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DATE: June 23, 2022

TO: Commissioners

FROM: Counsel Staff

RE: Developments in Counsel's Office since May 26, 2022

Commission Cases

Appeals from Commission Decisions

The City of Newark filed an appeal from the Commission's final decision (P.E.R.C. No. 2022-47) which found that the City violated the New Jersey Employer-Employee Relations Act when it implemented two General Orders and a disciplinary matrix that unilaterally modified negotiable disciplinary procedures and disciplinary penalty policies for employees who are members of the Fraternal Order of Police, Lodge No. 12, and the Newark Police Superior Officers Association.

Commission Court Decisions

Appellate Division affirms final Commission decision dismissing unfair practice charge filed by police union against county, in dispute over an officer's removal from overtime lists

In the Matter of County of Hudson and Hudson County PBA Local 334, 2022 N.J. Super. Unpub. LEXIS 1079 (App. Div. Dkt No. A-0342-20)

The Appellate Division of the Superior Court, in an unpublished opinion (attached), affirms the Commission's final decision (P.E.R.C. No. 2020-55, 46 NJPER 586 (¶133 2020)), in which the Commission declined to reconsider an earlier decision granting summary judgment to Hudson County and dismissing an unfair practice charge (UPC) filed by Hudson County PBA Local 334 (PBA). The UPC alleged the County violated the New Jersey Employer-Employee Relations Act by retaliating against a sheriff's officer, Mr. Mendoza, for engaging in protected activity (as a union officer) when the County transferred him from the Detective Bureau to the Cyber Crimes Unit and removed him from various overtime opportunities. PERC's initial decision, and its subsequent denial of reconsideration, found the UPC was untimely as it related to Mendoza's transfer, but was timely with respect to his removal from certain overtime lists. PERC held that removing Mendoza's name was not retaliatory, but rather a step taken in compliance with existing collective negotiated agreements (CNAs) governing contractual priority in being offered overtime as between the Detective Bureau and the Cyber Crimes Unit; in light of which the PBA itself had initially requested that the County limit Mendoza's overtime opportunities. When Mendoza individually filed an appeal, the Appellate Division denied without prejudice PERC's motion to dismiss for lack of standing, pending a decision on the merits, which now holds: (1) the appeal must be dismissed for lack of standing, as the UPC charge was brought by the union against a municipal entity, and since Mendoza was not a party to the prior proceedings and neither the County nor the PBA appealed PERC's decision, Mendoza lacks authority to appeal the outcome; (2) PERC decided the matter correctly on the merits, and its decision was not arbitrary or capricious; and (3) Mendoza's other arguments on appeal were "so lacking in merit" as to "not require further discussion in a written decision."

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

Appellate Division vacates Chancery court's order affirming grievance arbitration award, transfers case to PERC for scope of negotiations determination on teaching-assignment dispute

Union County College v. Union County College Chptr. of the Am. Ass'n of Univ. Professors, 2022 N.J. Super. Unpub. LEXIS 799 (App. Div. Dkt No. A-3564-19)

The Appellate Division of the Superior Court, in an unpublished opinion, vacates a Chancery Division order that confirmed a

grievance arbitration award, and transfers the matter to the Commission for a scope of negotiations determination. The grievance, filed by the defendant-respondent, Union County College Chapter of the American Association of University College Professors (AAUP), resulted in an arbitration award prohibiting the plaintiff-appellant, Union County College, from assigning an associate professor to the College's Academic Learning Center. The Chancery court affirmed the award and denied the College's application to vacate it. The College never sought to restrain arbitration before PERC, but argued before the arbitrator and the Chancery court that the determination of the teacher's assignment was an inherent managerial prerogative excluded from the arbitration process. The arbitrator ruled that, as a matter of law, arbitration did not impinge impermissibly on the College's managerial prerogatives. The Chancery court agreed, and declined to transfer the matter to PERC because the College neglected to seek a scope of negotiations determination from PERC. In vacating, the Appellate Division found that the arbitrator should have stayed the matter and required the scope of negotiations issue to be submitted to PERC, and the Chancery judge should have done likewise. The court, noting PERC was not a party in the appellate proceeding, concluded that the Commission's primary jurisdiction over scope of negotiations issues required a transfer to PERC.

