



**STATE OF NEW JERSEY
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DATE: April 19, 2023
TO: Commissioners
FROM: Counsel Staff
RE: Developments in Counsel's Office since March 30, 2023

Commission Cases

Appeals from Commission Decisions

No new appeals were filed since March 30.

Commission Court Decisions

No new Commission court decisions were issued since March 30.

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

Appellate Division reverses Law Division, reinstates grievance arbitration award finding "just cause" for disciplinary termination of Port Authority police officer

Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J., 2023 N.J. Super. Unpub. LEXIS 423 (App. Div. Dkt. No. A-2956-21)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses a trial court's decision which vacated a

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grievance arbitration award, and reinstates the award. The Port Authority Police Benevolent Association's grievance challenged the disciplinary termination of a Port Authority police officer on charges of harassing a civilian and engaging in other related misconduct. The parties' memorandum of agreement (MOA) required the arbitrator to determine whether there was "good and sufficient cause or reason" to support the imposition of major discipline on the charged officer. The arbitrator sustained the charges, but found there was "just cause" for the dismissal. The union then sought to vacate the award in the Law Division pursuant to N.J.S.A. 2A:24-8(d), contending the arbitrator exceeded his authority by applying a "just cause" standard that was inconsistent with the MOA's "good and sufficient cause or reason" standard. The trial judge ordered the officer be given another hearing "under the proper standard of review," set forth in the MOA. The employer appealed, arguing the award adhered to the essence of the MOA and was "reasonably debatable," and the judge failed to give deference to it and erroneously substituted his own judgment for arbitrator's. The Appellate Division agreed, holding among other things: (1) the arbitrator thoroughly canvassed the evidence and made clear and specific findings but misspoke when labeling the standard; (2) the arbitrator's findings adhered to – and did not exceed – the MOA's "good and sufficient cause or reason" standard; (3) the trial court's limited statutory authority to vacate arbitration awards did not allow it to disregard the arbitrator's factual findings; and (4) to allow an otherwise fair and reasonable arbitration award to be undone by the arbitrator's mislabeling of the contractual standard would exalt form over substance and defeat the legislative intent and public policy underlying N.J.S.A. 2A:24-8(d).

Appellate Division reverses, remands trial court's dismissal of college employee's lawsuit alleging discriminatory/retaliatory discharge related to Workers' Compensation leave

Nunez v. Middlesex County College, 2023 N.J. Super. Unpub. LEXIS 428 (App. Div. Dkt. No. A-0484-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms in part, and reverses and remands in part, a decision of the Law Division that summarily dismissed plaintiff Nunez's complaint against Middlesex County College alleging his disciplinary termination from the College's Facilities Department violated New Jersey's Law Against Discrimination (LAD) and the anti-retaliation provision of the Workers' Compensation Act (WCA). The College terminated Nunez on charges of working elsewhere while on Workers' Compensation, theft, falsification of

College records, possession of a controlled dangerous substance, and violations of the public trust. The College moved for summary judgment on Nunez's subsequent lawsuit, and in what the Appellate Division described as "a terse oral opinion that lacked any analysis of relevant precedent," the trial judge granted the motion and dismissed the complaint. On review, the Appellate Division affirmed the dismissal of Nunez's LAD claim of discrimination based on a perceived disability, deeming it waived as he did not brief it on appeal. In all other respects, the Appellate Division reversed and remanded to the Law Division for further proceedings, finding among other things: (1) there were disputed material facts as to whether Nunez was working at another location while on leave; (2) Nunez had not been convicted of a crime when he applied for a position at the College in 1996, so his answer on the application form was truthful and the College had not demonstrated Nunez was obligated to notify it of later incidents; (3) the motion record presented sufficient evidence of prima facie claims of discriminatory discharge, failure to accommodate and retaliation and under LAD, including that the College believed Nunez's return on light duty could foment more workplace injury claims; and (4) the record would allow a reasonable factfinder to find Nunez was discharged in retaliation for making a Workers Compensation claim, including evidence the College believed Nunez was "malingering."

Appellate Division affirms denial of accidental disability pension to police officer who voluntarily and irrevocably resigned to avoid disciplinary charges

Slimm v. Bd. of Trs., Police and Firemen's Ret. Sys., 2023 N.J. Super. Unpub. LEXIS 435 (App. Div. Dkt. No. A-3183-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final decision of the Board of Trustees of the Police and Firemen's Retirement System (PFRS or Board) finding that appellant Slimm was not eligible to apply for accidental disability retirement benefits. Slimm voluntarily and irrevocably resigned from his position as a police officer in Winslow Township as part of a settlement agreement to avoid litigating pending disciplinary charges against him. The charges arose after Slimm ceased working and applied for accidental disability retirement benefits, alleging he suffered from PTSD following an incident where a suspect opened fire during a vehicle pursuit. When the Township ordered Slimm to return to work and he refused, it served him a preliminary notice of disciplinary action specifying several offenses, including failure to return to work. The settlement agreement stated that Slimm intended to pursue his pension application but did not state that his alleged disability was the reason for his resignation. The Board then advised Slimm it was not going to process his accidental disability retirement application,

explaining he was not eligible because he had left his employment based on his voluntary settlement agreement. Slimm appealed, and an administrative law judge (ALJ) granted the Board's motion for summary decision and upheld the decision. The Appellate Division affirmed substantially for the reasons articulated by the ALJ: (1) a PFRS member's voluntary and irrevocable separation from employment automatically renders him ineligible for disability retirement benefits; (2) Slimm's claimed disability was irrelevant, because an officer who irrevocably resigns cannot legally be returned to that position if he ever recovers from his disability; and (3) Slimm did not sustain his burden of proving his resignation was based on his alleged disability, and the evidence, including the settlement document he signed, established it was not. The Appellate court added there was no statutory basis for Slimm's argument, first raised on appeal, that he could satisfy the pension laws' eligibility requirements by agreeing to waive his right to disability pension benefits if he were to recover from his disability.

