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August 13, 2009

MEMORANDUM

TO: Commissioners

FROM: Ira W. Mintz
General Counsel

SUBJECT: Supplemental Report on Developments in the Counsel's Office Since June 25, 2009

Commission Case

On June, 26, 2009, the Appellate Division denied CWA's motion for leave to appeal I.R. No. 2009-26, __ NJPER __ (¶____). In that case, charging parties had filed unfair practice charges accompanied by applications for interim relief. The charges alleged that respondents violated the New Jersey Employer-Employee Relations Act by implementing temporary layoffs (furloughs) of negotiations unit employees. In a related case, the Appellate Division had affirmed the promulgation of emergency regulations by the Civil Service Commission, except for the portions related to "staggered layoffs." As to that issue, the matter was transferred to PERC. As for a decision to lay off all employees in a layoff unit, even on a temporary basis, the Court stated that it must be considered a managerial prerogative and lawfully embodied in the emergent regulation. Finding himself bound to follow the Court's decision on non-staggered furloughs, the Commission designee denied interim relief as to the non-staggered temporary layoffs in the Civil Service jurisdiction cases before him. The Designee restrained Maplewood Township, a non-Civil Service jurisdiction, from unilaterally implementing temporary layoffs and reducing certain employees from full-time to part-time. CWA moved for leave to appeal seeking an order that PERC exercise primary jurisdiction over the negotiability of non-staggered furloughs. The Court denied the CWA's motion.

Related Matters

In accordance with the terms of the MOAs between the State and several unions, the Civil Service Commission has stayed the temporary layoff rule at N.J.A.C. 4A:8-1.1 pending the repeal of the rule.

Other Cases

In D'Ambrosio v. North Hudson Reg. Fire and Rescue, App. Div. Dkt. No. A-5869-07T1, the Appellate Division affirmed in part and reversed in part a trial court decision that had dismissed disciplinary charges against a firefighter as untimely under the 45-day rule in N.J.S.A. 40A:14-28.1 and had awarded the firefighter attorneys' fees. The Court held that it was improper to interfere with the decision of the Executive Director that required an investigation of the circumstances of the firefighter's conduct before taking action on one of the charges.

In Woodbridge Fire Dist. 1 v. PERC and IAFF, Local 290, App. Div. Dkt. No. A-0407-08T3, the Appellate Division reversed a trial court decision that had restrained binding arbitration over minor discipline imposed on Fire Captain Richard Foerch. Applying the presumption of arbitrability in the public sector, the Court found that the definition of grievance in the parties' contract, "a complaint, a view or an opinion pertaining to conditions or relationship between an employee and a superior," is sufficiently broad to encompass a dispute over the minor discipline imposed. Issues of procedural arbitrability, including timeliness, are for the arbitrator.

In Amalgamated Transit Union, Local 880 v. New Jersey Transit Bus Operations, Inc., ___ N.J. ___ (2009) (7/15/09), in a 5-2 decision, the New Jersey Supreme Court, applying the "reasonably debatable" standard of review for arbitration decisions, reversed an Appellate Division decision and deferred to an arbitration panel's conclusion that an employee terminated during his probationary period, did not have the right to access the grievance provisions of the collective bargaining agreement. The Appellate Division had reversed the trial court's judgment, finding that questions of substantive arbitrability were to be decided by a court unless the parties had agreed otherwise, whereas questions of procedural arbitrability were to be decided by an arbitrator; arbitrability should be determined solely on the basis of the CBA's terms; the arbitrators had erred by considering the employee's employment application; and the termination was indisputably subject to grievance and arbitration because the CBA did not expressly exclude probationary employees from the grievance process. The Appellate Division remanded for arbitration before a new arbitration panel. The Supreme Court majority determined that the question of procedural versus substantive arbitrability was largely irrelevant in this case. They stated that if the Appellate Division correctly found that the issue was substantive, the judicial remedy could not have provided anything more than that which the employee received from the arbitrators. The dissent agreed with the Appellate Division and wrote that a determination of whether a dispute was arbitrable—in this case, whether the probationary employee was entitled to access the grievance procedure—was an issue that was reserved to the court.