Appellate Division affirms Chancery court's order confirming grievance arbitration award and denying city's motion to vacate, in contractual dispute over military leave pay for firefighters

Newark Firefighters Union v. City of Newark, 2022 N.J. Super. Unpub. LEXIS 1001 (App. Div. Dkt No. A-2405-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms an order of the Chancery Division granting plaintiff Newark Firefighters Union, Inc.'s motion for confirmation of a grievance arbitration award, and denying the defendant City of Newark's motion to vacate. The arbitrator determined the City violated the parties' collective negotiations agreement by unilaterally terminating a 13-year practice of paying firefighters a military leave pay differential during their military service, and directed the City to negotiate over any change to the practice. The arbitrator found that as a result of the City's 2001 executive order establishing the benefit (consistent with statutory discretion to do so), it became a term and condition of employment and a binding past practice that could not be eliminated unilaterally through a subsequent executive order. The Chancery court found the arbitrator anchored that conclusion in precedent, and his award was reasonably debatable. In affirming, the Appellate Division: (1) found no basis to reverse the court's finding that the arbitrator did not exceed his authority, and (2) rejected the

City's argument that the award was procured through undue means via the arbitrator's ruling that certain evidence was irrelevant, concluding the proffered evidence (a former mayor's testimony that he did not intend the 2001 executive order to be binding on his successors) was clearly irrelevant.

Appellate Division holds school boards must provide tenured full-time teachers with advance notice of adverse consequences of voluntary acceptance of part-time teaching positions

Parsells v. Bd. of Educ. of Somerville, 2022 N.J. Super. LEXIS 81 (App. Div. Dkt No. A-3084-19)

The Appellate Division of the Superior Court, in a published opinion, affirms a final decision of the Commissioner of Education, which found that the Somerville Board of Education violated Ms. Parsells' rights by not allowing her to return to her position as a tenured full-time teacher. An administrative law judge (ALJ) found for the Board, concluding that as Parsells had voluntarily stepped down from her full-time position, she had no right to return to it. The Commissioner reversed, ordering the Board to reinstate Parsells to the full-time position, with full back pay, benefits, and related emoluments of employment. In affirming, the Appellate Division held: (1) imposing a duty on school boards to notify tenured full-time teachers in advance that they may not get their full-time job back after voluntarily going part-time was a proper and logical extension of the New Jersey Supreme Court's holding in Bridgewater-Raritan Educ. Ass'n, 221 N.J. 349 (2015)(imposing similar duty on school boards toward non-tenured teachers); (2) the board was best positioned to know about the consequences of a tenured full-time teacher's decision to transition to part-time employment; and (3) such teachers, who have substantial protections under the Tenure Act, are entitled to advance notice.

Appellate Division finds police internal affairs records exempt from OPRA disclosure but accessible under common law right of access, while reasons for officers' separation from employment are OPRA-able

African Am. Data & Research Inst. "AADARI" v. Franchetta, 2022 N.J. Super. Unpub. LEXIS 879 (App. Div. Dkt No. A-2846-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms, in part, and vacates and remands, in part, a trial court's decision granting the request of the plaintiffs, African American Data Research Institute (AADARI), for certain records under the New Jersey Open Public Records Act (OPRA), the

common law right of access, and counsel fees. AADARI sought internal affairs (IA) reports regarding an investigation of the City of Vineland's police chief, as well as documents containing the reasons why other individuals were separated from employment at the police department. The trial court found the IA records, appropriately redacted, were subject to disclosure under OPRA; and that documents stating the specific reasons behind employment separations were personnel records exempt under OPRA, but not exempt under the common law right of access. The trial court also awarded partial attorney fees to AADARI, as it had prevailed under OPRA on only one of its requests. The Appellate Division, applying the New Jersey Supreme Court's ruling in Rivera v. Union County. Prosecutor's Office, 250 N.J. 124 (2022), held that disclosure of the IA records was exempted under OPRA, but allowed under the common law right of access, provided AADARI demonstrates that it has an interest in the subject matter and its right to access outweighs the State's interest in preventing disclosure. The Appellate Division found that under a second recent Supreme Court opinion, Libertarians for Transparent Gov't v. Cumberland County., 250 N.J. 46 (2022), records containing the reason behind an officer's separation from employment, properly redacted, were government records subject to disclosure under OPRA. The Appellate Division: (1) remanded to the trial court to conduct a common law right of access analysis regarding the IA records, as required under Rivera; (2) affirmed the trial court's order to produce the separation-from-employment documents, albeit for different reasons, under Libertarians; and (3) affirmed the fee award.

