New York Law Journal

NEW YORK, MONDAY, JULY 26, 2010

MUNICIPAL LAW

BY JEFFREY D. FRIEDLANDER

Appellate Practice – Highlights of Cases

In past articles, I have had occasion to discuss the extensive appellate practice of the Law Department's Appeals Division in state and federal courts. That practice has been as busy and significant as ever in recent months. In this article, I will address recent appellate cases handled by attorneys of the Appeals Division that have helped shape the law in several areas of concern to the people of the city: police discipline, child safety, the city's ability to tax cigarette purchases and preservation of historic landmarks.

Police Discipline

An important case recently litigated by attorneys of the Appeals Division turned on whether the method of drug testing for police officers constitutes a mandatory subject of collective bargaining. In January 2005, the New York City Police Department informed representatives of police unions that it intended to introduce hair analysis for all drug screening of uniformed members (a methodology known as "radioimmunoassay"), rather than relying in large part on urine testing.

The Police Department wanted to change its drug testing methodology because hair analysis provides a substantially longer period of detection than urine analysis, and is therefore more effective in uncovering drug use. Moreover, drug residues remain permanently embedded in the hair and cannot be washed or bleached out.

In response, the Detectives Endowment Association, on behalf of itself and other unions of uniformed police officers filed an improper practice petition with the Board of Collective Bargaining, part of the New York City Office of Collective Bargaining, alleging that the Police Department's determination to change its drug testing procedures unilaterally was subject to collective bargaining. A separate but substantially identical petition was submitted by the Captains Endowment Association.

The Board of Collective Bargaining granted both petitions, concluding that the method and circumstances of drug testing constituted "a mandatory subject of collective bargaining." The city challenged that determination in New York State Supreme Court, which held for the city on the ground that collective bargaining over drug testing would "seriously limit[] the Commissioner's ability to enforce discipline" within the Police Department, and was thus barred by the Court of Appeals holding in Matter of Patrolmen's Benevolent Assn. v. New York State Public Employment Relations Board, 6 N.Y.3d 563 (2006) (PBA v. PERB), stating that police discipline in New York City was outside the scope of collective bargaining. City of New York v. Patrolmen's Benevolent Assn., 2007 N.Y. Misc. LEXIS 8803 (Sup. Ct., N.Y. Co. 2007).

The Appellate Division, First Department, reversed and reinstated the Board of Collective Bargaining determination, concluding that methods and procedures of drug testing were distinct from the commissioner's disciplinary authority, which arose "only after written charges have been preferred." Matter of City of New York v. Patrolmen's Benevolent Assn., 56 A.D.3d 70, 76 (1st Dept. 2008).

Upon the city's appeal, the Court of Appeals again reversed and held that drug testing methods and procedures are matters excluded from collective bargaining for uniformed police officers in New York City. Matter of City of New York v. Patrolmen's Benevolent Ass'n, 14 N.Y.3d 46 (Dec. 17, 2009). The Court reiterated its conclusion, stated in PBA v. PERB, that "New York City Charter §434(a) and Administrative Code §14-115(a), originally enacted as state statutes, 'state the policy favoring management authority over police disciplinary matters in clear terms' and 'express a policy so important that the policy favoring collective bargaining should give way.'" Id. at 58, quoting PBA v. PERB, 6 N.Y.3d at 576.

The Court further concluded that "the detection and deterrence of wrongdoing" within the Police Department—particularly crimes, such as illegal drug use—is a crucial component of the police commissioner's responsibility to maintain discipline within the force. There was no dispute, the Court pointed out, that the commissioner, pursuant to that responsibility, "may unilaterally institute drug testing of uniformed officers." Therefore, in the Court's view, "[t]he Police Commissioner's disciplinary authority…is not limited to the formal disciplinary process" but extends to the determination of drug testing methods and procedures, matters that, far from being "ancillary or tangential to his disciplinary authority," are "inextricably intertwined with the Commissioner's authority to conduct drug testing in the first place[.]" Id. at 59.

Child Protective Proceedings

It is the mission of the Administration for Children's Services (ACS) to safeguard the city's children from abuse and neglect. As part of that endeavor, ACS caseworkers have the

BY JEFFREY D. FRIEDLANDER

Appellate Practice – Highlights of Cases

difficult task of determining when to remove a child from his parents' custody based on suspected maltreatment. Whether ACS and its caseworkers may be held liable in the event the suspected abuse or neglect proves to be unsubstantiated was the issue recently faced by the U.S. Court of Appeals for the Second Circuit in two related cases, Cornejo v. Bell, 592 F.3d 121 (2d Cir., Jan. 4, 2010), and V.S. v. Muhammed, 595 F.3d 426 (2d Cir., Feb. 17, 2010).

