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DATE: January 20, 2023

TO: Commissioners

FROM: Counsel Staff

RE: Developments in Counsel's Office since December 15, 2022

Commission Cases

Appeals from Commission Decisions

The Borough of Carteret filed an appeal from the Commission's decision (P.E.R.C. No. 2023-16, 49 NJPER 266 (¶61 2022)) which reversed the Director of Representation's decision that granted the Borough's unit-clarification petition to exclude lieutenants from a negotiations unit of lieutenants and firefighters represented by FMBA, Local 67 due to an inherent conflict of interest.

Appellate Orders

The Appellate Division of the Superior Court issued an order denying the AAUP unions' application for leave to file an emergent motion on short notice following the Commission's decision (P.E.R.C. No. 2023-23), which reversed a Commission designee's grant of interim relief on unfair practice charges challenging a unilateral decision of Rutgers, the State University of New Jersey, to no longer require face masks in indoor teaching spaces and libraries. The Appellate Division

denied AAUP's emergent application for the following reasons: (1) the application on its face does not concern a threat of irreparable injury, or a situation in which the interests of justice otherwise require adjudication on short notice; and (2) AAUP has not satisfied the standard under Crowe v. De Gioia, 90 N.J. 126 (1982), to warrant emergent relief.

By order issued on its own motion, the Appellate Division of the Superior Court dismissed for lack of prosecution the Branchburg Township Education Association's 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 dismissing the Association's unfair practice charge. The charge alleged the Board violated our Act by holding a teacher to a higher performance standard on her summative evaluation in retaliation for her protected activity as Association President.

Commission Court Decisions

Appellate Division reverses PERC's decision allowing arbitration of grievance challenging assignments of campus police officers

In re Rutgers, the State Univ. of N.J. & AFSCME Local 888, 2022 N.J. Super. Unpub. LEXIS 2593 (App. Div. Dkt. No. A-3314-20)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses a final determination of PERC that (as a result of an unbreakable tie vote on a draft decision that would have restrained arbitration), effectively denied the request of Rutgers, the State University of New Jersey (Rutgers) to restrain arbitration of a grievance filed by the American Federation of State, County and Municipal Employees, New Jersey Council No. 63, Local 888 (Local 888), a unit of campus security officers. The grievance asserted that Rutgers violated the parties' collective negotiations agreement by assigning regular and overtime work to employees who are represented by another local union. In reversing, the Appellate Division found that restraint of arbitration was required, based on all three exceptions to the unit work rule as applied to this case, concluding: (1) based on five years of acquiescence by Local 888, there was an implied waiver of its right to negotiate the assignments; (2) the Local 888 unit historically performed in conjunction with others, and based on the period of time the two units had been consolidated, the second exception was met; (3) due to a significant increase in campus size, Rutgers showed there was a need to change the way its public safety services were organized, and by consolidating the two units it could best prepare for all the needs of a newly expanded campus; and (4) the consolidation of the units was

within Rutgers' managerial prerogative, and was, therefore, not mandatorily negotiable.

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

Appellate Division reverses dismissal, remands city worker's religious accommodation claim challenging suspension/dismissal for refusal to comply with COVID-19 testing policy

In re Whitehead, 2022 N.J. Super. Unpub. LEXIS 2591 (App. Div. Dkt. No. A-0730-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms, in part, and reverses and remands, in part, a final agency decision of the Civil Service Commission (CSC) which adopted the recommended decision of an administrative law judge (ALJ). The ALJ granted the City of East Orange's motion for summary decision affirming the City's suspension and termination of Ms. Whitehead's employment upon her refusal to obtain a negative COVID-19 test before returning to on-site work following the City's prior suspension of on-site work. The Appellate Division remanded for further proceedings on Whitehead's claim the City violated Title VII of the Civil Rights Act by suspending and terminating her employment and by failing to allow her to work from home as a reasonable accommodation for her religious-based refusal to undergo the COVID-19 testing, finding: (1) the motion record did not permit a summary decision on that claim as a matter of law; (2) Whitehead established a prima facie case of religious discrimination, as the undisputed record showed Whitehead objected to the COVID-19 testing requirement based on her sincere religious beliefs, and she was later suspended and then terminated based on the claimed conflict between her religious beliefs and the testing requirement; and (3) the ALJ made no findings or conclusions concerning whether a work-from-home accommodation would impose an undue hardship on the City, and the City's moving papers included no competent evidence establishing undisputed facts permitting that requisite determination. The court otherwise affirmed the summary decision rejecting and dismissing Whitehead's remaining claims.

Appellate Division holds public universities are immune from lawsuits seeking monetary damages arising from transition to on-line instruction during COVID-19 pandemic

Mueller v. Kean Univ., 2022 N.J. Super. LEXIS 149 2591 (App. Div. Dkt. No. A-3091-20)