Appellate Division affirms Civil Service Commission's reduction of disciplinary penalty and award of reinstatement and back pay to county employee whose workplace use of "N-word" did not target or offend other employees, or create hostile working environment

In re Ruggiero, 2022 N.J. Super. Unpub. LEXIS 1012 (App. Div. Dkt No. A-1498-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final decision of the New Jersey Civil Service Commission (CSC), which reduced a disciplinary sanction for Ms. Ruggiero, a Camden County employee, ordered her reinstatement, and awarded her back pay, pertaining to the County's charges seeking Ruggiero's removal for workplace misconduct centered on her use of a racial slur or epithet (the N-word). The removal sanction was first rejected by a hearing officer and then an Administrative Law Judge (ALJ), who found a six-month suspension, as recommended by the hearing officer, was a more appropriate penalty. On exceptions filed by both parties, the CSC accepted

the ALJ's findings of fact (including that Ruggiero recognized that she should not have used the word, that to do so was inappropriate, and that she would not do so again) but instead imposed a 30-day suspension, noting several mitigating considerations: Ruggiero's modest disciplinary record (a single written reprimand over 15 years, unrelated to the charged conduct); the fact that the slur was not directed to anyone; and the fact that Ruggiero had only been overheard speaking the word in private conversation. In affirming, the Appellate Division framed the question presented on appeal: "is a thirty working-day suspension for the use of the word 'nigga,' spoken by a person of color in her county-government workplace, directed towards no one, and only known for sure to have been overheard once by two white colleagues, neither of whom ever felt targeted by it, and neither of whom initiated a complaint about it, so out of step with public policy and so shockingly disproportionate and unfair that reasonable minds could not differ about the propriety of the discipline?" The Appellate Division found "that the answer to this question is no, both as to the duration of the suspension and the back pay," and held, among other things: (1) the CSC's decision was not arbitrary, capricious, or unreasonable; (2) it was supported by sufficient credible evidence; and (3) the County failed to meet its burden on appeal to show that it did not follow the law, there was not substantial evidence to support it, or that it could not reasonably have been made.

Third Circuit sets aside NLRB's ruling that publisher's joking tweet violated National Labor Relations Act by threatening reprisal against employees for any attempt to unionize

FDRLST Media, LLC v. NLRB, 2022 U.S. App. LEXIS 13664 (3d Cir. Dkt Nos. 20-3434, 20-3492)

The United States Court of Appeals for the Third Circuit, in a precedential decision, grants an employer's petition for review, denies a cross-petition for enforcement, and sets aside an order of the National Labor Relations Board (NLRB). The NLRB found that Ben Domenech, executive officer of FDRLST Media and the publisher of *The Federalist*, a right-leaning internet magazine, committed an unfair labor practice (ULP) when, on June 6, 2019 (the same day unionized employees of a left-leaning digital media company walked off the job during union contract negotiations), he posted a tweet from his personal Twitter account that read: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." The NLRB subsequently issued a ULP complaint against FDRLST Media (based on a charge filed by a non-employee who was not personally aggrieved by the tweet), alleging the tweet violated the National Labor Relations Act, as it

"threatened employees with reprisals and implicitly threatened employees with loss of their jobs if they formed or supported a union." The employer denied the charge, claiming the tweet was meant as a joke and a personal expression of Domenech, but a regional administrative law judge (ALJ) disagreed, concluding among other things that the tweet had "no other purpose except to threaten the FDRLST Media employees with unspecified reprisal." The NLRB affirmed the ALJ's decision and order with certain modifications. On review, the Third Circuit rejected the employer's arguments that the NLRB lacked jurisdiction and statutory authority to issue the complaint, but found on the merits that the NLRB's order was not supported by substantial evidence. The Court found the tweet's suggestion that these employees might be sent "back" to work in a "salt mine" to be "farcical," such that from the words of the tweet alone, it could not conclude a reasonable employee would view it as a plausible threat of reprisal. The Court further noted that it has never affirmed a ULP finding based on employer speech alone absent any indicia of labor friction; and that in this case, the NLRB pointed to no history of labor strife, no evidence of antagonism, nor a single example of labor-management tension.

