STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PO Box 429
TRENTON, NEW JERSEY 08625-0429

www.state.nj.us/perc

ADMINISTRATION/LEGAL
(609) 292-9830
CONCILIATION/ARBITRATION
(609 292-9898
UNFAIR PRACTICE/REPRESENTATION
(609) 292-6780

For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089
EMAIL: mail@perc.state.nj.us

April 19, 2018

TO: Commissioners

FROM: Counsel Staff

RE: Developments in the Counsel's Office Since March 15, 2018

COMMISSION CASES

New appeals

Toolen, et. al., v. State of New Jersey et. al., P.E.R.C. Docket Nos. MC-2017-1 and MC-2017-2.

Claims by various the majority representatives of law enforcement and civilian employees of the State were transferred to the Commission by the Superior Court Law Division, Mercer County. The Commission dismissed the claims on January 25, 2018 in P.E.R.C. No. 2018-29, 44 NJPER 300 (¶83 2018) and, on February 22, 2018 denied motions for reconsideration P.E.R.C. No. 2018-36, ___ NJPER ___ (¶ 2018). On April 3, 6, and 9, respectively, Notices of Appeal were filed by New Jersey Law Enforcement Supervisors Association and Policemen's Benevolent Association Local #105; State Troopers Fraternal Association; and New Jersey Superior Officers Law Enforcement Association. Each Notice stated the appeal was taken from P.E.R.C. No. 2018-36.

Court Decisions - Commission Cases

Middlesex County Sheriff and Mandato, 2018 N.J. Super. Unpub. LEXIS 610 (Dkt. No. A-1728-16T3)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms P.E.R.C. No. 2015-042. In this case the Commission dismissed as untimely a charge asserting that the rescission of a reassignment, a change of shift and post, and a suspension violated N.J.S.A. 34:13A-5.4a(1) and (3) (copy attached).

OTHER CASES

Arbitrator's reinstatement of discharged employee reversed where just cause was found

Township of Monroe v. United Service Workers Union, etc., 2018 N.J. Super. Unpub. LEXIS 591 (Dkt. No. A-3684-16T1)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court order that modified an arbitration award. The arbitrator ruled that the Township had just cause to terminate an EMT but held that reinstatement with seniority and benefits, conditioned on the employee signing a "last chance" agreement, was the appropriate penalty. The Township had terminated the EMT from full-time employment but allowed him to work on a per diem basis at lower pay and without benefits. The trial court held that the arbitrator exceeded his authority and had no ability to impose a different penalty once he found just cause for termination. The appeals court held that, even under the limited standard of review applicable to arbitration awards, the trial court ruling was correct:

> Here, based on the issue presented by the parties, had the arbitrator found [the EMT's] actions did not warrant just cause for discharge, he could have awarded a "disciplinary penalty less severe than that of discharge." Instead, once he decided Monroe had just cause to discharge [the EMT], the arbitrator exceeded the power set forth in the contract, and the award was properly modified by the trial court.

Arbitrator's award upholding tenured teacher's dismissal upheld

James Dunckley v. Board of Education, Rockaway Township, 2018 N.J. Super. Unpub. LEXIS 615 (Dkt. No. A-1152-16T1)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court order confirming an arbitration award issued pursuant to the Tenured Employees Hearing Law (TEHL). The award revoked Dunckley's tenure and terminated his employment with the District

based on his unbecoming conduct arising from his inappropriate touching of two of his teenage, female special needs students.

The appeals court held that the standard of review to sustain a TEHL arbitration award was a showing that the award was supported by substantial credible evidence. Although the trial court held that the award should be sustained if found to be "reasonably debatable," the appeals court found that the award was sustainable under both standards of review.

