



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

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April \_\_, 2022

TO: Commissioners

FROM: Counsel Staff

RE: Developments in Counsel's Office since March 31, 2022

**Commission Cases**

**Appeals from Commission Decisions**

The Lakewood Education Association filed an appeal from the Commission's decision (P.E.R.C. No. 2022-33, 48 NJPER 364 (¶81 2022)), which dismissed the Association's contested transfer petition alleging that the Lakewood Township Board of Education transferred an administrative secretary between work sites in violation of N.J.S.A. 34:13A-25, because the Association failed to establish that the transfer was predominately disciplinary, and the Board had valid, non-disciplinary reasons for the transfer.

**Commission Court Decisions**

Appellate Division grants PERC's consolidated motions to enforce orders against City of Newark on police union's unfair practice charges asserting City repudiated negotiated grievance procedure

In re City of Newark, 2022 N.J. Super. Unpub. LEXIS 474 (App. Div. Dkt Nos. A-3336-20, A-3392-20)

*New Jersey Is An Equal Opportunity Employer*

The Appellate Division of the Superior Court, in an unpublished opinion (attached), affirms and orders enforcement of: (1) the Commission's Final Agency Order in City of Newark and Newark Police Dep't, Superior Officers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. Rejecting the City's arguments (that PERC must demonstrate a willful failure to comply with its orders, and alternatively, that it is entitled to an evidentiary hearing to determine whether it is noncompliant and, if so, why), the Appellate Division found: (1) PERC's orders rested "upon substantial evidence on the record as a whole"; (2) as to all the unfair practice charges, the City conceded that its designated grievance representative issued a decision with which the City failed to comply, and the City never sought arbitration as it was entitled to do under the CNA; and (3) the City never contested that such conduct constitutes an unfair practice. The court further refused to consider the merits of the City's defenses that PERC's orders are contrary to law or against public policy, or are vague and unclear, noting that the City could have asserted those arguments by filing a timely appeal with the court, but for "reasons still unexplained" by the record, it chose not to do so.

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

Appellate Division remands to Law Division to reconsider discoverability of police IA records in light of N.J. Supreme Court's decision in *Rivera v. Union County Prosecutor's Office*

*Salvero v. City of Elizabeth & James Cosgrove*, 2022 N.J. Super. Unpub. LEXIS 544 (App. Div. Dkt No. A-0759-21)

The Appellate Division of the Superior Court, in an unpublished opinion, remands to a Law Division motion judge to reconsider his order quashing a subpoena to produce documents served by the plaintiff Barbara Salvero upon the Union County Prosecutor's Office (UCPO) relating to the UCPO's internal affairs (IA) investigation into the conduct of the City of Elizabeth's former

Police Director, defendant James Cosgrove. On a prior remand from the Appellate Division, the motion judge confirmed an earlier decision to quash which determined again the files were not relevant to Salvero's claim of discrimination against her and therefore her need for disclosure did not outweigh the UCPO's need for confidentiality. Thereafter, the parties filed briefs with the Appellate Division and, one hour before oral argument, the New Jersey Supreme Court issued its opinion in Rivera v. Union County Prosecutor's Office, 2022 N.J. LEXIS 190 (Sup. Ct. Dkt No. A-58-20) (this opinion was reported in the March 2022 General Counsel's Report). The Appellate Division noted that the Court in Rivera considered the discoverability of the same IA documents that the motion judge reviewed in Salvero, and concluded that the records were not disclosable under the Open Public Records Act but "should be disclosed under the common law right of access when interests that favor disclosure outweigh concerns for confidentiality." Under these circumstances, the Appellate Division directed the motion judge to reconsider his earlier determination anew in light of Rivera, as well as Salvero's need for discovery as it relates to her discrimination claim against the City, and to do so with specific references to documents while using redactions to maintain confidentiality where necessary.

