



**STATE OF NEW JERSEY
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DATE: January 20, 2022
TO: Commissioners
FROM: Counsel Staff
RE: Developments in Counsel's Office since December 21, 2021

Commission Cases

Appeals from Commission Decisions

The City of Ocean City filed an appeal in the New Jersey Superior Court, Appellate Division (App. Div. Dkt. No. A-001391-21), from a Hearing Examiner's decision (H.E. No. 2022-2) (final by reason of no exceptions filed), which found that a lifeguard employed by the City engaged in protected conduct as a union representative, and that the City knew of the activity and was hostile to it by removing job duties, moving the work location, eliminating the employee's title, demoting the employee and reducing his wages. The decision awarded back pay, a pension adjustment and other contractual emoluments to which the employee would have been entitled in the absence of discrimination.

Commission Court Decisions

No Commission court decisions were issued since December 21, 2021.

New Jersey Is An Equal Opportunity Employer

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

Appellate Division upholds grievance arbitration award regarding City's contractual obligation to pay health care expenses of certain police-union retirees

City of Plainfield v. PBA Local 19, PBA/SOA, 2022 N.J. Super. Unpub. LEXIS 60 (App. Div. Dkt No. A-4435-19)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the trial court's confirmation of a grievance arbitrator's award which found, among other things, that the City of Plainfield's 2018-2021 collective negotiation agreements (CNA) with PBA Local 19, PBA/SOA (negotiated after the parties had achieved full implementation under Chapter 78 during their prior contract), obligated the City to pay the health care expenses of unit member retirees, their spouses, and dependents, on behalf of retirees hired before May 21, 2010. In affirming, the appellate court found that the relevant CNA provision was neither unlawful nor contrary to a clear mandate of public policy, because once Chapter 78's fourth tier or "full premium" contribution level was reached, the future contribution level became a negotiable component of subsequent CNAs. The court further noted that Chapter 78 did not create a minimum contribution level for those hired prior to May 21, 2010, and the 1.5 percent contribution floor under N.J.S.A. 40A:10-21.1 does not exist as to the grievants at issue, who had twenty-five or more years at retirement, were hired before May 21, 2010, but did not have twenty years of service as of June 28, 2011. Both courts distinguished an arbitration award on the same issue involving Plainfield fire officers that had a different outcome (which followed a Commission scope of negotiations determination (P.E.R.C. No. 2020-57)), noting that there the parties did not negotiate the item.

Appellate Division upholds arbitration panel's award sustaining disciplinary removal of NJT bus driver for gross negligence

Estil v. N.J. Transit Bus Operations, 2021 N.J. Super. Unpub. LEXIS 3172 (App. Div. Dkt. No. A-0260-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a Law Division order confirming an arbitration award that resulted in the disciplinary termination of plaintiff Erick Estil's employment as a bus driver for New Jersey Transit Bus Operations, Inc. (NJT), on charges of gross negligence for an

accident that occurred when the bus he was driving struck a pedestrian in a crosswalk, causing severe injuries. Like the trial judge, the Appellate Division concluded: (1) Estil's complaint seeking to vacate the award was untimely under N.J.S.A. 2A:24-7 and he failed to establish good cause that would excuse his late filing; (2) the abundance of evidence before the arbitration panel refuted Estil's substantive claims that the award should be vacated because it was procured by undue means as the CNA did not define "gross negligence," and because the arbitrator refused to consider evidence. Finally, because it concluded Estil's action was time-barred, the appellate court did not decide whether he had standing to file his Law Division action, but noted that generally, absent an alleged breach of the duty of fair representation by the union (which did not occur here), union members lack standing to challenge a labor arbitration award where the parties to the CNA were the employer and the employee's union. The court was not aware of any authority that empowers a union to confer standing on an employee when the union opts not to appeal an arbitration award under similar circumstances. But because the union, through counsel, expressly authorized Estil "to pursue such an appeal", the court discerned no error in the trial judge's determination that Estil made a "colorable argument" that he acquired standing from the union.

Appellate Division affirms summary judgment dismissing police officer's contractual benefits and discrimination claims against employer following officer's voluntary forfeiture of position as condition of pretrial intervention to resolve criminal charges

Gorman v. Borough of Audubon, 2021 N.J. Super. Unpub. LEXIS 3107 (App. Div. Dkt. No. A-3504-19)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court's order granting summary judgment to the Borough of Avalon, and dismissing with prejudice the complaint of Thomas Gorman, a Borough police officer who, upon being charged with a second-degree crime, entered the Pretrial Intervention Program (PTI) and agreed to forfeit his position as a police officer with the Borough. Gorman sued the Borough when it refused to provide him and his family with medical benefits after he had left his employment, claiming he was entitled to those benefits under a CNA between the Borough and his union, and that the denial was discriminatory, in violation of the New Jersey Law Against Discrimination (LAD). In affirming, the Appellate Division found: (1) Gorman was not entitled to medical benefits under the CNA, which granted such benefits to police officers who retired, because Gorman forfeited his position as a condition of PTI, and a forfeiture is not a retirement; (2) the Borough's action was not based on a disability or perceived disability; rather, it was in response to plaintiff's forfeiture

of his position, as embodied in two court orders (one of which Gorman and his counsel signed), therefore the Borough established a legitimate, non-discriminatory reason for the denial of the health benefits, and Gorman did not prove that reason was a pretext.

Third Circuit finds NLRB erred and exceeded its authority in finding employer defaulted on unfair practice settlement agreement and in ordering "full remedy" including reinstatement and back pay for such default

East Brunswick European Wax Ctr. v. NLRB, 2022 U.S. App. LEXIS 851 (3d Cir. Dkt. Nos. 20-2120 & 20-2233)

The United States Court of Appeals for the Third Circuit, in a precedential decision, grants a petition filed by East Brunswick European Wax Center (EBEWC) for review of a decision and order of the National Labor Relations Board ("Board"), and denies the Board's application for enforcement of its order of default against EBEWC on the terms of a settlement agreement resolving unfair labor practice charges filed by a former EBEWC employee. The Board found EBEWC failed to "fully comply" with the settlement agreement's "Electronic Notification" provision requiring EBEWC to text the requisite notice to its employees, and ordered a "full remedy" for such default, including reinstatement of the former employee. The Third Circuit determined: (1) the Board erred where the only alleged "default" was EBEWC e-mailing rather than texting the Notice to employees and there was no indication that this affected the employees themselves in any way; (2) the Board's action in imposing a full remedy was punitive and thereby inconsistent with its obligations under the National Labor Relations Act (NLRA); (3) the Board exceeded the scope of its authority by ordering EBEWC to offer the employee reinstatement even though she had declined that relief; (4) the Board likewise went too far by ordering EBEWC to make the employee whole for any loss of earnings or other benefits (including backpay with interest) despite the fact that settlement agreement specified that a payment of \$20,000 (which was made by EBEWC) would suffice to make her whole.