Correction Officer's misconduct while on military duty was criminal warranting discharge

Donju Frazier v. New Jersey State Prison, Department of Corrections, 2018 N.J. Super. Unpub. LEXIS 604 (Dkt. No. A-1239-16T3)

The Appellate Division of the Superior Court, in an unpublished opinion, overturns a "deemed adopted" decision of an Administrative Law Judge suspending, rather than discharging a corrections officer. The officer, while on leave with the National Guard became intoxicated and sexually harassed a female soldier. He was reduced in rank and dismissed with a less than honorable discharge. The Department of Corrections sought his dismissal asserting that his actions while on military duty were criminal. The ALJ disagreed that Frazier engaged in criminal conduct and recommended reducing his penalty to a 120-day suspension. Because the Civil Service Commission lacked a quorum, the ALJ's decision was deemed adopted.

The appeals court held that in "deemed adopted" cases, it will affirm an ALJ's findings if "they are supported by substantial credible evidence in the record," but afford no deference to the ALJ's legal conclusions and review them de novo."[1] It concluded that Frazier's conduct in the military was criminal in nature and warranted his discharge as a corrections officer.

Decree vacating arbitration award on tuition reimbursement reversed and remanded

Borough of Mountainside v. Mountainside PBA Local 126, 2018 N.J. Super. Unpub. LEXIS 701 (Dkt. No. A-3207-16T1)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses a trial court order that vacated an arbitration award. The Borough denied a police officer's request for tuition payments for courses leading to a masters degree but did not articulate any reason for doing so. An arbitrator sustained the PBA's grievance challenging the Borough's action relying on the Borough's silence as opposed to finding that the there was an obligation to approve all such requests. The Chancery Division judge agreed with the Borough that the arbitrator had exceeded

[1]The Court cited In re Hendrickson, 451 N.J. Super. 262, 272-73, (App. Div.), certif. granted, 231 N.J. 143 (2017), another case where an ALJ decision was "deemed adopted" and the appeals court applied a less stringent standard of review. Hendrickson was recently argued before the Supreme Court.

his powers by impermissibly adding terms to the CNA and vacated the award. Considering the parties' contentions, the appeals court observed:

> We agree with the Borough and the trial court that . . . an arbitrator exceeds his powers when he ignores the limited authority that the contract confers. . . . [A]n arbitrator may not disregard the terms of the parties' agreement, nor may he rewrite the contract for the parties.
>
> [W]e agree with the union and the arbitrator that the law imposes a general obligation upon both parties to a contract to carry out their respective obligations in good faith. . . [u]nder such an imputed overarching covenant of good faith. . . . As a corollary proposition, a party breaches the implied covenant when it "exercises its discretionary authority arbitrarily, unreasonably, or capriciously...."
>
> Here, as the trial court noted, the record is silent as to exactly why the Borough turned down [the officer's] request. We offer no views on the subject. The issue must be adjudicated on its merits before the arbitrator, something which apparently was never done.
>
> For these reasons, we vacate the trial court's decision without prejudice and remand for further proceedings before an arbitrator to address the merits of the Borough's denial.

CNA did not require arbitration of claim for vacation benefits under civil service act

Hallie Torian, et al. v Newark School District, 2018 N.J. Super. Unpub. LEXIS 706, A-3398-16T2

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court order holding that teachers' aides were not obligated to use their collective negotiations agreement (CNA) to arbitrate claims made under the Civil Service Act that they were entitled to paid vacation leave. The aides and cafeteria workers filed a class action in Superior Court seeking those benefits.

Examining the CNA, the presumption favoring arbitration in N.J.S.A. 34:13A-5.3 and recognizing that arbitration forfeits a right to seek judicial relief, the Court observed:

> In summary, a plain reading of the CBA establishes: (1) the decision to bring a grievance rests with the employee and his or her union; (2) the grievance procedure is not mandatory; and (3) the follow up arbitration procedure is not mandatory. In short, the teachers' aides are not required to submit their claim for paid vacation leave to arbitration.

The District argued that the public policy favoring arbitration required that the aides' claim be entertained in that forum. The court responded:

> We reject the District's arguments and hold that the CBA here did not mandate arbitration of the claim for vacation leave by the teachers' aides. Thus, that claim, together with the claim of the other class members, can be evaluated in the trial court.