

April 1, 2011

## **I. EMPLOYMENT LITIGATION**

### **In Reversing the Decision of an Administrative Body, the Appellate Division Exceeded Its Authority by Reinstating the Termination of an Employee**

*In the Matter of Anthony Stallworth*, --- A.3d ---, 2011 WL 1367756 (N.J. April 12, 2011), Petitioner Anthony Stallworth was a pump station operator for the Camden County Municipal Utilities Authority (CCMUA), a regional authority that handles wastewater collection and treatment. At the time of the incident giving rise to this case, Stallworth had been employed by the CCMUA for seventeen years. As part of his job responsibilities, he was provided with a marked CCMUA truck in which he traveled to and from pumping stations and pipelines. The truck had a navigation system that could be monitored by the CCMUA. On the morning of November 15, 2005, Stallworth left the pumping station to which he was assigned and went to a convenience store two blocks away. He remained there for approximately one hour and fifteen minutes—one hour longer than the fifteen-minute morning break he was authorized to take. The CCMUA terminated Stallworth based on this misconduct and his disciplinary history.

Stallworth appealed to the Civil Service Commission (Commission). The appeal was referred to the Office of Administrative Law (ALJ), where a “contested case” hearing was conducted. Stallworth testified that it is common practice at the CCMUA for pump operators to combine break times to take a longer break. Stallworth indicated that he often took his morning and lunch breaks together and did so to ensure that he had enough time to eat in the morning for the proper management of his diabetes. Stallworth's supervisor testified at the hearing that when asked about his prolonged absence, Stallworth merely said, “[y]eah, whatever.” When Stallworth was asked at the hearing why he did not tell his supervisor that he was diabetic and leaving to get something to eat, he responded, “why should I have to tell him.”

Testimony was also presented about Stallworth's prior disciplinary history, which included multiple violations of the CCMUA's “Critical Rules.” The Director of Operations and Maintenance for the CCMUA, testified that any violation of a Critical Rule was deemed “a major infraction by the agency.” He also testified that the CCMUA sought to terminate Stallworth for the present offense after reviewing and taking into account his “extensive” disciplinary history.

The ALJ found that Stallworth violated two Critical Rules and noted Stallworth's extensive “disciplinary record,” listing sixteen charges (including fourteen “Critical Rule” violations) sustained against him between 1993 and 2006. While recognizing the concept of “progressive discipline,” the ALJ found the incident at hand “egregious enough to warrant removal.”

The Commission concluded that that the penalty imposed was too harsh and modified the penalty from removal to a four-month suspension. It also directed that Stallworth be immediately reinstated, with the appropriate back pay. In assessing the appropriate penalty, the Commission took into account Stallworth's employment history and record, noting that he was a "seventeen year employee," and his disciplinary record evidenced only one major disciplinary action—a fifteen-day suspension—and several minor disciplinary actions.

On appeal, the Appellate Division, in an unpublished opinion, recognized the level of deference owed to a final decision of an administrative body such as the Commission. However, the Appellate Division was unable to reconcile Stallworth's disciplinary history with the Commission's characterization of it as evidencing only one major disciplinary action, and several minor ones. Relying on the CCMUA Director's testimony that violations of "Critical Rules" are "major" infractions, the panel further concluded the offenses were "not minor in nature." The panel determined to reinstate the termination and Stallworth appealed.

The New Jersey Supreme Court was asked to consider whether the Appellate Division erred when it reversed the Commission's penalty because it determined that the Commission, in its progressive discipline analysis and fixing of the penalty, underestimated the significance of petitioner's prior disciplinary record. The concept of progressive discipline addresses the necessary desire to promote proportionality and uniformity in the rendering of discipline of public employees. It is used in two ways": (1) to "ratchet-up" or "support imposition of a more severe penalty for a public employee who engages in habitual misconduct"; and (2) "to mitigate the penalty" for an employee who has a record largely unblemished by significant disciplinary infractions. On the other hand, progressive discipline is not "a fixed and immutable rule to be followed without question" because "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record."

The New Jersey Supreme Court found that the meaning and significance of Stallworth's prior disciplinary record was unclear, and that it is not possible to determine whether the Commission properly exercised its statutory authority when fixing Stallworth's penalty at a level less than the termination or removal from office as ordered by his employer. The court noted that in the record there was considerable disagreement as to what constitutes a "major infraction" for purposes of Stallworth's employment, and how many "major" infractions Stallworth had.

The New Jersey Supreme Court held that it could not conclude from the Commission's statement of reasons that it adequately considered Stallworth's entire record of misconduct. Therefore, the court held that the Commission disregarded its statutory obligation to "state with particularity" its reasons for rejecting the ALJ's findings and conclusion. N.J.S.A. 52:14B-10. Thus, the result reached by the Appellate Division in reversing the Commission was correct.

