



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

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DATE: February 15, 2023
TO: Commissioners
FROM: Counsel Staff
RE: Developments in Counsel's Office since January 26, 2023

Commission Cases

Appeals from Commission Decisions

Old Tappan Borough filed an appeal, and PBA Local 206 filed a cross-appeal, from the Commission's decision, P.E.R.C. No. 2023-22, 49 NJPER 304 (¶72 2022), which granted the PBA's summary judgment motion on its unfair practice charge alleging the Borough violated the Act by refusing to implement the parties' interest arbitration award, Docket No. IA-2021-001.

Oral argument will take place on February 14, 2023, in the Lakewood Education Association's appeal from the Commission's decision, P.E.R.C. No. 2022-33, 48 NJPER 364 (¶81 2022), App. Div. Dkt. No. A-002340-21T2, dismissing the Association's petition challenging the Lakewood Township Board of Education's transfer of an administrative secretary between work sites.

Oral argument was scheduled for March 14, 2023, in City of Ocean City and Edwin Yust, App. Div. Dkt. No. A-001391-21T4, P.E.R.C. No. 2009-45, 35 NJPER 48 (¶21 2009), in which the City appeals a Hearing Examiner's determination that the City violated the Act

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through hostility to Mr. Yust's protected conduct while employed as a City lifeguard.

Commission Court Decisions

No new Commission court decisions were issued since January 26.

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

Appellate Division, reversing Chancery Division, restrains arbitration of grievance seeking contractually enhanced pay for work performed during COVID-19 state of emergency

N. Bergen Mun. Utils. Auth. v. I.B.T.C.W.H.A. Local 125, 2023 N.J. Super. LEXIS 8 (App. Div. Dkt. No. A-3163-21)

The Appellate Division of the Superior Court, in a published opinion, reverses the Chancery Division's order denying the request of the North Bergen Municipal Utilities Authority to permanently restrain a grievance arbitration pending before a PERC arbitrator. The grievance, filed by I.T.C.W.H.A. Local 125 on behalf of sanitation and recycling drivers and loaders employed by the Authority, sought to enforce a provision of the parties' expired collective negotiations agreement (CNA) which provided for 2.5 times the employee's hourly rate of pay for all hours worked during a State of Emergency (SOE). The CNA expired on December 31, 2019. The grievance arose in March 2020, during the SOE declared by the Governor in response to the COVID-19 pandemic, and while the parties were negotiating for a successor agreement. Negotiations for the successor contract reached impasse over the SOE clause. Pursuant to PERC's negotiation impasse procedures, the parties proceeded to mediation followed by the terminal step of fact-finding. The fact-finder's report recommended a new SOE clause that would be retroactive to January 1, 2020, limiting the payment for such work to weather-related SOEs. The fact-finder further recommended the Authority provide each union member with a one-time payment of \$500, in recognition of the pending grievance. After that, the Authority made a last, best and final offer that included the recommended SOE clause and the \$500 payments. Local 125 rejected the offer, and the Authority unilaterally implemented a 2020-2023 CNA with the modified SOE clause, and the payments. The Chancery court ruled that the grievance could be arbitrated under the terms of the expired contract. The Appellate Division reversed and restrained arbitration, finding: (1) the SOE language from the expired CNA was superseded by the successor CNA, thus the grievance did not present an arbitrable contract interpretation issue; (2) the

Chancery court erred in denying restraint of arbitration where the Authority, in accordance with the PERC Act and regulations, implemented the last best offer incorporated in the fact-finder's Report; (3) the successor CNA clearly and unambiguously limited the SOE payments to weather-related events, contrary to Local 125's interpretation which was the gravamen of the grievance, such that on its face, the March 2020 grievance regarding SOE pay was not covered by the 2020-2023 CNA. Notably, the opinion did not rely on or mention the Appellate Division's unpublished decision, Jersey City Public Employees, Inc., Local 245 v. City of Jersey City, 2021 N.J. Super. Unpub. LEXIS 1018 (App. Div. Dkt No. A-4558-19) (previously discussed in the November 2021 and February 2022 GC Reports), wherein the court found similar contract language unambiguously provided that City employees were entitled to double time pay if the Governor declared an SOE.

