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October 19, 2022

TO: Commissioners

FROM: Counsel Staff

RE: Developments in Counsel's Office since September 29, 2022

Commission Cases

Appeals from Commission Decisions

No new appeals from Commission decisions were filed since September 29.

Commission Court Decisions

Appellate Division affirms PERC's refusal to issue complaint on employee's untimely, meritless unfair practice charges against university and union

In re Rutgers, 2022 N.J. Super. Unpub. LEXIS 1821 (App. Div. Dkt. No. A-4178-19)

The Appellate Division of the Superior Court, in an unpublished opinion (attached), affirms the Commission's final agency decision, P.E.R.C. No. 2020-44, 46 NJPER 442 (¶98 2020), sustaining the Director of Unfair Practices' refusal to issue a complaint on charges of unfair labor practices filed by the appellant, the late Dr. Spinnato, against his employer, Rutgers,

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the State University of New Jersey (Rutgers), and his majority representative, AAUP – Biomedical and Health Sciences of New Jersey (AAUP). For the reasons stated by PERC and the Director in their written opinions, which the court found to be thorough and well-reasoned, the Appellate Division affirmed that: (1) Spinnato's charges concerning holiday compensation time were untimely; (2) his claim that he was prevented from timely filing them lacked evidentiary support; and (3) the manner in which Rutgers and AAUP processed Spinnato's request to withdraw from the union did not violate the law and would not, even if not in compliance with the CNA or the Workplace Democracy Enhancement Act, constitute an unfair labor practice under the New Jersey Employer-Employee Relations Act.

Appellate Division affirms PERC's refusal to restrain arbitration of salary-reduction dispute arising from school board's elimination of teaching staff positions and transfer of staff

Linden Bd. of Educ. v. Linden Educ. Ass'n, 2022 N.J. Super. Unpub. LEXIS 1874 (App. Div. Dkt. No. A-0434-21)

The Appellate Division of the Superior Court, in an unpublished opinion (attached), affirms the Commission's final agency decision, P.E.R.C. No. 2022-2, 48 NJPER 100 (¶24 2021), denying the appellant Linden Board of Education's scope of negotiations petition that sought to restrain binding arbitration of a grievance filed by the Linden Education Association (Association) contesting the reduction of certain teaching staff members' salaries when they were transferred from 12-month to 10-month positions for the 2020-2021 school year. PERC found the Association's claim that the CNA had been violated due to the grievants' reduction in compensation was legally arbitrable and severable from the Board's managerial prerogative to eliminate positions for educational or budgetary reasons. Substantially for the reasons expressed by PERC in its final decision, which the court found thorough and well-reasoned, the Appellate Division held: (1) the denial of the Board's application to restrain binding arbitration was not arbitrary, capricious, or unreasonable; (2) the record amply supported PERC's findings of fact; and (3) its conclusions were consonant with applicable legislative policies and precedential case law.

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

Appellate Division affirms Civil Service Commission's final decision removing police officer for posting sexually explicit social media content without victim's consent

In re Adams, 2022 N.J. Super. Unpub. LEXIS 1722 (App. Div. Dkt. No. A-2618-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final decision of the Civil Service Commission (CSC) upholding appellant Czezre Adams' disciplinary removal from employment as a police officer in the City of Newark Police Department (NPD). An administrative law judge (ALJ) sustained the disciplinary charges, concluding Adams violated multiple NPD rules, a departmental order, and a CSC regulation by recording and later repeatedly posting on his social media account sexually explicit content without his sexual partner's consent, finding these off-duty actions, including threatening statements to his victim, reflected irresponsible behavior on social media and were incompatible with the high degree of integrity and respect expected of all police officers. However, the ALJ declined to bypass progressive discipline, found termination "unreasonably harsh," and reduced the penalty to a 180-day suspension. On exceptions filed by NPD, the CSC adopted the ALJ's findings of fact, rejected her recommendation to reduce the penalty, and upheld removal. The CSC found that standing alone, the charges were sufficiently egregious to warrant removal, regardless of Adam's prior disciplinary history. The Appellate Division agreed, finding Adam's repeated misconduct, coupled with his threatening statements to his victim, fell far below the stricter standard of conduct to which police officers are held.

