



**STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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DATE: August 20, 2021  
TO: Commissioners  
FROM: Counsel Staff  
RE: Developments in Counsel's Office since June 24, 2021

**Commission Cases**

**Update on Federal Court Litigation involving the Commission**

The Chairman and several current and former members of the Commission were named as defendants in federal lawsuits that were filed after public sector agency shop arrangements were declared unconstitutional in Janus v AFSCME, 138 S.Ct. 2448 (2018).

In Lutter v JNESO, et al., Dkt No. 1:19-cv-13478, plaintiff Jody Lutter filed a notice of appeal with the United States Court of Appeals for the Third Circuit, from the District Court's Order and Opinion dismissing the complaint.

**Enforcement Actions**

The New Jersey Superior Court, Appellate Division, issued Orders (App. Div. Dkt. No. A-003336-20) granting and consolidating

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General Counsel's motions for leave to appeal seeking enforcement of: (1) the Commission's Final Agency Order in City of Newark and Newark Police Dep't, Superior Officers Ass'n, P.E.R.C. No. 2021-2, 47 NJPER 104 (¶25 2020), wherein the Commission found the City violated the Act when it failed to honor the decisions of its Police Director to sustain grievances concerning lump sum payouts for unused vacation days upon retirement; and (2) a Hearing Examiner's Order (final by reason of no appeal) in City of Newark and Newark Police Dep't, Superior Officers Ass'n, H.E. No. 2020-10, 47 NJPER 59 (¶15 2020), which found the City violated the Act when it refused to pay active unit members longevity on their accrued compensatory time payouts, pursuant to a grievance sustained by the Police Director at Step 5 of the negotiated grievance procedure.

The Newark Fire Officers Union, Local 1860, IAFF, AFL-CIO, filed with the Commission a request for compliance and enforcement of a Commission Designee's interlocutory Decision and Order (I.R. No. 2021-27) temporarily restraining the City of Newark from continuing to require Local 1860 unit employees to perform EMS duties other than basic first aid, pending the outcome of related unfair practice charges (CO-2021-258) filed by Local 1860.

#### **Appeals from Commission Decisions**

The City Association of Supervisors & Administrators (CASA) filed an appeal in the New Jersey Superior Court, Appellate Division (App. Div. Dkt No. A-3175-20T4), from the Commission's decision (P.E.R.C. No. 2021-48) granting the request of the Newark Board of Education for a restraint of binding arbitration of a grievance filed by CASA, which alleged the Board violated the parties' collective negotiations agreement when it designated someone other than the superintendent or assistant superintendent to evaluate a school principal.

Rutgers, the State University of New Jersey (Rutgers) filed an appeal in the New Jersey Superior Court, Appellate Division (App. Div. Dkt No. A-003314-20T4), from the Commission's allowance of a grievance filed by AFSCME Council 63, Local 888 to proceed to arbitration following the Commission's consideration of a draft decision (SN-2021-021), which resulted in an unbreakable tie vote. The grievance asserts that Rutgers violated the parties' collective negotiations agreement by assigning regular and overtime work to employees who are represented by another local union.

The New Jersey Superior Court, Appellate Division, issued an Order denying a motion for a stay filed by the City of East

Orange in its appeal (App. Div. Dkt No. A-002786-20) from the Commission's decision (P.E.R.C. No. 2021-50) affirming a Hearing Examiner's grant of summary judgment to the East Orange Superior Officers' Association, Fraternal Order of Police, Lodge No. 188 a/w FOP New Jersey Labor Council (FOP), on the FOP's unfair practice charge challenging the City's policy on the use of paid leave under the Family Medical Leave Act and/or New Jersey Family Leave Act.

General Counsel's office filed a motion to dismiss in In the Matter of County of Hudson and Hudson County PBA Local 334 (App. Div. Dkt No. A-000342-20), wherein the pro se appellant (a former PBA president and the grievant in the underlying matter) appeals from the Commission's decision (P.E.R.C. No. 2021-5, 47 NJPER 114 (¶28 2020)) granting the County's motion for summary judgment and dismissing the PBA's unfair practice charge. The basis of the motion to dismiss is that the appellant does not have standing to file the appeal, and that only the union may appeal the Commission's decision.

#### **Commission Court Decisions**

No new Commission court decisions were issued since June 24.

#### **Non-Commission Court Decisions Related to the Commission's Jurisdiction**

New Jersey Supreme Court reinstates PERC-appointed grievance arbitrator's award, finding it was "reasonably debatable" and should have been upheld on appeal

Borough of Carteret v. Firefighters Mut. Benevolent Ass'n, Local 67, 2021 N.J. LEXIS 642 (App. Div. Dkt No. A-10-20, 084709)

The Supreme Court of New Jersey, reversing the Appellate Division, reinstates a PERC-appointed grievance arbitrator's award, upheld by the Chancery Division, which sustained a grievance filed by the Firefighters Mutual Benevolent Association, Local 67, alleging that the Borough of Carteret's failure to pay lieutenants at the rate of an acting captain when a lieutenant assumed a captain's responsibilities violated the parties' collective negotiations agreement (CNA). The arbitrator awarded back pay at the higher rate. The court held, among other things: (1) the arbitrator's award was supported by a plausible interpretation of the CNA and therefore satisfies the "reasonably debatable" standard; (2) the Appellate Division incorrectly substituted its own judgment and did not afford proper deference to the arbitrator's interpretation of the CNA, which is what the parties bargained for.

