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PENNSYLVANIA STATE LODGE  
FRATERNAL ORDER OF POLICE

Legal Update - November 2, 2008

1. **39 PPER 108: Board of Commissioners of Upper Moreland Township v. Officer Bryan McCauley, (Pa. Cmwlth., July 25, 2008)**

The Commonwealth Court affirmed a decision of the Court of Common Pleas which upheld a decision of the Civil Service Commission reducing an officer's suspension from eight (8) days to four (4) days.

The facts involved a veteran police officer who activated his lights and siren as he began to respond to a traffic stop initiated by a probationary officer. While en route, he was notified that the on scene officer did not need assistance. Although he deactivated his lights and siren, he continued to the probationary officer's location at a speed in excess of the speed limit due to his concern for and in order to assist the probationary officer. In the process, he became involved in a serious vehicular accident.

The Township charged the veteran officer with conduct unbecoming and suspended him for eight (8) days. After a hearing, the local Civil Service Commission reduced the suspension to four (4) days, concluding that the officer's actions did not constitute conduct unbecoming, but rather a neglect of duty.

The trial court upheld the Commission's decision based upon the Commission's conclusion that the officer's conduct did not meet the established definition for conduct unbecoming:

Conduct unbecoming ... [is] such conduct which adversely affects the morale or efficiency of the police force, or tends to destroy public respect for and confidence in the police force ...

However, the trial court agreed with the Commission's determination that the officer's conduct was sufficient to constitute "neglect or violation of official duties" within the meaning of the department's General Orders.

The Commonwealth Court affirmed the finding that the Commission's decision did not constitute an abuse of discretion.

**2. 39 PPER 111: Niles Dodd v. SEPTA, et al., (Ed. Pa. 2008)**

A police officer, a professed Rastafarian, was terminated when he continued to wear his hair in dreadlocks in violation of the employer's grooming policy (to maintain the hair above the uniform cap). The officer alleged that although he pulled his hair up in a bun under his hat or wore it in a ponytail, his discharge was discriminatory in that he was treated in a disparate manner because of his religious beliefs.

While the District Court dismissed his First Amendment claims (involving religious beliefs and expression), it concluded that the officer made a prima facie case that the grooming policy was applied in a disparate manner, i.e., that several female officers were permitted to wear their hair in ponytails. Moreover, the court indicated that the officer's request to wear his hair in a style so as to permit him to keep it long, was a "minor deviation" from the grooming policy and consistent with the hairstyle practices of other officers.

**3. 39 PPER 114: Viola v. Borough of Throop, (M.D. Pa. 2008)**

A police officer was initially suspended with pay for being in his residence (while on duty) for an extended period of time, and subsequently suspended for ten (10) days without pay for alleged misconduct. The officer filed suit claiming that he was denied procedural due process with respect to both suspensions. Specifically, the officer alleged that the Borough failed to follow its departmental disciplinary procedures and also that it failed to notify him during his six-year tenure that his performance was deficient. In granting summary judgment in favor of the employer, the District Court determined that no predeprivation hearing (a reference to Loudermill rights) was necessary in the first instance (suspension with pay) because the officer received a prompt hearing and suffered no adverse financial impact during the suspension with pay. Also, the suspension without pay was imposed only after the officer had received written notice of charges and the scheduling of a hearing which he attended and at which time he was represented by counsel and allowed to present evidence on his own behalf.

**4. 39 PPER 117: McAndrew v. Municipal Civil Service Commission of Scranton, et al., (Pa. Cmwlt. 2008)**

A police detective, passed over for the position of Lieutenant, appealed the Civil Service Commission's action in reducing the passing grade for the written portion of the examination from 70% to 60% *after* the test had been given and graded. The Commission allegedly took this action, after consultation with various administrators, as

well as the test-taking authority, due to the low number of applicants meeting the initial passing score.

The Civil Service Commission rejected the appeal. The Court of Common Pleas concluded that the Commission's actions in lowering the passing score after the test was already taken and graded violated the governing regulations. The Common Pleas Court ordered that the officer, who had passed with a score of 70% or better, be awarded the position of Lieutenant and receive back pay and other remedial relief. The City appealed this decision arguing, *inter alia*, that the relief ordered exceeded the Court's authority.

