



**STATE OF NEW JERSEY
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DATE: September 24, 2021
TO: Commissioners
FROM: Counsel Staff
RE: Developments in Counsel's Office since August 26, 2021

Commission Cases

Appeals from Interim Relief Decisions

The New Jersey Superior Court, Appellate Division, granted motions for leave to appeal from a preliminary injunction order issued on September 1, 2021 by a Commission Designee (I.R. No. 2022-4) in several consolidated unfair practice charges against the City of Newark (City), arising from the City's decision to mandate Covid-19 vaccinations for City employees. The motions for leave to appeal were respectively filed by the City and by unions that represent the employees affected: Newark Police Superior Officers' Association (SOA), Newark Firefighters Union (NFU), AFSCME Co. 63 Locals 2297, 2298 and 2299, IAFF Local 1860, FOP Lodge 12, Newark Co. No. 21, IFPTE, Teamsters Local 97, JNESO District Council 1 IUOE, and SEIU Local 617. General Counsel filed a brief opposing the motions, arguing: (1) the Designee properly found that the City had a managerial

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prerogative to mandate the vaccine; (2) the Designee correctly identified mandatorily negotiable issues severable from that prerogative; (3) the moving parties failed to establish that grave damage will occur if the parties proceed exactly as ordered by the Designee to expeditiously negotiate over severable impact issues; and (4) if those negotiations fail, the underlying unfair practice cases should proceed uninterrupted on an administrative track. Oral argument was held on September 22, 2021.

Enforcement Actions

General Counsel filed with the New Jersey Superior Court, Appellate Division, a brief in support of consolidated enforcement actions (App. Div. Dkt. No. A-003336-20) 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. General Counsel argued: (1) the City has a pattern of continually flouting final agency orders, requiring enforcement by the Appellate Division; (2) the City sat on its rights twice - first by choosing not to appeal its police director's grievance determinations, and then by choosing not to appeal the agency orders at issue; (3) the merits of the underlying grievance determinations are irrelevant to whether the City refused to negotiate in good faith by repudiating the contractual grievance procedure, in violation of the Act; and (4) the City's arguments as to the merits of the underlying grievances are baseless.

Appeals from Commission Decisions

The New Jersey Superior Court, Appellate Division, issued an Order denying, without prejudice, PERC's 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. The Order stated that this issue can be raised to the merits panel.

The New Jersey Superior Court, Appellate Division, issued an Order dismissing, as withdrawn, the appeal of the City Association of Supervisors & Administrators (CASA), (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. The Order of dismissal followed CASA's letter of withdrawal stating the parties had resolved the grievance, 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.

Commission Court Decisions

No new Commission court decisions were issued since August 26.

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

Appellate Division vacates Law Division's order vacating grievance arbitrator's award, transfers matter to PERC for resolution of negotiability dispute under PERC's primary jurisdiction over that issue

Policemen's Benevolent Ass'n Local No. 400 v. Salem County & Salem County Sheriff's Dep't, 2021 N.J. Super. Unpub. LEXIS 1765 (App. Div. Dkt No. A-3533-19)

The Appellate Division of the Superior Court, in an unpublished opinion, vacates an order of the Law Division (in favor of Salem County vacating a grievance arbitration award) and transfers the matter to PERC for resolution of the scope of negotiability of the County Sheriff's 2019 special order reassigning the duties of transporting inmates from correction officers to sheriff's officers. The Law Division judge determined the arbitrator erred in refusing to consider the negotiability issue on the basis that the County had not filed a scope petition with PERC. The judge found the County raised the "non-negotiability" argument in the arbitration, and that the arbitrator should have addressed the negotiability factors and weighed the interests of the parties under the three-part test set forth in In re Local 195, IFPTE v. State, 88 N.J. 393 (1982). Performing that analysis herself, the trial judge then found the challenged decision was non-negotiable and therefore non-arbitrable, vacated the award, and denied the

PBA's motion for reconsideration. In vacating the Law Division's order, the Appellate Division held that PERC's primary jurisdiction over scope of negotiations issues requires transfer to PERC, explaining: (1) the County should have filed its scope petition pursuant to N.J.A.C. 19:13-2.1 before proceeding to arbitration and the arbitrator rendering his award; (2) short of that, the County should have asked the Law Division judge to transfer the scope of negotiations question to the Commission for resolution (as PERC had previously suggested in a letter to County counsel directing the County to withdraw a post-arbitration scope petition); and (3) even absent such request, the judge should have declined to decide the negotiability question and referred that dispute to PERC.