Appellate Division affirms Law Division's ruling that employee's disciplinary settlement agreement with school board, which did not result in the employee's removal, was not OPRA-able

Shurin v. Bd. of Educ. Schs. of Tech., 2022 N.J. Super. Unpub. LEXIS 1771 (App. Div. Dkt. No. A-3716-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a Law Division order dismissing the verified complaint of plaintiff Shurin, a journalist, and denying his order to show cause in which he sought an order compelling defendant Board of Education of Hudson County Schools of Technology to produce an employee settlement agreement pursuant to the Open Public Records Act (OPRA). The Appellate Division concluded that the settlement agreement at issue resolved an internal disciplinary proceeding that did not result in the unnamed employee's separation from government service, and thus

was not subject to disclosure within the meaning of OPRA's personnel-records exception as interpreted by the New Jersey Supreme Court in Libertarians for Transparent Government v. Cumberland County, 250 N.J. 46 (2022).

Appellate Division affirms Civil Service Commission's final decision sustaining disciplinary removal of corrections officer for use of excessive force against inmate

In re Isner, 2022 N.J. Super. Unpub. LEXIS 1770 (App. Div. Dkt. No. A-2070-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision by the Civil Service Commission (CSC), finding support for disciplinary charges filed against appellant Isner by respondent Camden County Correctional Facility (CCCF), as affirmed by an administrative law judge (ALJ), resulting in his termination as a corrections officer. The court discerned no basis for disturbing the CSC's determination that Isner should be removed from employment after violating several CCCF policies, General Orders and Rules, and his use of excessive and impermissible force against an inmate who was not threatening the safety or security of the officer, the facility, or himself. The court rejected Isner's claim that the CSC's decision was arbitrary, capricious, and unreasonable, because the evidence was sufficient to sustain the ALJ's findings regarding his conduct. The Appellate Division also rejected Isner's argument that progressive discipline, rather than termination, was warranted because, while Isner lacked any prior disciplinary record, his story changed over time regarding threats made by the inmate, and he filed an inaccurate report contrary to General Orders and Rules.

Appellate Division affirms Law Division's determination that students/parents' names, including their initials, are student records exempt from disclosure under OPRA

L.R. v. Cherry Hill Bd. of Educ., 2022 N.J. Super. LEXIS 126 (App. Div. Dkt No. A-1819-20)

The Appellate Division of the Superior Court, in a published opinion, affirms the denial of an Open Public Records Act (OPRA) request made by plaintiff L.R., the mother of a disabled student, to defendant Cherry Hill Board of Education, seeking all settlement agreements involving the Board as a named defendant and a student and/or parent as named plaintiff(s). The OPRA request asked that the students/parents' names be redacted,

leaving only their initials. The Board provided the records sought, but redacted all personally identifiable information (PII), including initials. Plaintiff sued and moved for summary judgment (SJ), asserting the Board violated OPRA by redacting all PII. The Board cross-moved for SJ, arguing the documents were not public records, but rather student records under the Family Educational Records and Privacy Act (FERPA) and the New Jersey Pupil Records Act (NJPRRA), and plaintiff was not an authorized requester under the relevant regulation. The trial court granted the Board's cross-motion for SJ, finding the initials were exempt from disclosure under FERPA and the NJPRRA. The Appellate Division affirmed substantially for the reasons expressed by the trial judge, and added: the trial judge's conclusion that plaintiff was not entitled to the unredacted records was unaffected by an amended regulation at issue, because the initials would still constitute information related to an individual student, and the amended regulation excluded from the definition of confidential student records "information recorded by certified school personnel solely as a memory aid . . . [i]n the absence of any 'information related to an individual student.'" "

Appellate Division reverses, remands grievance arbitration remedy award in dispute over retiree health benefits plan change