On appeal, the Commonwealth Court ruled that although it agreed with the lower court that the Commission's lowering of the passing grade under these circumstances violated the governing regulations, the relief ordered exceeded the Court's authority. The Commonwealth Court reasoned that under the "rule of three", although the detective would have had to compete with less candidates, he was not necessarily assured the promotion because the mayor, as the appointing authority, had discretion to pass over a particular candidate due to legislative reasons. The Commonwealth Court observed that automatically awarding the detective a promotion put the detective in a better position than he would have been had the Commission maintained the initial 70% passing score. Accordingly, the Commonwealth Court reversed the Common Pleas' order in part (i.e., setting aside the promotion) and remanded the matter to the lower court to fashion an appropriate remedy.

**5. E.B. Jermyn Lodge No. 2 of the Fraternal Order of Police v. City of Scranton, et. al., Nos. 2322 C.D. 2007 & 232 C.D. 2008 (argued September 10, 2008)**

This appeal was taken from the decision of the Court of Common Pleas of Lackawanna County, which vacated and set aside an Act 111 Interest Arbitration Award, covering the years 2003 through 2007, as being in conflict with an Act 47 (distressed municipality) Recovery Plan, which, by its terms, expired December 31, 2005. The Court of Common Pleas determined that insofar as the Recovery Plan stated that "base hourly wages and salaries of all City employees shall not exceed existing (2002) rates ...," and further, that its terms were "for the period 2002, 2003, 2004, 2005 and beyond," wage increases in years 2006 and 2007 were inconsistent with the Recovery Plan and, accordingly, illegal.

Several significant legal issues were raised in the appeal including, but not limited to, the following: (1) that insofar as the restrictive language set forth in Section 252 expressly precluded "[a] collective bargaining agreement or arbitration *settlement* executed after the adoption of a plan" from violating, expanding or diminishing its provisions, such language did not apply to an Act 111 interest arbitration *award*; (2) that the terms of Act 47 expressly provide that an employer can voluntarily amend the Recovery Plan, thereby authorizing an Act 111 panel to do that which the City could voluntarily have done under existing law; (3) that the Award did not "violate, expand or diminish" the Plan (at least as to years 2006 and 2007) because the Plan, by its express terms, terminated December 31, 2005; and (4) that the Plan is void *ab initio*, because the

Plan Coordinator's violation of the Pennsylvania State Adverse Interest Act has irrevocably tainted the Plan.

The issues were comprehensively briefed, argued, and presented to the full Commonwealth Court and a decision is pending.

**6. City of Philadelphia v. Fraternal Order of Police, Michael Lutz Lodge No. 5, 38 EAP 2007 (argued October 21, 2008)**

This appeal was taken from a decision of the Commonwealth Court, which reversed an Act 111 grievance arbitration award in a termination case. The Commonwealth Court determined that the arbitrator acted in excess of his authority and/or denied the City its constitutional rights to a due process hearing by issuing sanctions against the City that precluded the City from introducing key testimony in support of its case. The arbitrator had ruled that due to the City's failure to comply with the terms of a subpoena (requiring the City to produce certain documents, including witness statements), the City would be precluded from introducing the statements and/or testimony related to such statements at the hearing. The Commonwealth Court determined that such sanctions were not only unauthorized, but that they also effectively deprived the City of its constitutional due process right to present its case.

On appeal, Lodge No. 5 argued that the arbitrator's right to control the hearing, and, more specifically, to make evidentiary rulings and/or determinations regarding the refusal to produce subpoenaed materials, was inherent in the process. Such authority was necessary to promote the strong public policy in favor of the swift resolution of disputes involving critical public safety employees. Moreover, the FOP argued that if parties were forced to go to Courts of Common Pleas in an attempt to enforce subpoenas prior to the actual hearing, such delays would frustrate the public policy in favor of the swift resolution of grievance disputes. A question was also raised as to whether the ruling and/or result reached by the arbitrator fell within the permissible scope of appellate review of narrow criteria, applicable to Act 111.

A decision is pending.