However, the court noted that its conclusion that the Commission understated or misperceived the true impact or significance of Stallworth's prior disciplinary history as a whole should not have translated into a reinstatement of the ALJ's decision merely because the panel determined that the record did not permit it to affirm the Commission's decision. The court found that given the concept of progressive discipline and the preeminent role of the Commission in the discipline of public employees, the matter should have been remanded to the Commission to permit a

reexamination of the record and explanation by the Commission that adequately justifies any Commission determination to reject the appointing authority's termination of Stallworth. As such, the New Jersey Supreme Court ordered that the case be remanded.

## **II. GENERAL LITIGATION**

### **Filing of Post-Trial Motions Mandatory Under the Procedural Posture of Case**

In *Newman Development Group of Pottstown, LLC v. Genuardi's Family Market, Inc.*, --- A.3d ---, 2011 WL 940820, (Pa.Super. March 18, 2011), the parties' dispute arose over Genuardi's commercial lease of space in a shopping center to be built by Newman. The lease was eventually signed in April, 2000. Genuardi's was subsequently acquired by Safeway, to whom the lease was assigned in February, 2001. By February 13, 2002, however, Safeway informed Newman that it was terminating the lease due to Newman's failure to meet certain deadlines. Newman responded by filing a complaint against Genuardi's and Safeway, alleging anticipatory breach of the lease agreement. Based on a determination that appellants had breached the lease, judgment was entered in favor of Newman and was increased following post-trial motions.

The parties filed cross-appeals on two issues: (1) whether the trial judge erred in determining that appellants had breached an enforceable promise, and (2) whether the trial judge properly determined the amount of damages arising from the breach. The Appeals Court affirmed the trial judge's decision finding the appellants in breach of the lease, but vacated and remanded on the issue of damages. On remand, the court entered an Order dated January 15, 2010 and again revised appellee's damage award.

On February 17, 2010, appellants filed a motion for reconsideration of the January 15th opinion, which the trial judge denied by order dated February 25, 2010, filed March 3, 2010. Appellants filed no motions to the February decision. Instead, they filed a direct appeal on March 19, 2010.

In response to appellants' claims of trial court error, appellee argued that the failure to raise the issues in a post-trial motion resulted in waiver on appeal, pursuant to Pa.R.A.P. 227.1. The court agreed with appellee that the matter required the filing of post-trial motions and appellants' failure to do so resulted in waiver of the issues on appeal.

Appellants' position on the necessity of post-trial motions centered on the particular procedural posture of the case. They asserted that the "proceeding on remand" did not permit, much less require, post-trial motions. Appellants did not dispute that this matter, as a whole, obviously included a trial, however, they focused on the events following remand, insisting that those proceedings did not "constitute a trial" for the purposes of Rule 227.1, thus post-trial motions were unnecessary. In support of their argument, appellants asserted that following remand, no new evidence was introduced (other than an accounting of costs, attorneys' fees and interest), therefore, the decision Appellants challenged was based solely on legal arguments and the factual record developed prior to the first appeal. Appellants further argued that "proceedings

that do not involve the introduction of evidence do not count as trials for purposes of triggering the post-trial motion requirement.”

The court disagreed that the particular procedural circumstances of this case relieved appellants of the burden of filing post-trial motions raising the issues of trial court error. The court explained that post-trial motions are meant to provide the trial court with an opportunity to correct errors. Here, post-trial motions were filed to the original entry of judgment in appellee's favor, and the trial judge used the opportunity provided to him by the motions to revise the damages awarded. That award was again revised based on this Court's directives on remand that the trial judge had erred in failing to apply an applicable portion of the lease. Appellants challenged the trial judge's latest determination of damages, and the errors which appellants asserted the judge had committed are of the type which the trial court must be permitted to address upon the filing of post-trial motions. As such, the court concluded that the filing of post-trial motions was mandatory under the procedural posture of this case and appellants waived their claims of trial court error for purposes of review.

**All Orders Compelling and Denying Arbitration are Deemed Final for Purposes of Appeal, Regardless of Whether Such Orders Dispose of All Issues and All Parties**

In *GMAC v. Pitella v. Pine Belt*, --- A.3d ---, 2011 WL 1004698 (N.J. March 23, 2011), defendant third-party plaintiff Rosanna Pittella entered into a “retail installment sale contract” with third-party defendant Pine Belt Enterprises, Inc. (“Pine Belt”) to finance the purchase of a car. Pittella simultaneously signed an arbitration agreement entitled “Option to Arbitrate Disputes.” Pine Belt assigned the contract to GMAC. In February of, 2008, GMAC repossessed the car for non-payment and filed suit against Pittella in the Special Civil Part for a deficiency balance. Pitella filed an answer, counterclaim, and third-party complaint against Pine Belt, alleging violations of Consumer Fraud Act and other claims, and sought class certification for claims relating to Pine Belt's actions in selling extended warranties for automobiles.

