

NEW JERSEY'S RURAL MUNICIPALITIES ARE ENTITLED TO RECEIVE STATE POLICE COVERAGE

By James F. Moscatiuri, Esq.

Many of New Jersey's rural municipalities do not have the financial means to economically provide for a local law enforcement unit to serve and protect their citizens. As a result, such municipalities rely upon the New Jersey State Police to provide police protective services, ranging from motor vehicle incidents to more serious criminal violations. Unfortunately, as an apparent result of the current economic crisis, the State of New Jersey, in some instances, has sought to reduce or terminate State Police coverage for, or require reimbursement from, New Jersey's rural municipalities over the past several months. The New Jersey Council on Local Mandates has determined that the State is not entitled to reimbursement for said coverage, however, the State's more recent efforts to terminate or reduce State Police coverage to rural sections of the State has yet to be adjudicated by the Court.

The powers and duties of the New Jersey State Police are established by State statute. Specifically, *N.J.S.A. 53:2-1* states, in pertinent part, as follows: "[M]embers of the State Police shall be subject to the call of the Governor." "They shall be peace officers of the State." "[They] shall primarily be employed in furnishing adequate police protection to the inhabitants of rural sections" within the State of New Jersey. As can be seen by review of the statutory language just recited, the primary purpose for the creation of the State Police was

to provide rural municipalities with police protective services. As such, absent a change in the statutory mandate that presently exists, the State may not endeavor to terminate or reduce State Police services to New Jersey's rural municipalities.

This office has had the opportunity to challenge the State's decision to terminate State Police coverage for one of our municipal clients. In that case, the State sought to terminate overnight State Police coverage to a rural municipality, which employed a part-time police force. After the decision by the State was rendered, this office filed an emergent application to the Appellate Division of the Superior

Court of New Jersey, requesting a permanent injunction precluding the State from terminating overnight coverage. However, the matter was never adjudicated due to the fact that the State reversed its decision, and agreed to continue to provide overnight coverage. Thus, it remains to be seen whether the State has backed off its aggressive stance as a matter of policy, or just in the isolated case where said decision was challenged.

Accordingly, should your municipality encounter a similar situation, you should immediately contact your legal counsel in order to ascertain whether or not the State's action is proper. ♦

DINA M. MIKULKA, ESQ. JOINS FIRM

Paris Eliades, Esq., head of the firm's Family Law Department, is happy to announce the addition of Dina M. Mikulka, Esq. Ms. Mikulka is a graduate from Seton Hall University School of Law. Upon graduation, she served as a Law Clerk to the Honorable George W. Parsons, Jr., J.S.C., in the Bergen County Family Law Division.

Following her clerkship, Ms. Mikulka was employed as a Deputy Attorney General for the New Jersey Office of the Attorney General where she worked until 2005. During that time, Ms. Mikulka was primarily responsible for representing the State's interests in trials and appeals involving the Division of Youth and Family Services.

After leaving the Office of the Attorney General, Ms. Mikulka worked in private practice, specializing in family law matters, including divorce, child custody, DYFS actions and contested adoptions. Mr. Eliades describes Dina as "an excellent addition to the Family Law Department and a wonderful asset to the firm's clients."

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RELIGIOUS LAND-USE LAWSUITS

By Robin J. Willner, Esq.

The land-use portion of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) was enacted to prevent discrimination by the government against the use of real property by religious organizations. On its face, the wording of the statute may appear to apply to circumstances that arise infrequently, but many churches and other religious institutions have used the RLUIPA to get their way in zoning standoffs with local governments.

The RLUIPA prohibits the government from imposing or implementing a land-use regulation in a manner that imposes a “substantial” burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. Thus, a complaining party has the considerable initial burden of showing that the land-use regulation substantially burdens the exercise of religion, and is not merely expensive or inconvenient. If that hurdle is crossed, however, the government may well have a difficult time showing both the “compelling” governmental interest and that it has selected the least

restrictive means to advance that interest.

In one RLUIPA case, a village zoning board violated the RLUIPA when it denied an application for a special-use permit allowing a private religious day school to construct a classroom building on its campus. The expansion project was a building on, and conversion of, real property for the purpose of a religious exercise, within the meaning of the RLUIPA, given that the rooms that were planned and the facilities to be renovated would all be used, at least in part, for religious education and practices.

Even while ignoring a substantial burden imposed on the school's religious exercise, the zoning board did not act to further any compelling state interest, as was shown by the lack of evidence for its stated reasons for denying the permit. Instead, the board had acted with undue deference to the opposition of a small group of neighbors. Even if some compelling state interest was involved, the board refused to consider approving the application subject to conditions, and thus had not used the least restrictive means available to it.

Of course, religious organizations have not batted a thousand when they have invoked the RLUIPA. Sometimes even similar cases have

had opposite outcomes, making any predictions difficult. In another case of a growing church that had plans to expand the church facilities, including a school on its property, a federal appellate court upheld a township's decision to deny the church's application for a special-use permit. The court found that the township's denial of the church's application to build a structure in excess of 25,000 square feet on its property did not impose a substantial burden on the church's religious exercise, so as to violate the RLUIPA.