Appellate Division affirms PERC-appointed grievance arbitrator's award determining defendant township's deduction of Tier IV amounts for members' health care benefits pursuant to Chapter 78 did not violate parties' CNA

W. Essex PBA, Local 81 v. Fairfield Twp., 2021 N.J. Super. Unpub. LEXIS 1209 (App. Div. Dkt No. A-2853-19)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Chancery Division's denial of a motion filed by the West Essex PBA, Local 81, to vacate a PERC-appointed grievance arbitrator's award determining defendant Township of Fairfield did not violate the parties' 2018-2020 collective negotiation agreement (CNA) by deducting Tier IV amounts for the PBA members' health care benefits pursuant to Chapter 78. Applying the New Jersey Supreme Court's decision in Matter of Ridgefield Park Bd. of Educ., 244 N.J. 1 (2020), the Appellate Division upheld the arbitrator's conclusion that, because the Chapter 78 Tier IV rates were reached in an expired CNA and the parties neither agreed to nor implemented modifications to those rates in their 2018-2020 agreement, the Tier IV rates remained in effect for the successor CNA.

Appellate Division affirms PERC-appointed grievance arbitrator's award determining board of education did not violate CNA or Chapter 78 by paying union members the difference between the negotiated copay amount and a higher copay resulting from the board's change in health insurance plans

Robbinsville Education Ass'n v. Robbinsville Bd. of Ed., 2021 N.J. Super. Unpub. LEXIS \_\_\_ (App. Div. Dkt No. A-3459-19)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Law Division's order affirming a PERC-appointed grievance arbitrator's award in favor of the Robbinsville Board of Education, in a dispute over whether the Board violated Chapter 78 and its collective negotiations agreement (CNA) with the Robbinsville Education Association by paying unit members, through a credit card payment system (the Difference Card), the difference between the negotiated copay amount and a higher copay resulting from the Board's change in health insurance plans. The Appellate Division affirmed the award as being reasonably debatable, finding: (1) the arbitrator made detailed findings explaining how the Difference Card satisfied the Board's obligation to provide the insurance coverage required by Chapter 78 and the requirement that the parties enter into negotiations in the event of a premium refund

from the Difference Card; (2) the record supported the arbitrator's conclusions that the Difference Card was a form of insurance premium and part of the cost of coverage, consistent with Chapter 78 and the CNA, and that the funds paid to the Difference Card constituted a form of self-insurance permissible under Chapter 78; and (3) the Association's argument that the Difference Card was not a form of health insurance chargeable under Chapter 78 was without merit.

Appellate Division affirms State Attorney General's denial of three separate recommendations for State Trooper's promotion to sergeant

Sirakides v. Grewal, 2021 N.J. Super. Unpub. LEXIS 1581 (App. Div. Dkt No. A-1132-19)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the New Jersey Attorney General's (AG's) denials of promotion of a New Jersey State trooper to sergeant. The trooper's declaratory judgment complaint, alleging that the denials were arbitrary and capricious, was transferred from the Law Division because it involved a final decision of a state agency, review of which is exclusively within the jurisdiction of the Appellate Division. The trooper contended on appeal that the transfer was improper, and jurisdiction in the Law Division was appropriate, because the denials (communicated via short letters, each citing his disciplinary history without further detail) were not final agency decisions, as they contained no factual or legal conclusions, and did not state they were final agency decisions or advise of a right to seek review. The court disagreed, concluding that the trooper, an experienced employee familiar with his own record, knew from the time he received his first denial letter that he was not promoted because of his lengthy disciplinary history. Based upon that record, the court could not find that the denials were arbitrary and capricious.

Third Circuit affirms District Court's summary dismissal of public employee's constitutional and statutory claims arising from township's termination of police chief without hearing

Dondero v. Lower Milford Twp., 2021 U.S. App. LEXIS 21405 (3d Cir. Dkt No. 20-1128)

The United States Court of Appeals for the Third Circuit, in a precedential decision, affirms the District Court's grant of summary judgment in a public employee's suit against his former employer, Lower Milford Township, alleging, among other things, that he was entitled to a hearing before the Township eliminated

the police department and terminated his employment as chief of police and his job-related disability benefits. The court held, in sum: (1) the police department was eliminated through a valid government reorganization, and because Dondero could not show the reorganization was illegitimate, he was not entitled to a pre-termination due process hearing; (2) his position was eliminated for economic reasons, through the Township's exercise of its legitimate power of reorganization, which effectively removed him from the group of employees covered by the applicable disability benefits law, thus he was not entitled to a hearing before the termination of those benefits.

Third Circuit upholds and enforces NLRB ruling that utility company violated National Labor Relations Act by refusing to bargain with union after certain employees voted to join it

Atlantic City Electric Co. v. NLRB, 2021 U.S. App. LEXIS 20095 (3d Cir. Dkt Nos. 20-1504 & 20-1606)

The United States Court of Appeals for the Third Circuit, in a precedential decision, sustains a determination by the National Labor Relations Board (NLRB) that the Atlantic City Electric Company (Company) violated the National Labor Relations Act (Act) by refusing to bargain with a unit of Company employees represented by IBEW, Local 210, after the Company's system operators voted to join that unit. In denying the Company's petition for review and granting the NLRB's cross-application for enforcement, the court found substantial evidence supported the NLRB's conclusion that system operators were properly included in the bargaining unit because they were employees under the Act, not supervisors, as they had no authority to assign or responsibly direct other employees. The court also rejected arguments made by the Company on appeal, faulting the NLRB's application of relevant evidential standards, that it failed to raise below.