Appellate Division affirms corrections officer's disciplinary termination for racially insensitive social media posts

In re Chirichello, 2023 N.J. Super. Unpub. LEXIS 101 (App. Div. Dkt. No. A-0812-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision by the Civil Service Commission (CSC) terminating Ms. Chirichello's employment as a senior correctional officer at the Edna Mahan Correctional Facility. The disciplinary termination was prompted by a member of the public's complaint to the New Jersey Department of Corrections (DOC) about Chirichello's social media posts around the time of the murder of George Floyd, including several bearing racially insensitive and violent undertones. Following an investigation and Chirichello's suspension, the matter was transferred to the Office of Administrative Law and tried before an administrative law judge (ALJ). The ALJ sustained the charges, but found the penalty of termination too severe, and recommended a 180-day suspension without pay, plus mandatory diversity training and a psychological examination as a prerequisite to reinstatement. The CSC upheld the ALJ's decision sustaining the charges, but found termination rather than suspension was the appropriate penalty because of the egregious nature of appellant's conduct. The court affirmed substantially for the reasons expressed in the CSC's decision, finding: (1) the social media posts were inappropriate, inflammatory, and discriminatory, and fell short of the high standards required of her office; and (2) the record amply supported the conclusion appellant violated applicable regulations and DOC policies, and her arguments to the contrary lacked merit.

Appellate Division affirms denial of OPRA requests seeking documents plaintiffs failed to obtain in discovery in related employment discrimination lawsuit

Ass'n for Governmental Responsibility v. State, 2023 N.J. Super. Unpub. LEXIS 139 (App. Div. Dkt. No. A-2647-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court's order dismissing an order-to-show-cause complaint and denying Open Public Records Act (OPRA) requests made by appellants, Association for Governmental Responsibility, Ethics and Transparency (AGREAT) and Tara Kumor, for documents maintained by defendant State of New Jersey Office of the Attorney General (OAG), Department of Law and Public Safety, Division of Law (DOL), relating to its former temporary employee, Kumor. The OPRA requests were made in connection with Kumor's wrongful termination lawsuit pending when the OPRA matter was filed, and included documents Kumor failed to obtain through discovery in the wrongful termination action. The lower court concluded the records were exempt under OPRA as personnel records, and that they contained advisory, consultative, deliberative, or attorney-client communications. The judge also found plaintiffs did not establish a common law right of access to the documents and dismissed their complaint with prejudice. In affirming, the Appellate Division agreed with the trial judge's findings that the requested material, respectively: (1) was protected as attorney-client communications under OPRA as it outlined confidential legal advice pertaining to issues related to Kumor's status as a temporary employee; (2) concerned personnel records protected under the deliberative process privilege; and (3) that under the common law right of access, the defendant's interest outweighed AGREAT's because there is a robust need to prevent chilling of government deliberative decision-making. The Appellate Division further concluded the plaintiffs improperly tried to utilize OPRA and the common law right of access to obtain documents that they were denied in the employment discrimination case, stressing that OPRA is a public disclosure statute not intended to replace or supplement the discovery of private litigants.

Appellate Division affirms applicant's restoration to list of eligibles for firefighter position where applicant provided appointing authority with sufficient information to complete background check regarding a juvenile arrest

In re Dunlap, 2023 N.J. Super. Unpub. LEXIS 157 (App. Div. Dkt. No. A-0565-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final order of the Civil Service Commission (CSC) reversing the appointing authority Hillside Township's removal of respondent Dunlap from the list of eligible persons for the position of firefighter. The Township removed Dunlap's name from the list based on his failure to include a juvenile charge of resisting arrest on his application for the position, which the Township found was an omission constituting a material misrepresentation. On his application, Dunlap disclosed the arrest, but only mentioned that it was in connection with his possession of a weapon, a pocket knife, on school grounds. On investigation, the Township learned the incident led to Dunlap's being charged with resisting arrest; possession of a weapon in an educational institution; aggravated assault; and possession of a weapon for an unlawful purpose. Ultimately, the other charges were dismissed. The CSC reversed, finding the omission not material because Dunlap supplied sufficient information to enable the Township to properly complete its background investigation. The CSC also found the incident, which took place when Dunlap was a juvenile, to be an isolated one, and that as he had not been involved in any other criminal incidents, the incident was sufficiently remote in time to declare him rehabilitated. In affirming, the Appellate Division held: (1) the record supported the CSC's decision that Dunlap's answers to relevant questions on the application were sufficiently detailed, including the date and location of the incident, his age at the time, and his juvenile disposition; and (2) the Township failed to meet its burden of showing the CSC's decision to be arbitrary, capricious, or unreasonable.