The denial would require the church to incur increased expense to accomplish its goal of building a significantly larger church and school, and to endure increased inconvenience if it were not able to build a facility of the desired size, but, in the court's view, nothing the township had done required the church to violate, modify, or forgo its religious beliefs or precepts, or to choose between those beliefs and a benefit to which the church was entitled. That the church was still free to carry out all of its missions and ministries, just not on the scale it desired, foreclosed any finding of a “substantial” burden. ♦

EMPLOYMENT LAW ALERT

SUPREME COURT RULES FOR WHITE FIREFIGHTERS IN TITLE VII CASE

By Howard A. Vex

In a dramatic ending to its term, the U.S. Supreme Court ruled, 5-4, that the City of New Haven violated the civil rights of White and Hispanic firefighters when it tossed out the results of a promotion exam after no African-Americans had passed it. The Court ruled in *Ricci v. DeStefano* that the city's justification—that it feared it would be sued by the African-American applicants for violating Title VII by relying on a test that had “disparate impact” on minorities—did not constitute the “strong basis in evidence” that is needed for an employer to make employment decisions based on fear of liability. The Court said instead that the city's action was based on race and amounted to a “disparate treatment.” ♦

AGE DISCRIMINATION IN EMPLOYMENT

By Robin J. Willner, Esq.

When the federal government required one of its defense contractors to reduce its workforce, the contractor first evaluated its employees based on the criteria of “performance,” “flexibility,” and “critical skills.” After adding points to scores for years of service, the employer arrived at a list of 31 employees to be laid off. On their face, the criteria were age-neutral, but all but one of the employees chosen to receive a pink slip were at least 40 years old, within the age group protected by the federal Age Discrimination in Employment Act (ADEA).

The laid-off employees sued their former employer under the ADEA, alleging the disparate impact form of age discrimination. Disparate impact refers to the use of policies or criteria by an employer in making employment decisions that are not overtly based on age, but which, when applied, allegedly have a disproportionate impact on older individuals. (The other type of employment discrimination, known as “disparate treatment,” asserts that the employer intentionally treated applicants or employees differently because of their age.)

The plaintiffs first established, using statistical experts, that such a skewed result against older workers under the layoff criteria would rarely happen by chance, and that the same factors that were most closely linked statistically to the older employees—flexibility and critical skills—were also the factors most influenced by the discretion of the contractor’s supervisors.

The contractor countered that it was not liable because the ADEA provides that an employer action is not unlawful if differentiation among employees is based on “reasonable factors other than age” (RFOA). A jury returned a multimillion-dollar verdict for the plaintiffs. Ultimately, the case reached the United States Supreme Court, which upheld the judgment for the plaintiffs.

The critical issue determined by the Supreme Court was whether the RFOA element needed to be proven by the plaintiffs or by the defendant employer. In other words, did the plaintiffs have to prove that there were no reasonable factors other than age underlying the employer’s decision, or did it fall to the employ-

er to present an “affirmative defense” and prove the existence of the other reasonable factors? Examining the language of the ADEA and taking note of a previous ruling where a similar provision in the law was in the nature of an affirmative defense, the Court ruled that RFOA is an affirmative defense that the employer must prove and, in this case, had not.

The Court’s opinion anticipated criticism, which, in fact, was forthcoming, that its decision could open the floodgates for similar claims and make it too easy for plaintiffs to prevail. It pointed out that, even before the RFOA affirmative defense comes into play, the plaintiff in an ADEA disparate impact case must isolate and identify specific performance practices by the employer that are responsible for statistical disparities disfavoring older workers. As the Court put it, “[t]his is not a trivial burden.”

However, concerns about tilting the scales too far against employers should be directed at Congress, according to the Court, since it created the RFOA concept and made it a defense to be proven by employers. ❖

FARMLAND PRESERVATION

By Katrina L. Campbell, Esq.

In the past few years, most New Jersey residents have been asked to vote on referendums concerning an open space/farmland preservation tax on a State, County or local level. Most residents have heard of farmland preservation but there are questions regarding what exactly it is and how does it benefit the residents of New Jersey. How long are the farms preserved, who owns the preserved farms and are these farms open to the public are just a few of the questions that are being asked.

The process commonly known as farmland preservation is the purchasing of non-agricultural development rights by a government or non-profit agency. Landowners are paid to give up their rights to develop their property in the future and in turn ensuring that

their farm will forever be protected for agricultural use. Landowners who have preserved their property still own the property and can sell their land at any time. The deed restrictions prohibiting non-agriculture development run with the land, so future owners are required to comply with the same restrictions. The preserved farm is not public property and the public has no right to use the land without the landowner’s consent. Nonetheless, the Garden State’s residents are benefiting from farmland preservation. According to the State Agriculture Development Committee, “farmland preservation is an important part of keeping New Jersey green and prosperous. Preserved farmland limits urban sprawl, protects water and soils, provides us with an

abundance of locally grown farm products and maintains our connection to the land and the longstanding agricultural traditions that earned our reputation as the Garden State.”

The results of farmland preservation can be seen across the State. It has been reported that in 2008 alone, 142 New Jersey farms (approximately 12, 405 acres) were preserved. Of those farms, 32 farms (2,119 acres) were preserved in Warren County, making Warren County the leader in farmland preservation last year. At the beginning of this year, Warren County had preserved a total of 17,289 acres of farmland.

Courter, Kobert & Cohen is experienced in representing both landowners and government agencies in the process of farmland preservation. ❖

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PEOPLE IN THE NEWS

COURTER, KOBERT & COHEN, P.C. is pleased to announce that **HOWARD A. VEX** has become a Partner. Howard has been associated with the Firm since 2003 and primarily specializes in labor and employment law. Howard is a graduate of Cornell University's School of Industrial and Labor Relations and Rutgers Law School-Newark, where he concentrated his studies in labor and employment law and litigation.

MICHAEL B. LAVERY has been unanimously elected to a three-year term to the Heritage Conservancy Board of Directors.

HOWARD A. VEX was elected President of the Sussex Warren Human Resource Management Association and will take office on August 1, 2009. Howard has been an active member of the Northwest New Jersey SHRM Chapter since 2005 and has served as Legislative Chair since 2006. Howard will also be a feature speaker at SHRM's July 22, 2009 Employment Law Update, presented at the Morristown Hyatt at Headquarters Plaza.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

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