In Cornejo, after the plaintiff's six-month-old son, Kenny, died from what appeared to be shaken baby syndrome, ACS removed Kenny's brother from the home and placed him in foster care. Thereafter, ACS filed child abuse petitions against the parents. When it was determined that Kenny's injuries were not the result of having been shaken, the Family Court permitted ACS to withdraw its petitions. However, the plaintiff subsequently sued ACS caseworkers and ACS attorneys in District Court under 42 U.S.C. §1983, alleging a deprivation of her due process and Fourth Amendment rights. The plaintiff also asserted state law claims of malicious prosecution and breach of duty.

The Second Circuit, reviewing de novo the district court's grant of summary judgment to the defendants, held that the ACS caseworkers were entitled to qualified immunity regarding the federal claims, because their actions were the functional equivalent of arresting officers in a criminal case. The court found that it was reasonable for the caseworkers to remove the children and participate in child abuse proceedings in reliance on the opinion of a qualified physician.

The court further determined that the ACS attorneys were entitled to absolute immunity, since they were performing "'functions analogous to those of a prosecutor'" in a criminal proceeding. 592 F.3d at 127, quoting Butz v. Economou, 438 U.S. 478 (1978). Finally, the court held that the defendants were entitled to immunity from liability with regard to the plaintiff's state law claims. Plaintiff has petitioned for certiorari to the U.S. Supreme Court to challenge the Second Circuit's determination that ACS attorneys have absolute immunity.

In V.S. v. Muhammed, a case presenting substantially similar facts, the Second Circuit, relying on its decision in Cornejo, reversed the district court's denial of summary judgment to the defendants and held that an ACS caseworker and his supervisors were entitled to qualified immunity for removing a child from its mother's custody on the basis of a medical opinion attributing the child's injuries to shaken baby syndrome.

The court rejected plaintiff's argument that the ACS defendants were not entitled to qualified immunity because the physician on whose opinion they relied allegedly had a reputation for over-diagnosing child abuse. In the court's view, "to impose on an ACS caseworker the obligation in such circumstances of assessing the reliability of a qualified doctor's past and present diagnoses would impose a wholly unreasonable burden of the very kind qualified immunity is designed to remove." 595 F.3d at 431. The court further held, again in reliance on Cornejo, that the defendants were entitled to absolute immunity with regard to plaintiff's state law claims of malicious prosecution and abuse of process.

Cigarette Tax Collection

In response to difficult economic conditions, the city, like other jurisdictions, has increased its efforts to recover unpaid taxes. One such effort, the collection of taxes lost through the Internet sale of cigarettes, led to the U.S. Supreme Court, where the Law Department tried, albeit unsuccessfully, to develop a new remedy.

Under authority of state law, the city taxes all cigarettes possessed or used within its borders. Administrative Code §11-1302(a). At the time of the litigation, prior to the enactment of the federal legislation described below, when cigarettes were shipped to the city for sale by vendors located outside New York State, the city could not recover the tax from the vendor, but had to collect from the purchaser. Under the federal Jenkins Act, 15 U.S.C. §375 et seq., vendors engaged in the interstate sale of cigarettes are required to provide their customer information to state taxing authorities. Such information, shared with the city by New York State, enabled the city to collect taxes owed by cigarette purchasers.

In 2005, the city filed suit in the Southern District against a number of Internet cigarette vendors who had failed to submit the customer information required by the Jenkins Act. The city's complaint, submitted by attorneys of the Affirmative Litigation Division, asserted that the vendors' failure constituted mail and wire fraud under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 et seq., that the city had been injured by losing tax revenues it would otherwise have been able to recover, and that the city was consequently entitled to an award of treble damages and an injunction requiring the vendors to comply with the Jenkins Act.

Although the district court ruled against the city, a panel of the Second Circuit, including now Supreme Court Justice Sonia Sotomayor, reversed and reinstated the city's RICO claim, concluding that the city had standing to assert its claim because the defendants' alleged wire and mail fraud, if proven, constituted the proximate cause of the city's claimed injury, as required by applicable judicial interpretation of the RICO statute. City of New York v. Smokes-Spirits.com, 541 F.3d 425, 440-444 (2d Cir. 2008). The court further concluded that the city stated a valid RICO claim because its loss of tax revenue, if proven, satisfied the statute's requirement that a plaintiff be injured in its "business or property." Id. at 444-445.

When one of the defendant cigarette vendors, Hemi Group, sought review of the Court of Appeals determination by the U.S. Supreme Court, attorneys of the Appeals Division defended the city's position. Leonard Koerner, chief assistant

BY JEFFREY D. FRIEDLANDER

Appellate Practice – Highlights of Cases

corporation counsel and chief of the Appeals Division, argued the city's case before the Court. Although Hemi Group challenged the Court of Appeals' determination both on the ground that its conduct was not the proximate cause of the city's injury and on the ground that loss of tax revenue was not an injury to the city's "business or property," the Supreme Court focused in its determination on the issue of causation.