Appellate Division reverses trial court's denial of OPRA request for documents containing reasons why employees were separated from employment at police department, in light of N.J. Supreme Court's decision in Libertarians for Transparent Gov't v. Cumberland County

African American Data Research Institute v. Profitt, 2022 N.J. Super. Unpub. LEXIS 622 (App. Div. Dkt No. A-2485-20)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses the trial court's order denying the plaintiffs' order to show cause to compel the production of records and dismissing their complaint seeking documents under the Open Public Records Act (OPRA) and the common law right of access. Among other things, the plaintiffs sought the names, date of hire, date of separation and reason for separation of those who either resigned or were terminated from the Carneys Point police department over a five-year period. The trial court concluded that the defendants' limited response about two officers, stating only that one was "terminated" and the other "resigned," was a sufficient response under the plain language of OPRA. Under the common law right of access doctrine, the court concluded it could not undertake the required balancing test because there was no request for a specific document. In reversing, the Appellate Division, applying the New Jersey Supreme Court's recently issued opinion in Libertarians for Transparent Gov't v. Cumberland County, 2022 N.J. LEXIS 187 (Sup. Ct. Dkt No. A-34-20) (see also,

March 2022 General Counsel's Report), held that the plaintiffs are entitled under OPRA to review documents that contain information regarding the reason why an employee was separated from employment at the police department, and the trial court's order denying that records request violated OPRA. The court also held that the plaintiffs are prevailing parties and entitled to an award of counsel fees, and remanded to the trial court for a determination on fees if the parties cannot otherwise come to an agreement, and to review and redact the disclosed documents.

Appellate Division affirms trial court's refusal to vacate PERC-appointed grievance arbitrator's award sustaining minor discipline against police officer

In re PBA Local No. 122 Sheriff's Officer Michael Rouse & Gloucester, 2022 N.J. Super. Unpub. LEXIS 492 (App. Div. Dkt No. A-2013-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Law Division's refusal to set aside a grievance arbitration award sustaining a Gloucester County sheriff's officer's five-day suspension for a minor disciplinary violation at work. The PERC-appointed arbitrator addressed the contested issue of whether the officer's Level Four arbitration request was procedurally deficient for lack of timely union support as required by the relevant collective negotiations agreement (CNA). After considering the matter, the arbitrator granted the County's motion to dismiss the arbitration request on the grounds of procedural noncompliance. Applying the relevant sections of the CNA which delineated the grievance procedures under Level Four and at arbitration, the arbitrator concluded that an individual sheriff's officer cannot legitimately file a demand for arbitration as an individual. Noting that the officer's initial arbitration demand was signed by his attorney alone, with no indication that the attorney also represented the union or that the union approved the filing, the arbitrator determined that the officer filed the demand as a lone actor without standing to do so; and his revised arbitration request, filed four months after the Level Three grievance had been dismissed, was untimely. In affirming, the Appellate Division found the officer failed to satisfy the narrow grounds under N.J.S.A. 2A:24-8 for vacating an arbitrator's determination, specifically that the arbitrator exceeded his authority; and further rejected the officer's other theories for reversal.

Appellate Division upholds PERC-appointed grievance arbitrator's award finding township's deduction of health insurance premiums from police officers' paychecks did not violate CNA, where Chapter 78, Tier IV rates was status quo and there was no mutual agreement to move off those rates in successor contract

