



**STATE OF NEW JERSEY  
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DATE: September 21, 2022  
TO: Commissioners  
FROM: Counsel Staff  
RE: Developments in Counsel's Office since August 18, 2022

**Commission Cases**

**Appeals from Commission Decisions**

The Borough of Bergenfield filed an appeal of the Commission's decision, P.E.R.C. No. 2023-1, 49 NJPER 98 (¶21 2022), which vacated a previously-remanded interest arbitration award covering members of PBA Local 309, and remanded it to another arbitrator, finding the award failed to define the 10-step salary guide for new hires, failed to clarify step placement at the start of the award, and did not provide sufficient support for its healthcare contributions award or its overall salary award.

Oral argument before the Supreme Court of New Jersey has been scheduled for September 28, 2022, on Mr. DiGuglielmo's petition seeking review of the appellate court's judgment in In the Matter of New Jersey Institute of Technology (NJIT), Officer Gregory DiGuglielmo and Public Employment Relations Commission, 2020 N.J. Super. LEXIS 219 (App. Div. Dkt No. A-003772-19T2), that (1) the NJIT police force is "law enforcement agency" as defined by N.J.S.A. 40A:14-200; and (2) NJIT officers are ineligible for

special disciplinary arbitration because they are not officers who work for non-Civil Service municipal police departments.

General Counsel's office filed a brief in the Lakewood Education Association's appeal from the Commission's decision, P.E.R.C. No. 2022-33, 48 NJPER 364 (¶81 2022), dismissing the Association's petition challenging the Lakewood Township Board of Education's transfer of an administrative secretary between work sites.

General Counsel's office filed a brief in the City of Ocean City's appeal from a Hearing Examiner's decision, P.E.R.C. No. 2009-45, 35 NJPER 48 (¶21 2009) (final by reason of no exceptions filed), which found that Edwin Yust, 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.

General Counsel's office filed a brief in the City of Newark's appeal from the Commission's final decision, P.E.R.C. No. 2022-47, 49 NJPER 17 (¶4 2022), which found that the City violated the 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**

No new Commission court decisions were issued since August 18.

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

Appellate Division affirms summary dismissal of NJ Transit train operator's claim alleging discriminatory application of sleep apnea policy

Alleyne v. N.J. Transit Corp., 2022 N.J. Super. Unpub. LEXIS 1435 (App. Div. Dkt. No. A-0753-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms, on different grounds, a Law Division order granting defendant New Jersey Transit Corporation (NJT) summary judgment and dismissing plaintiff Alleyne's class action complaint alleging NJT's sleep apnea policy was discriminatorily applied to Alleyne, a train engineer, and the class members, in violation of the New Jersey Law Against Discrimination (LAD) and the Workers' Compensation Act (WCA). NJT implemented the policy requiring sleep apnea screening after a train crash that left one

person dead and more than 100 injured when the train's engineer, who suffered from undiagnosed sleep apnea, fell asleep at a train's controls as it neared the station. The Appellate Division found the motion judge applied the wrong standard when finding plaintiff's sleep apnea condition was not a disability under the Americans with Disabilities Act (ADA), because plaintiff did not assert an ADA claim. But the court found that, even if his sleep apnea diagnosis satisfied the LAD's definition of disability, NJT removed him from service for a medical condition that posed a serious threat of injury to the health and safety of himself and others, and that action did not violate the LAD. The Appellate Division further rejected plaintiff's argument that NJT was required to pay for his sleep apnea examination under the WCA, because NJT did not require him to see a particular doctor.

Appellate Division reverses, remands disciplinary removal of county parks employee where Civil Service Commission's final decision was unsupported by sufficient, credible evidence

In re Figueroa, 2022 N.J. Super. Unpub. LEXIS 1438 (App. Div. Dkt. No. A-2686-20)

The Appellate Division of the Superior Court, in an unpublished opinion, vacates and remands a final administrative decision of the Civil Service Commission (CSC) summarily adopting an Administrative Law Judge's (ALJ's) findings of fact and conclusions of law and affirming Mr. Figueroa's disciplinary removal from employment with the Camden County Parks Department (County). The Appellate Division concluded that the CSC's decision was not supported by sufficient, credible evidence in the record where, among other things: (1) there was no testimony or evidence to support the ALJ's findings that Figueroa misused sick time to attend court hearings stemming from his arrest and subsequent guilty plea to harassment in exchange for dismissal of second-degree sexual assault charges; (2) the County did not separately charge Figueroa with misusing sick time relative to his harassment plea; and (3) the ALJ assured Figueroa's counsel during the hearing that the alleged misuse of sick leave would not be considered. The court stressed that any future disposition of the charges should be made without reference to alleged violations of sick time.

Appellate Division affirms 10-day suspension, demotion of sheriff's officer for lying about being sick to attend wedding

In re Suarez, 2022 N.J. Super. Unpub. LEXIS 1440 (App. Div. Dkt. No. A-0019-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final decision of the Civil Service Commission (CSC) which adopted an initial decision of an administrative law judge (ALJ), sustaining disciplinary charges and upholding the ten-day suspension of Mr. Suarez, a Middlesex County (County) Sheriff's officer. During his working test period as a newly promoted sergeant, Suarez lied about being sick so he could attend a wedding. As a result, he was charged with conduct unbecoming, neglect of duty, other sufficient cause, and violation of departmental rules. At the end of his working test period, two weeks before the departmental hearing on the charges, Suarez was returned to his former title for having unsuccessfully completed the working test period. The demotion decision was separately appealable to the CSC, but Suarez did not timely appeal it. Instead, he challenged it within his appeal from the 10-day suspension. In affirming, the Appellate Division held: (1) the question of whether Suarez was appropriately returned to his permanent title was not properly before it, as Suarez did not appeal the demotion at the end of his working test period; (2) even so, no controlling or persuasive precedent prohibited the County from demoting Suarez at the end of his working test period for the same conduct forming the basis of disciplinary charges; and (3) Suarez was not deprived of his right under the civil service laws to appeal the Sheriff's actions.

Appellate Division affirms tenure arbitrator's reduction of salary, reverses demotion to lesser title, on tenure charges stemming from teacher's misrepresentation of workplace injury

Sanjuan v. Sch. Dist. of W. N.Y., 2022 N.J. Super. LEXIS 118 (App. Div. Dkt No. A-3273-20)

The Appellate Division of the Superior Court, in a published opinion, affirms in part, and reverses and remands, in part, a Law Division order confirming an arbitration award which sustained tenure charges filed by the West New York Board of Education (Board) against Ms. Sanjuan, demoted her from assistant principal to a fourth-grade teacher; and determined she was not entitled to back pay withheld for a 120-day suspension imposed upon the Board's certification of charges. The charges stemmed from Sanjuan's misrepresentation of a workplace injury. The Appellate Division: (1) affirmed that Sanjuan was not entitled to

back pay withheld during her suspension, based upon the arbitrator's determination that her conduct was unbecoming; (2) reversed and remanded to the extent the arbitrator lacked the statutory authority to demote her from her assistant principal position, finding he could only reduce her salary; (3) ordered Sanjuan reinstated to her assistant principal position; and (4) directed the arbitrator, on remand, to determine to what extent, if any, her salary should be further reduced through unpaid suspension and/or withholding salary increments.