Newark Fire Officers Union, Local 1860 v. City of Newark, 2022 N.J. Super. Unpub. LEXIS 1849 (App. Div. Dkt No. A-4535-19)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses a Chancery Division decision confirming a grievance arbitration remedy award in favor of plaintiff, Newark Fire Officers Union, Local 1860, IAFF, AFL-CIO (Union), and remands to the arbitrator to reconsider the original remedy, which directed the defendant, City of Newark, to eliminate a certain "formulary drug list" from its self-insured retiree prescription drug program. The grievance arose after the City made a number of changes to its health insurance carriers, resulting in Union retirees being put on the self-funded plan. The arbitrator concluded the current plan was not substantially similar to a prior plan, and entered an award directing the City to restore the previous plan's level of benefits. During a hearing to resolve a subsequent dispute over the City's efforts at compliance, the arbitrator barred the City from introducing evidence about the prior plan's formulary, and concluded the current formulary should not be applied to the retirees. The Chancery judge granted the Union's motion to confirm the remedy award and denied the City's cross-motion to vacate it. Reversing, the Appellate Division faulted the arbitrator for

ordering the City to eliminate the formulary drug list "without any analysis" as to what that would mean for the retirees' prescription drug plan, and for failing "to define what a formulary is and what it does." The Appellate Division remanded the matter to the arbitrator to enter an appropriate remedy after consideration of the prior plan's documents.

Appellate Division affirms Civil Service Commission's final decision removing individual from police officer eligibility list for falsifying application and for history of discriminatory remarks on social media accounts

In re Gabriel Nazario Ramirez, 2022 N.J. Super. Unpub. LEXIS 1857 (App. Div. Dkt No. A-3457-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final decision of the Civil Service Commission (CSC), upholding the Township of North Brunswick's removal of appellant Ramirez's name from its 2020 police officer eligibility list for falsifying his application and historically posting discriminatory remarks on his social media accounts. In its comprehensive final decision, the CSC acknowledged the Township's notice of removal included petitioner's "discriminatory social media posts," while the initial notice only cited "the falsification issue," but found Ramirez had an opportunity to address both charges because the Township ultimately notified him that its decision was based on both; and that nonetheless Ramirez failed to provide a substantive response. The CSC concluded Ramirez's "racially and sexually discriminatory comments" evinced the lack of good judgment required for municipal law enforcement officers. The Appellate Division affirmed substantially for the reasons articulated in CSC's decision, finding: (1) it was supported by sufficient credible evidence on the record as a whole; and (2) the decision was not arbitrary, capricious, or unreasonable.

Appellate Division, reversing Civil Service Commission, orders enforcement of settlement agreement resolving disciplinary charges against police officer

In re Valente, 2022 N.J. Super. Unpub. LEXIS 1882 (App. Div. Dkt No. A-3180-21)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses a Civil Service Commission (CSC) decision which overruled an administrative law judge's (ALJ's) decision granting the Township of West Milford's motion to enforce a settlement agreement resolving disciplinary charges against

Valente, a Township police officer, and dismissing Valente's appeal from those charges. Valente's former attorney had negotiated the settlement with the Township's attorney, but on the eve of a departmental hearing on the charges, and before the agreement was formally executed, Valente retained new counsel who disavowed the settlement and requested the hearing proceed. The Township agreed without waiving its right to pursue enforcement of the agreement. The charges were then sustained at the departmental hearing, and Valente's CSC appeal was referred to the ALJ. The CSC disagreed with the ALJ that a valid and enforceable settlement had been reached (requiring Valente's resignation, among other things), and ordered a hearing on the merits of the disciplinary charges. On review, the Appellate Division concluded the parties had an enforceable settlement agreement, and that the CSC acted arbitrarily and capriciously in its final order overturning the ALJ's decision. The court found: (1) Valente's former attorney had apparent authority to enter into the settlement; (2) the relevant documents in evidence contained all of the essential terms of the agreement; (3) the Township's attorney had authority to enter into settlements on its behalf; (4) there was no need for the ALJ to conduct a hearing on the Township's motion to enforce because there were no disputed facts regarding the settlement; and (5) the CSC erroneously concluded that the Township's conduct of a disciplinary hearing "cut against" its argument that a valid settlement was reached, where the Township expressly advised it was not waiving any rights by doing so and reserved the right to continue to assert a settlement had been reached.