The Appellate Division of the Superior Court, in a published opinion on an issue of first impression in consolidated appeals, affirms dismissal of plaintiffs' complaints, concluding the

defendants, Kean University and Montclair State University, are immune from liability under the Emergency Health Powers Act (EHPA), N.J.S.A. 26-13-19, in connection with the universities' transition, during the COVID-19 pandemic, to total online instruction rather than an in-person, on-campus education experience. Plaintiffs (full-time undergraduate students) alleged they lost the benefit of the in-person education that they paid for, without having their tuition and fees refunded to them. The trial courts dismissed both complaints with prejudice under the EHPA's immunity provision. In affirming, the Appellate Division distinguished and declined to follow a narrower ruling employed by a New Jersey federal district court in a similar case, Gaviria v. Lincoln Educ. Servs. Corp., 547 F. Supp. 3d 450 (D.N.J. 2021), which found that, unlike tort-based property injury claims, contractual monetary damage claims were not covered by the EHPA's immunity provision. As Gavira did not consider the definition of "property" found in N.J.S.A. 1:1-2 (which expressly includes money and provides that its definition shall apply absent a specific definition in a particular statute), the Appellate Division concluded: (1) the EHPA incorporates the definition of "property" found in N.J.S.A. 1:1-2, thereby extending the immunity afforded by the EHPA to public entities against such claims; (2) permitting plaintiffs to recover monetary damages would run counter to the Legislature's intent to liberally construe N.J.S.A. 26:13-19 and its purpose in granting authority to take such actions to thwart the dangers posed by the COVID-19 pandemic; and (3) the immunity afforded by the EHPA does not conflict with State or Federal Constitutions, as the statute is intended to promote the general health and welfare of New Jersey residents, employees, students, and visitors, thus giving it a significant and legitimate public purpose.

Appellate Division declines to apply N.J. Supreme Court ruling retroactively on certain records requests under OPRA

Owoh v. Borough of Norwood, 2023 N.J. Super. Unpub. LEXIS 41 (App. Div. Dkt. Nos. A-2941-20, A-2943-20, A-2981-20)

The Appellate Division of the Superior Court, in an unpublished opinion on consolidated appeals, affirms three orders entered by Government Record Council (GRC) denying requests for records pursuant to the New Jersey Open Public Records Act (OPRA) and the Common Law Right of Access from separate municipalities. The requests sought complaint-summonses, known as "CDR-1s," for certain classes of drug-related offenses. The information contained in CDR-1s, although forwarded to and maintained by the municipal courts, and by extension, the judiciary, are created by

municipal police departments. In each case, the GRC issued its denial relying upon a published and then-binding Appellate Division ruling that such records were neither possessed nor maintained by the municipality, but rather once created were maintained instead by the judiciary, therefore the municipalities had no disclosure obligation under OPRA. That decision was subsequently overturned by the New Jersey Supreme Court in Simmons v. Mercado, 247 N.J. 24 (2021). The Supreme Court found, among other things, that because local municipal police officers create the information contained in the CDR-1s, they fall well within OPRA's definition of a government record, and are the type of record law enforcement is required to retain and turn over. In affirming the GRC denials in Owhoh, the Appellate Division held: (1) the GRC did not act arbitrarily, capriciously, or unreasonably (based on then-controlling case law) and the record contains ample support for the conclusions reached in the three cases; and (2) because the Court in Simmons did not espouse a new rule, but rather expanded on previous holdings and clarified codified language, its ruling does not apply retroactively to these three matters decided by the GRC prior to Simmons.

Appellate Division affirms reduction of disciplinary penalty against county public works employee from termination to 20-day suspension for argument with supervisor

In re Stuiso, 2023 N.J. Super. Unpub. LEXIS 35 (App. Div. Dkt. No. A-3789-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final order of the New Jersey Civil Service Commission (CSC), which adopted the recommended decision of an administrative law judge (ALJ) reducing a disciplinary sanction against respondent Stuiso, a Bergen County public works employee, from termination to a twenty-day suspension, and awarding Stuiso back pay, benefits, and seniority, but denying his request for attorneys' fees. The discipline stemmed from an argument between Stusio and his supervisor over workplace safety issues. In affirming, the Appellate Division held: (1) the CSC's ruling was in accordance with the applicable law, supported by sufficient credible evidence (i.e. that Stuiso was justified in approaching his supervisor to discuss the safety issues, and that conflict and foul language is not uncommon in the workplace such that the conduct was not so severe as to render him unsuitable for continued employment), and was therefore neither arbitrary, capricious, nor unreasonable; (2) the ALJ adequately considered Stuiso's prior disciplinary history before applying progressive discipline principles, including by acknowledging prior offenses

but finding insufficient significant prior discipline or evidence this type of behavior was habitual; (3) the record contained sufficient evidence for the ALJ to conclude Stuiso was competent to continue his employment; and (4) the CSC's twenty-day suspension falls within the continuum of reasonable outcomes, and is not shocking to one's sense of fairness.

Third Circuit affirms denial of attorneys' fees to school-age children and parents who obtained temporary injunctions of mask-optional policies in school districts, after update to CDC guidance on COVID mitigation measures moots underlying claims

Doe v. Upper St. Clair Sch. Dist., 2023 U.S. App. LEXIS 840 (3d. Cir. Dkt. No. 22-2106)
John DOE 1 v. N. Allegheny Sch. Dist., 2023 U.S. App. LEXIS 838 (3d. Cir. Dkt. No. 22-2245)

The United States Court of Appeals for the Third Circuit, in two non-precedential decisions issued on the same day, affirms the District Courts' denials of attorney fees to plaintiffs, school-age children and their parents who sued on behalf of medically vulnerable children, to enjoin the defendant school districts, Upper Saint Clair School District and North Allegheny School District, from instituting optional COVID-19 masking policies in January 2022. The plaintiffs claimed that when the districts voted to make masking optional, those decisions violated their children's rights under the Americans with Disabilities Act. In both matters, the plaintiffs obtained temporary restraining orders (TROs) to preserve the parties' status quo pending a decision on the merits. Before the merits of either case could be decided, the Centers for Disease Control and Prevention (CDC) published revised guidance for COVID-19 mitigation measures, removing the districts from the high risk categories of transmission. The Court of Appeals concluded that guidance mooted plaintiffs' claims, and dismissed the appeals without prejudice. The plaintiffs then moved for attorneys' fees and costs. The motions were denied as they were not prevailing parties.