Appellate Division affirms trial court's ruling that private employer may fire at-will employee for racially insensitive remarks on personal Facebook account

McVey v. AtlantiCare Med. Sys., 2022 N.J. Super. LEXIS 70 (App. Div. Dkt No. A-0737-20)

The Appellate Division of the Superior Court, in a published opinion, affirms a trial court's ruling that the First Amendment and the New Jersey Constitution did not bar a private employer, AtlantiCare Medical System, Inc., from terminating Ms. McVey, an at-will employee, for posting racially insensitive comments about the Black Lives Matter (BLM) movement on her personal Facebook account. During the height of nationwide protests over the murder of George Floyd by police in Minnesota, McVey, whose Facebook profile prominently stated she was an AtlantiCare Corporate Director, posted that she found the phrase "Black Lives Matter" to be "racist," believed the BLM movement "causes segregation," and asserted that Black citizens were "not dying ... they are killing themselves." The trial court summarily dismissed McVey's wrongful discharge complaint, accepting AtlantiCare's contention that McVey cannot base her complaint on a constitutional free speech claim where, as here, there is no state action; and noting that the State Legislature had not created a cause of action that subjects private employers to liability for such discharges. In affirming, the Appellate

Division held: (1) because McVey is a private employee who was terminated by her private employer, there was no state action, thus constitutional freedom of speech provisions do not support a claim that her discharge violated a clear mandate of public policy under Pierce v. Ortho Pharm. Corp., 84 N.J. 58 (1980); and (2) McVey's slight freedom of speech interest in publicly stating her position on the BLM movement did not outweigh AtlantiCare's strong business interest in avoiding unwanted adverse publicity and criticism.

Appellate Division affirms Law Division's dismissal of legal malpractice claim against union attorneys where plaintiff, who had her own counsel during grievance arbitration proceeding, did not establish attorney-client relationship with union attorneys

Thorpe v. Cipparulo, 2022 N.J. Super. Unpub. LEXIS 821 (App. Div. Dkt No. A-0418-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Law Division's order granting defendants Rosemarie Cipparulo, Esq. and Weisman & Mintz, LLC's motion for summary judgment, and dismissing plaintiff Judy Thorpe's complaint alleging legal malpractice. The trial court found the defendants did not represent Thorpe in the action she referenced in her complaint, a grievance arbitration proceeding in which Thorpe's former union, the Communications Workers of America (CWA), pursuant to its collective negotiations agreement (CNA) with the State, unsuccessfully challenged a decision by Thorpe's former employer, the Juvenile Justice Commission (JJC) to remove Thorpe her from her position as a supervisor of nursing services. The CNA permits the CWA, but not the employee, to appeal an employee's termination to binding arbitration. The CWA retained defendants to represent it in the grievance proceeding, while Thorpe had her own attorney with whom she consulted throughout the matter.[1] In affirming, the Appellate Division found no basis for disturbing the trial court's decision, holding: (1) the undisputed facts demonstrated defendants represented the CWA, rather than Thorpe, during the arbitration; and (2) because Thorpe did not have an attorney-client relationship with defendants, she could not bring a legal malpractice action

[1] After the arbitrator upheld the termination, Thorpe filed unfair labor practice (ULP) charges against the CWA and the State, claiming they breached their duties of fair representation and good faith negotiation during the arbitration. PERC found Thorpe did not satisfy the complaint-issuance standards, as affirmed in In re CWA Loc. 1040, No. A-0852-13 (2017).

against them. The Appellate Division further declined to consider Thorpe's claim, raised for the first time on appeal, that the attorney who represented her in the Law Division in the legal malpractice action provided her with "ineffective assistance."