LEXIS 1965 (App. Div. 7/22/11) reverses a jury verdict in favor of the plaintiff, a County corrections officer and a former official of the union representing the correction officers. A jury had found that the County retaliated against Stewart for making claims under the Worker's Compensation Act and for activity protected by the Law Against Discrimination, even though claims of adverse actions based on race and gender were dismissed before the case reached the jury. The trial court's instructions to the jury advised that filing grievances on behalf of herself and other co-workers was activity protected by the LAD and satisfied her obligation to show she had engaged in protected activity and that her employer was aware of it. The jury returned a verdict finding a violation of the LAD based on that activity. The Appellate Division concludes that filing workplace grievances asserting violations of a collective negotiations agreement is not an activity protected by the LAD and remands for a new trial.