Appellate Division publishes previously unpublished opinion affirming that temporary disability benefits are not "base salary" for purposes of calculating Chapter 78 employee healthcare contributions

Grillo v. State, 2021 N.J. Super. LEXIS 117 (App. Div. Dkt No. A-1038-19)

The Appellate Division of the Superior Court reissued as a published opinion a decision previously issued as unpublished on April 1, 2021. As reported in the April 2021 General Counsel's Report, the opinion affirms a decision of the Law Division, Mercer County, L-0495-19, which dismissed with prejudice the appellants' complaint seeking a judgment declaring that the calculation of their employee healthcare contributions, required of public employees under L. 2011, c. 78 (Chapter 78) and the State Health Benefits Program premium cost contribution statute, N.J.S.A. 52:14-17.28c, should be based not on their "base salary," but on the rate of temporary disability benefits they received through workers' compensation during periods of leave following work-related injuries. The Appellate Division found, "section 17.28c expressly states that '[b]ase salary shall be used to determine what an employee earns for the purposes of this provision' and therefore must contribute," and found "no basis in principles of statutory construction to substitute temporary disability benefits . . . for collectively bargained salary, pensionable or not."

Appellate Division affirms trial court's denial of school board's request for interim relief and dismissal without prejudice in dispute over tenure arbitrator's discovery rulings which board sought to have vacated prior to conclusion of arbitration

Roselle Borough Bd. of Educ. v. Batts, 2021 N.J. Super. Unpub.

LEXIS 1772 (App. Div. Dkt No. A-2530-19)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms Chancery Division orders that denied the appellant Roselle Board of Education's request for a preliminary injunction and then dismissed its complaint without prejudice, where the Board, in a pending arbitration proceeding involving tenure charges against a teacher, sought interim relief to reverse rulings made by the tenure arbitrator assigned to hear the case, asserting the arbitrator lacked authority to permit respondent to file late responses to discovery requests. In affirming, the Appellate Division observed that N.J.S.A. 2A:24-8, the statute cited by the Board as authority for vacating the arbitrator's discovery ruling, addresses vacating arbitration awards; however, as no award had been issued yet, the trial court correctly denied the Board's requests for relief after determining it lacked authority to intervene before the arbitration concluded. Like the trial court, the appellate panel discerned no basis to overturn the arbitrator's ruling under N.J.S.A. 2A:24-8, particularly given the deference owed to an arbitrator's ruling.

Third Circuit vacates and remands for further proceedings District Court's summary dismissal of overtime claims by deputy coroners employed by elected county coroner, under "personal staff of elected officials" exception to Fair Labor Standard Act protections

Clews v. Cty. of Schuylkill, 2021 U.S. App. LEXIS 26088(3d Cir. Dkt No. 20-2216)

The United States Court of Appeals for the Third Circuit, in a precedential decision, on a case of first impression in the Third Circuit concerning whether the personal staff of elected officials are protected by federal employment laws such as the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq, vacates and remands for further proceedings the District Court's order granting summary judgment in favor of the County of Schuylkill, which concluded that all three plaintiffs (who alleged the County violated the FLSA by failing to pay them overtime and then firing them in retaliation for seeking overtime pay) were personal staff of the County's elected Coroner and thus cannot bring an FLSA claim. The court explained that a plaintiff seeking compensation under the FLSA has the initial burden of proving that an employer-employee relationship exists, but once this burden is met, the employer bears the burden of proving entitlement to any exemptions or exceptions, such as the "personal staff exception." The court concluded that "for an employee to be a member of an

elected official's personal staff, 1) the official must work closely with the employee in a sensitive position of trust and confidence, and 2) the official exercises personal control over the employee's hiring, promotion, work conditions, discipline, and termination." The court further held, if there is no genuine issue of material fact as to the applicability of those two themes and their application is so one-sided that no reasonable jury could disagree with the result, summary judgment is appropriate. Otherwise, it is not. In vacating and remanding, the Court of Appeals found, among other things, that there were disputed issues of material fact, including as to whether the large number of deputy coroners were personal staff of the county's elected Coroner, whether the Coroner worked closely with all of them and they all worked in sensitive positions of trust and confidence, and whether the Coroner exercised control over or could fire them at will.