



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

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DATE: March 24, 2022

TO: Commissioners

FROM: Counsel Staff

RE: Developments in Counsel's Office since February 24, 2022

**Commission Cases**

**Appeals from Commission Decisions**

The Branchburg Township Education Association filed an appeal from the Commission's decision (P.E.R.C. No. 2022-30, 48 NJPER 305 (¶68 2022)) which adopted a Hearing Examiner's recommended decision and order granting the Branchburg Township Board of Education's motion for summary judgment and dismissing the Association's unfair practice charge. The charge alleged the Board violated our Act by holding a teacher to a higher performance standard and giving her two partially effective ratings on her summative evaluation in retaliation for her protected activity as Association President.

**Commission Court Decisions**

No Commission court decisions were issued since February 24.

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

New Jersey Supreme Court holds that settlement agreements resolving disciplinary charges against public employees are government records subject to disclosure under OPRA

Libertarians for Transparent Gov't v. Cumberland County, 2022 N.J. LEXIS 187 (Sup. Ct. Dkt No. A-34-20)

The Supreme Court of New Jersey reinstates a trial court's order directing the disclosure, under the Open Public Records Act (OPRA), of a redacted settlement agreement between Cumberland County and a corrections officer formerly employed at the Cumberland County Jail by which, in return for admitting to disciplinary charges of misconduct and cooperating with the County's investigation of four other officers suspected of similar misconduct, the County agreed to dismiss the charges and permit the officer to retire in good standing with a reduced pension. Libertarians for Transparent Government sent the County an OPRA request asking for a copy of the agreement in connection with a separate lawsuit against the same corrections officer. The County refused, claiming it was a personnel record exempt from disclosure. Instead, the County provided certain details in writing and stated, untruthfully, that the officer had been charged with a disciplinary infraction and was terminated. Libertarians then filed a complaint in Superior Court seeking disclosure under OPRA and the common law right of access. The trial court found the settlement agreement was a government record subject to disclosure under OPRA, but did not address the common law right of access. The Appellate Division reversed, finding it was a personnel record exempt from disclosure under OPRA, but remanded to the trial court to determine whether it should be disclosed under the common law right of access. The Supreme Court held, among other things: (1) certain items qualify as a government record under OPRA's plain language, including a person's name, title, "date of separation and the reason therefor"; (2) to the extent that information appears in a settlement agreement, the record should be available to the public after appropriate redactions are made.

New Jersey Supreme Court holds that police Internal Affairs reports are exempt from disclosure under OPRA, but may be disclosed under common law right of access when interests favoring disclosure outweigh concerns for confidentiality

Rivera v. Union County Prosecutor's Office, 2022 N.J. LEXIS 190 (Sup. Ct. Dkt No. A-58-20)

The Supreme Court of New Jersey reverses and remands a decision of the Appellate Division which held that police Internal Affairs (IA) reports are exempt from disclosure under OPRA and the common law right of access, even if all personally identifiable information was redacted. In reversing, the Supreme Court held, among other things: (1) OPRA does not permit access to IA reports, but those records can and should be disclosed under the common law right of access - subject to appropriate redactions - when interests that favor disclosure outweigh concerns for confidentiality; (2) the public interest in transparency may be heightened depending on the nature and seriousness of the misconduct and whether it was substantiated, the natures of the discipline imposed and the official's position, and the individual's record of misconduct; (3) to allow a court to assess the factors in favor of confidentiality as well as disclosure, the parties should present more than generalized, conclusory statements; (4) here, the public interest in disclosure is great, considering that alleged racist and sexist conduct by the civilian head of a police department violates the public's trust in law enforcement. The Court remanded the matter to the trial court to assess any potentially legitimate confidentiality concerns by reviewing the report in camera and making appropriate redactions.

