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March 26, 2009

MEMORANDUM

TO: Commissioners

FROM: Ira W. Mintz
General Counsel

SUBJECT: Supplemental Report on Developments in the Counsel's Office Since February 26, 2009

Legislation

On March 5, 2009, Governor Corzine signed legislation designed to expedite disciplinary proceedings when law enforcement officers and firefighters are suspended without pay by limiting the number of days pay can be suspended. P.L. 2009, c. 16. The legislation also requires the Commission to establish a special panel of arbitrators to review police and firefighter terminations in non-Civil Service jurisdictions. The bill applies to terminations for non-criminal conduct that occurs after June 1, 2009.

Other Cases

In State of New Jersey Department of Environmental Protection v. Mazza, ___ N.J. Super. ___ (App. Div. 2009), the Court reviewed the purpose and mechanics of enforcement of administrative agency decisions. Although Rule 4:67-6(c)(3) prohibits a trial court from considering the validity of an agency order in an enforcement action, an agency seeking enforcement of one of its orders must show that the defendant has failed to comply with the order and that the court's assistance is necessary to secure compliance.

In Asbury Park Press v. Monmouth Cty., ___ N.J. Super. ___ (App. Div. 2009), the Court held that the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to -13, required disclosure

of the County's agreement with an employee to settle her sexual harassment and discrimination lawsuit.

In Brown v. New Brunswick Bd. of Ed., App. Div. Dkt. No. A-2501-07T2 (3/20/09), the Court held that filing a grievance is the commencement of an adjudicatory process that does not satisfy the definition of a whistle-blowing activity under the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 to -8.

In Rodgers v. Neptune Tp., App. Div. Dkt. No. A-3290-07T2 (3/18/09), the Township suspended a police officer without pay. A departmental hearing officer found termination to be warranted. The officer sought review in the Superior Court pursuant to N.J.S.A. 40A:14-150. The Judge reduced the penalty to a three-month suspension and the Appellate Division reversed, restoring the termination. The Court found that the officer's misconduct involved public safety and caused a present and future risk of harm to ordinary citizens, as the hearing officer had recognized. Thus, the trial court had acted arbitrarily. L. 2009, c. 16, effective June 1, 2009, limits unpaid suspensions to 180 days and permits police officers in non-Civil Service jurisdictions to have their terminations reviewed in binding arbitration other than the Superior Court.

In North Jersey Media Group, Inc. v. Bergen Cty. Prosecutor's Office, ___ N.J. Super. ___ (App. Div. 2009), the Appellate Division upheld a trial court decision that the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to -13, did not permit the Bergen County Record to inspect records of Prosecutor's Office employees who sought approval for outside employment. Disclosure of the requested information was found to result in a substantial risk to the employees and their families.

In Cipriano v. City of Trenton, App. Div. Dkt. No. A-2220-07T3, the Appellate Division affirmed the dismissal of a CEPA claim against the city and its then civilian police director. The trial court had held that the plaintiff, a police lieutenant who had been the Trenton PBA President, had to exhaust the available appeal procedures to contest discipline that he alleged was retaliatory. The Appeals court held that CEPA contains no exhaustion requirement, but that the plaintiff did not allege facts that would violate CEPA. The case mentions that the PBA had filed several unfair practices challenging the police director's efforts to re-structure the police department.

In Dumont Custodial Maintenance Ass'n v. Dumont Bd. of Ed., Dkt. No. C-532-08 (2/5/09), the trial court held that because the contract did not specify discharge as a penalty for an employee's first serious disciplinary offense, the arbitrator improperly sustained the discharge of a custodian for stealing a student's iPod. The court reduced the penalty to a 15-day suspension.

In Hemsey v. PFRS, ___ N.J. ___ (2009), the Supreme Court held that a retired police officer did not satisfy the statutory requirements for mandatory re-enrollment in PFRS because there was insufficient credible evidence to conclude that he exercised administrative or supervisory duties over police officers or firefighters in his current position as Director of Communications for the City of Trenton.