On July 31, 2008, the trial court entered an order compelling “binding arbitration” of Pittella's individual claims against Pine Belt, but did not stay GMAC's claims pending the arbitration. Pittella and GMAC subsequently resolved their dispute in the pending litigation and, on March 5, 2009, executed a stipulation of dismissal with prejudice. Within forty-five days thereafter, on April 14, 2009, Pittella filed a notice of appeal from the July 31, 2008 and August 29, 2008 orders. Pine Belt moved to dismiss the appeal as untimely, arguing that Pittella was required to file her appeal within forty-five days of the respective orders. Therefore, the challenge to the order compelling arbitration had to have been filed in September 2008. Pittella countered that the orders did not dispose of all issues as to all parties, and therefore were not final judgments appealable as of right.

The Appellate Division denied Pine Belt's motion to dismiss the appeal as untimely, and decided Pittella's appeal on its merits and in her favor. The Appellate Division considered the appeal timely because the matter did not result in a final judgment until it was resolved as to all claims and all parties.

The Supreme Court granted certification to decide whether orders compelling arbitration as to some, but not all parties, in a litigation are excepted from the Court's unconditional holding in *Wein v. Morris*, 194 N.J. 364, 944 A.2d 642 (2008) that all orders compelling arbitration are deemed final and immediately appealable as of right.

Pine Belt argued Pittella's appeal was not timely because all orders compelling arbitration are deemed final for appeal purposes under the express wording of *Rule 2:2-3(a)*, including orders that do not dispose of all issues as to all parties. *Rule 2:2-3(a)* reads, in relevant part, that “an order compelling arbitration, whether the action is dismissed or stayed, shall also be deemed a final judgment of the court for appeal purposes.”

Pittella defended her appeal as timely because the 2008 orders did not dispose of the entire litigation and, thus, were not final as to all claims and all parties. She further asserts that *Wein* is not applicable because in *Wein* the trial court compelled arbitration between the only two parties in that litigation and, thus, the order compelling arbitration disposed of all the issues as to all parties before the trial court. She also contended that if the Court decided to alter the rule of finality to read that all orders compelling arbitration are final regardless of whether some parties, issues or claims remain for resolution, that rule should be given only “purely prospective” effect; that Pine Belt has suffered no prejudice in this matter because little more than a year has elapsed between the filing of GMAC's complaint and Pittella's appeal; and that Pittella did not waive her right to appeal by proceeding to arbitration with Pine Belt.

The court noted that unlike *Wein* this case did not involve an order that compelled arbitration of all issues and all parties. Here, more remained before the trial court than the mere return of the parties for finalization of the arbitrator's award: the trial court still had to decide GMAC's deficiency claim against Pittella. Therefore, the July 31, 2008 order-although final, under *Wein*, as between Pittella and Pine Belt-was not final as to all issues and all parties. It, thus, was distinguishable from *Wein* because it presents a markedly different fact pattern. The court found that this difference required it to again consider basic principles regarding finality.

The court then held that that *Rule 2:2-3(a)* be amended to permit appeals as of right from all orders permitting or denying arbitration. Because the order shall be deemed final, a timely appeal on the issue must be taken then or not at all. A party cannot await the results of the arbitration and gamble on the results.

The court further ordered that the *Rules* and administrative practice within the Appellate Division also be amended to require the expeditious processing of these appeals similar to those on discretionary interlocutory review. Further, *Rule 2:9-1(a)* was amended to permit the trial court to retain jurisdiction to address issues relating to the claims and parties that remain in that court, such as other motions to compel arbitration, to stay proceedings, or to sever claims and parties. The court provided, “While we encourage parties to immediately file motions which relate to an application to compel arbitration, so that all related proceedings can be reviewed on appeal, or by motion for leave to appeal filed with respect to the other orders, we leave a residuum of jurisdiction in the trial court when other claims and parties remain. “

As to this case the Court held:

Because it addressed less than all issues as to all parties, it was not clear that the order compelling arbitration of Pittella's claims against Pine Belt was final under Rule 2:2-3(a) and Wein. That question and its resolution are now crystal clear: orders compelling or denying arbitration are deemed final and appealable as of right as of the date entered. Based on the prior lack of clarity, we affirm that portion of the Appellate Division decision denying the motion to dismiss the appeal from the final judgment. We do so with the following warning: as of today, litigants and lawyers in New Jersey are on notice that all orders compelling and denying arbitration shall be deemed final for purposes of appeal, regardless of whether such orders dispose of all issues and all parties, and the time for appeal therefrom starts from the date of the entry of that order.

As such, the Court held that any order compelling or denying arbitration shall be deemed final for purposes of appeal, but that the trial court shall retain jurisdiction to address other issues pending the appeal.

***Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.***

**© Thomas Paschos & Associates, P.C. (2011) All Rights Reserved.**