In an opinion delivered by Chief Justice John G. Roberts, the Court held that the city could not show the "direct relationship" or "causal link" between Hemi Group's conduct and the city's injury required to establish proximate causation. Rather, in the Court's view, the city's injury was directly caused by the failure of city residents who purchased cigarettes from Hemi Group to pay the city's tax. Since Hemi Group had no obligation to the city under the Jenkins Act, the Court concluded, its conduct, even if it constituted a predicate offense under RICO, was not actionable by the city. Hemi Group v. City of New York, —U.S.—, 130 S. Ct. 983 (Jan. 25, 2010).

In a dissent authored by Justice Stephen G. Breyer, three justices concluded that the city had indeed established proximate causation because its injury was the foreseeable and intended result of Hemi Group's conduct, and was within the scope of the harm intended by Congress to be prevented by the enactment of RICO. Id. at 997-998. Justice Sotomayor, who had participated in the determination of the Second Circuit, recused herself from the matter.

Although the city lost in court, subsequent congressional action did provide a remedy. On March 31, 2010, Congress passed, and President Barack Obama subsequently signed into law, the Prevent All Cigarette Trafficking Act of 2009 (P.L. 111-154). Intended to prevent the sale of untaxed cigarettes and reduce the sale of cigarettes to children, the legislation includes provisions that amend the Jenkins Act and related federal statutes to (1) prohibit the transport of cigarettes and smokeless tobacco in the U.S. mail, (2) allow states to require that interstate cigarette vendors prepay to state and local taxing authorities all taxes accruing on their cigarette sales (thus putting interstate vendors in the same position as local vendors), (3) make violation of the act a felony punishable by a criminal fine and/or prison, and (4) allow state and local governments to bring actions in U.S. District Court to prevent and restrain violations of the act. No longer constrained to prove a claim under RICO, the city thus has authority in the future to act directly against Internet purveyors of untaxed cigarettes.

Landmarks Preservation

Law Department attorneys are often called upon to defend determinations of the city's Landmarks Preservation Commission (LPC), whose actions to preserve buildings of historical or cultural significance are sometimes challenged by building owners. In one recent noteworthy case, Stahl York Avenue Company v. City of New York, attorneys of the Appeals Division not only successfully defended an LPC determination but also helped to define, in a way favorable to LPC, the standard of review applicable to the city's landmark designation process.

At issue in that case was the propriety of the granting of landmark status to two buildings that are part of the city and Suburban First Avenue Estate, a full-block complex of 15 buildings located between East 64th and East 65th streets and York and First avenues, one of only two such full-block, "light-court model tenement" housing complexes in the country. Constructed to provide affordable housing for low-income workers at the turn of the last century, the buildings are six stories tall and configured so that courtyards, stairways, hallways and apartments receive maximum exposure to light and air.

In 1990, LPC designated the full block of tenement buildings as a historic landmark. However, the Board of Estimate, which at that time had final authority under the New York City Charter in the landmark designation process, modified LPC's action to remove the two subject buildings from the designation. In 2006, LPC amended the designation of the First Avenue Estate to include the two buildings. In February 2007, the City Council, which now has authority under Charter §3020(9) to modify or disapprove landmark designations, voted to approve the amendment.

Petitioner, the owner of the designated buildings, challenged the new landmark designation in an Article 78 proceeding, arguing that the decision of LPC and the City Council to depart from the Board of Estimate's 1990 determination was arbitrary and capricious and, further, that the City Council, as successor to the Board of Estimate, was bound by stare decisis to the board's prior determination. Petitioner also argued that the buildings were unfit for landmark designation due to their architecture and recent alteration work performed on their façades. The Supreme Court, New York County, upheld the inclusion of the two subject buildings in the First Avenue Estate landmark site. Matter of Stahl York Avenue Company v. City of New York et al., 2008 N.Y. Misc. LEXIS 9432 (Sup. Ct., N.Y. Co. 2008).

On June 24, 2010, the Appellate Division, First Department, unanimously affirmed the dismissal of the Article 78 petition. In re Stahl York Avenue Company v. City of New York et al., 2010 N.Y. App. Div. LEXIS 5527 (1st Dept., 2010). The court ruled that, since landmark determinations are administrative rather than quasi-judicial in nature, review is limited to whether a particular determination has a rational basis, with significant deference afforded, in this case, to LPC's expertise. Moreover, the court reasoned, because LPC is authorized by law to amend any prior landmark designation, it and the City Council were free to reconsider the Board of Estimate's prior determination regarding the two subject buildings.

BY JEFFREY D. FRIEDLANDER

Appellate Practice – Highlights of Cases

The court found evidence in the record that the council had examined that prior determination and concluded that it was "based upon improper considerations which had nothing to do with the buildings' historical or cultural significance," providing a rational basis for the decision to depart from it. In addition, the court found that petitioner's alteration work on the two subject buildings did not change their defining characteristics as part of the First Avenue Estate, whose significance was cultural and historical rather than primarily architectural. Accordingly, the court concluded, notwithstanding the prior Board of Estimate determination, the redesignation was fully authorized.

Jeffrey D. Friedlander *is first assistant corporation counsel of the City of New York.* ***Julie Steiner****, senior counsel in the appeals division of the law department, assisted in the preparation of this article.*