Appellate Division affirms Civil Service Commission's final agency determination that it lacked subject matter jurisdiction over administrative appeal from reduced disciplinary suspension

In re Young, 2022 N.J. Super. LEXIS 31 (App. Div. Dkt No. A-0400-20)

The Appellate Division of the Superior Court, in a published opinion, affirms a final agency decision of the New Jersey Civil Service Commission (CSC), finding the CSC properly upheld an initial decision of an administrative law judge (ALJ) summarily dismissing an employee's administrative appeal of a disciplinary action for lack of subject matter jurisdiction. The ALJ found the appointing authority, Department of Human Services, permissibly exercised its inherent discretion in reducing the employee's disciplinary penalty to a five-day suspension, thereby divesting the CSC of jurisdiction under the Civil Service Act and

its accompanying regulations and eliminating the right to a hearing before the Office of Administrative Law on the resulting minor disciplinary action. The appointing authority had to issue its Final Notice of Disciplinary Action (FNDA) within the time constraints set forth in the Act, and no language prohibited an appointing authority from reducing a penalty after the FNDA was issued. In affirming, the court concluded that the action was consonant with the governing statutory and regulatory schemes.

Appellate Division rejects firefighter union's safety-based challenge to fire department staffing levels, finding issue neither substantively arbitrable nor mandatorily negotiable

Twp. of Edison v. Int'l Ass'n, Local 1197, 2022 N.J. Super. Unpub. LEXIS 315 (App. Div. Dkt No. A-1303-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a Chancery Division order restraining arbitration of a grievance against the Township of Edison filed by the International Association of Firefighters Local 1197, alleging among other things that the Township refused to safely staff the fire department, sent an unsafe number of staff to a fire, and reduced minimum staffing levels to unsafe levels. The Township's Fire Chief denied the grievance, and the union filed for arbitration before a PERC-appointed arbitrator. Thereafter, the Township filed a complaint and order to show cause in the Chancery Division seeking to restrain arbitration of the grievance. After a hearing, the court granted the Township's application, based on the judge's statements made on the record in open court that the matter was not substantively arbitrable. In affirming, the Appellate Division reasoned that the grievance did not qualify for arbitration under the arbitration clause of the parties' CNA, and its requirement that the parties "cooperate to the fullest extent in the promotion of safety" did not provide a mechanism for disputing safe staffing levels. The court further held that the issue of the fire department's staffing level was non-arbitrable because it would effectively "delegate government policymaking to an individual who is not accountable to the public at large," and also infringes on a managerial prerogative that falls squarely within the Township's authority.

Appellate Division upholds Civil Service Commission's denial of appeal from bypass of name on certified eligible list for position of Clifton Police Chief

In re Niland, 2022 N.J. Super. Unpub. LEXIS 424 (App. Div. Dkt No. A-1775-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final administrative action of the New Jersey Civil Service Commission (CSC) upholding the bypass of the appellant's name on the certified eligible list for Police Chief of the City of Clifton Police Department. Niland challenged the bypass under the "Rule of Three" and claimed he was the superior candidate with more years of service, superior work assignments and more extensive training which the City ignored, promoting another candidate based on favoritism, nepotism, and political connections. Niland requested that his appeal be referred to the Office of Administrative Law (OAL) as a contested case for hearing. The CSC denied Niland's appeal, finding no material issue of disputed fact that would require a hearing. The CSC further found, among other things, that since only non-veterans were listed on the certification, it was within Clifton's discretion to select any of the two interested eligibles on the certification. Niland, who had the burden of proof, failed to provide any substantive evidence beyond mere allegations that his bypass was motivated by improper reasons. Clifton presented legitimate reasons for bypassing Niland, who did not show that Clifton's proffered reasons were pretextual. The CSC reasoned that even assuming Niland was more qualified for the position at issue, Clifton still has selection discretion under the Rule of Three to appoint a lower-ranked eligible absent any unlawful motive. The Appellate Division affirmed substantially for the reasons expressed by the CSC in its written decision, finding it was supported by sufficient credible evidence on the record as a whole.