Policemen's Benevolent Ass'n Local No. 191 & Superior Officers Ass'n v. Twp. of E. Windsor, 2022 N.J. Super. Unpub. LEXIS 565 (App. Div. Dkt No. A-2073-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Law Division's order denying the unions' motion to vacate a PERC-appointed arbitrator's award which found that the Township of East Windsor did not violate the parties' collective negotiations agreement (CNA) by improperly deducting Tier IV premium payments for health care benefits from union members' paychecks pursuant to P.L. 2011, Chapter 78. The trial court found the award was not a product of "undue means" under N.J.S.A. 2A:24-8(a), and that the arbitrator properly concluded the Tier IV rates were the "status quo" after he determined that there never was mutual assent to move off Tier IV rates when the parties negotiated a new CNA that took effect after the parties reached the Tier IV contribution level during the prior CNA, and the Township never agreed to reduce the payment rates for union members. The Law Division concluded the arbitrator's interpretation of the CNA was reasonably debatable, and affirmed the award. In affirming, the Appellate Division agreed that: (1) full Tier IV rates were the status quo for the parties in the relevant CNA; (2) there was no meeting of the minds on the benefit contribution issue, therefore the Tier IV rates remained in effect; (3) the arbitrator's award was reasonably debatable, and was neither procured by undue means, nor contrary to law; and (4) the award was fully supported by the record.

Appellate Division affirms trial court's de novo review upholding township's disciplinary termination of police officer on charges of dishonesty, misuse of sick time

Musser v. Eastampton Twp. Police Dep't, 2022 N.J. Super. Unpub. LEXIS 482 (App. Div. Dkt No. A-2386-19)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court's order denying plaintiff Michael Musser's application for reinstatement to his position as a police officer with defendant Eastampton Township following an administrative determination of misconduct, dismissing his complaint, and affirming the administrative decision. Musser had sought the trial court's de novo review of the removal decision

by the Township, a non-civil service employer. The trial court upheld Musser's disciplinary termination on charges of misconduct (dishonesty) in using sick time and in preparing his initial report about it to internal affairs (IA) investigators. The trial court found the charges were supported by substantial credible evidence in the record as a whole (including evidence that Musser called out sick the day before flying with his family to Florida and did not advise his employer of the change in his confinement from home to travel out-of-state), that Musser violated the Township's sick time policy, and that the Township met its burden and proved misconduct pursuant to N.J.S.A. 40A:14-147. The Appellate Division affirmed substantially for the reasons expressed in the trial court's comprehensive written decision, recognizing it was based on findings of fact which were adequately supported by the record evidence, and found the trial court's decision was not arbitrary, capricious, or unreasonable.

Appellate Division sustains Civil Service Commission's refusal to consider untimely appeal of disciplinary removal of police officer, and Law Division's summary dismissal of complaint challenging procedural sufficiency of his termination

In re Ramzi, 2022 N.J. Super. Unpub. LEXIS 563. (App. Div. Dkt Nos. A-1976-19, A-4540-19)

The Appellate Division of the Superior Court, in an unpublished opinion addressing Steven Ramzi's consolidated appeals, affirms (1) the Civil Service Commission's (CSC's) final administrative decision denying Ramzi's motion to reconsider the CSC's earlier refusal to consider his untimely appeal from Weehawken Township's termination of his employment as police officer, and (2) a Law Division order dismissing with prejudice his complaint in lieu of prerogative writs that challenged the procedure followed by Weehawken when its township manager terminated Ramzi's employment. Ramzi was terminated upon a final notice of disciplinary action stemming from his admitted use and distribution of anabolic steroids, a schedule III controlled dangerous substance. The Appellate Division found no cause to disturb the CSC's determination that Ramzi's appeal was untimely, in light of the fact that his appeal deadline was February 11, 2019 and no intended recipient received it until August 2019. Together with certain discrepancies in exhibits filed by Ramzi's attorney and paralegal, the court found there was insufficient evidence that an appeal was mailed in February. The court further found no reason to address Ramzi's substantive challenges to Weehawken's termination of his employment, including those he argued for the first time on appeal, as they were never properly considered by the CSC. The court found Ramzi's filing of the Law

Division action improperly attempted to contravene both the CSC's exclusive jurisdiction over these matters and the appellate court's sole responsibility in the first instance to review the CSC's decision. Nonetheless, the court found the Law Division correctly determined that Weehawken was entitled to summary judgment, because the record did not support Ramzi's claims that the procedures Weehawken followed in terminating his employment violated the Faulkner Act and the Open Public Meetings Act.