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January 27, 2010

MEMORANDUM

TO: Commissioners

FROM: Ira W. Mintz
General Counsel

SUBJECT: Supplemental Report on Developments in the Counsel's Office Since December 17, 2009

Other Cases

In New Jersey Transit Corp. v. New Jersey Transit Police, App. Div. Dkt. No. A-4902-07T3 (1/11/10), the Appellate Division affirmed a Law Division decision confirming a grievance arbitration award finding that NJ Transit improperly determined that an officer, who had been injured on duty, could no longer do his job without convening a board of doctors as set forth in the collective bargaining agreement. The dispute was also the subject of a scope of negotiations determination. In New Jersey Transit Corp., P.E.R.C. No. 2007-63, 33 NJPER 145 (¶51 2007), the Commission had held that the dispute over convening a board of doctors to assess the officer's medical condition was within the scope of negotiations and therefore legally arbitrable.

In Roa v. LAFE and Marino Roa, ___ N.J. ___ (2010), the New Jersey Supreme Court held that under New Jersey's Law Against Discrimination, the statute of limitations begins to run on a discrete retaliatory act, such as a discharge, on the date on which the act takes place, and a timely claim based on post-discharge retaliatory conduct does not sweep in a prior untimely discrete act which the victim knew or should have known gave rise to a retaliation claim. However, a discrete post-discharge act of retaliation is independently actionable even if it does not relate to present or future employment, and evidence relating to barred claims may be admissible in the trial of the timely claim.

In Asbury Park Press v. Monmouth Cty., ___ N.J. ___ (2010), the New Jersey Supreme Court held that the Open Public Records Act requires disclosure of an agreement between the County and an employee who filed a lawsuit claiming sex discrimination, sexual harassment, retaliation, and a hostile work environment.

In In re Deborah Payton, App. Div. Dkt. No. A-6117-07T3 (12/31/09), the Appellate Division reversed a decision of the Merit System Board (now Civil Service Commission), that had reversed an ALJ initial decision sustaining a discharge. The MSB had previously reduced the penalty to a five-day suspension and the Appellate Division had reversed and remanded to the MSB. On remand, the MSB imposed a 30-day penalty and the Appellate Division reversed again. The Court stated that the MSB's action essentially rejected the ALJ's credibility determination that the employee took five one-dollar bills home intentionally rather than negligently. The Court found that because the MSB failed to set forth any evidence that could reasonably support its implicit rejection of the ALJ's credibility determination, it was the Board's action that was arbitrary, capricious and unreasonable.

In South Amboy PBA Local 63 v. City of South Amboy, App. Div. Dkt. No. A-1089-08T3 (1/5/10), the Appellate Division affirmed an order confirming an arbitration award that had held that the City had to maintain retired police officers' health and prescription benefits at the level set by the collective negotiations agreement. The City had moved from a self-insured plan to the State Health Benefits Program and the arbitrator ordered the City to reimburse retirees for the difference in prescription co-pays and for Medicare Part D premiums. The Court noted that the "reasonably debatable" standard of review has only been applied where the appellant is challenging an arbitration award under the Arbitration Act and that a party opposing a common-law action for confirmation may only avoid confirmation if it can demonstrate that the award is contrary to existing law or public policy.

In Hudson Cty. v. District 1199J, App. Div. Dkt. No. A-2726-08T2 (1/15/10), the Appellate Division reversed a trial court decision that had vacated a grievance arbitration award. The grievant was a provisional employee who had worked for more than six months. The contract provided that after a provisional had worked for six months, he or she could invoke the grievance procedure. The grievant took, but did not pass, an examination for the position. The County then laid him off. The arbitrator found that nothing in Civil Service regulations required that the grievant be laid off. The Appellate Division agreed. The Court found no regulation or statute that mandated the grievant's termination prior to the twelve-month provisional period given the facts present and the arbitrator's reasonably debatable interpretation of his status. The award was also the subject of a post-award scope of negotiations decision, P.E.R.C. No. 2009-38, 35 NJPER 6 (¶4 2009). The Commission held that the grievance award was not preempted by Civil Service statutes or regulations and was within the scope of negotiations.

In Groslinger v. Wyckoff Tp., App. Div. Dkt. No. A-5861-07T2 (1/20/10), the Appellate Division upheld a grant of summary judgment dismissing an employee's LAD and CEPA claims. The Court stated that the result was not inconsistent with the arbitration award it had confirmed in Wyckoff Tp. v. PBA Local 261, 409 N.J. Super. 344 (App. Div. 2009). There, the factual basis for the arbitrator's conclusion was not challenged and the parties' focus was on the arbitrator's interpretation of the issue presented to him: whether the employer violated the discrimination provision in the collective negotiations agreement.