Appellate Division issues parallel decisions addressing disclosure of public members' email addresses under OPRA

Rise Against Hate v. Cherry Hill Twp., 2023 N.J. Super. Unpub. LEXIS 471 (App. Div. Dkt. Nos. A-3421-20, A-1440-21, A-1517-21); -and- Brooks v. Kennedy, 2023 N.J. Super. Unpub. LEXIS 468 (App. Div. Dkt. No. A-3769-20)

The Appellate Division of the Superior Court, in two unpublished opinions issued the same day, considered the issue of whether members of the public have an objectively reasonable expectation in the privacy of their email addresses sufficient to protect them from disclosure by a municipality under the Open Public Records Act (OPRA). The different outcomes of the opinions depended, respectively, on: (1) whether the requesting party intended to use the email addresses to send recipients unsolicited emails, in which case the addresses were protected from disclosure; and (2) whether a municipality obtained the email addresses through communications with elected officials about public business, in which case the addresses could be disclosed. In Rise Against Hate, the court concluded that members of the public who submit their email addresses to receive electronic newsletters and notices from a municipality have an objectively reasonable expectation that their email addresses will not be disclosed to a non-government organization that intends to send unsolicited emails to them to further the organization's political and social objectives. And in Brooks v. Kennedy, the court concluded that when members of the public

engage in email communications with municipal elected officials and employees about public business, they cannot objectively reasonably expect that their names and email addresses will not be subject to public disclosure as part of a log of emails sent and received by those officials and employees.

Appellate Division affirms dismissal of NJIT's action to restrain arbitration of campus police officers' grievances seeking contractual/policy-based double-time pay during COVID-19 pandemic

N.J. Inst. of Tech. v. NJIT Patrol Officers' Ass'n, 2023 N.J. Super. Unpub. LEXIS 504 (App. Div. Dkt. No. A-0741-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Chancery court's dismissal of a complaint filed by plaintiff New Jersey Institute of Technology (NJIT) seeking to enjoin arbitration of grievances brought by the NJIT Patrol Officers' Association and the NJIT Superior Officers' Association (the Unions) which alleged NJIT failed to comply with its Emergency Closing Policy (Closing Policy) and their collective negotiations agreements (CNAs) by refusing to pay campus police officers double-time while NJIT was operating in reduced capacity during the COVID-19 pandemic. In response to requests for arbitration filed by the Unions with PERC, NJIT filed a verified complaint and order to show cause in the Chancery Division, arguing the grievances were not substantively arbitrable. The Chancery Division denied NJIT's request for an injunction and dismissed its verified complaint with prejudice, finding the grievances fell within the CNAs' contractual rights to arbitrate because they concerned the officers' negotiable terms and conditions of employment. In affirming, the Appellate Division held the grievances fall within the ambit of the CNAs' arbitration provisions because: (1) the question of whether NJIT must pay double-time to its campus police officers affects those officers' compensation, which is a negotiable term and condition of employment; (2) the Unions' claim that NJIT violated the Closing Policy affects the compensation allegedly due to campus police officers; (3) the CNAs' arbitration provisions cover "grievances involv[ing]" a "claimed violation" of "University rules, regulations or governing policy"; (4) the Unions in seeking higher compensation for their members under the Closing Policy do not challenge NJIT's managerial right to curtail its operations; and (5) NJIT's arguments that the Closing Policy was not meant to apply to the COVID-19 pandemic and that it was never invoked, and that the claims for double pay are inequitable or unconscionable, go not to the issue of substantive arbitrability but to the merits of the grievances which are for the arbitrator.

Appellate Division affirms dismissal of CEPA, LAD, constructive discharge claims against school district in dispute over school counselor's reporting of student's disclosure of sexual abuse by fellow student

Sutliff v. Clifton Bd. of Educ., 2023 N.J. Super. Unpub. LEXIS 509 (App. Div. Dkt. No. A-1919-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court's order granting summary judgment in favor of defendant Clifton Board of Education, and dismissing a lawsuit filed by plaintiff Sutliff in connection with her handling of an incident that occurred while Sutliff was employed by the Board, when a high school student (who was referred to Sutliff in her then-capacity as a Student Assistance Counselor) disclosed to Sutliff that the student was sexually assaulted by a fellow student off school grounds the previous school year. The school principal directed Sutliff to report this to the Division of Child Protection and Permanency (DCPP) and the local prosecutor's office, as per the school district's child abuse policy. Sutliff objected, believing the incident was not "child sexual abuse" as she understood it because it involved two minors, and that it was subject to her profession's ethics and confidentiality rules as it did not take place on school property and thus did not require mandatory reporting. Despite her objections, Sutliff at first partially complied with the principal's directive and reported the incident to the DCPP, and eventually reported it to the prosecutor. The administration then directed the principal to discipline Sutliff for not immediately reporting the incident, and the principal drafted a letter withholding her salary increase and discussed it with Sutliff, but he did not give it to her pending a further meeting between Sutliff and an assistant superintendent. That meeting never occurred as Sutliff subsequently went out on accumulated sick leave and resigned at the end of the school year. The district never officially filed a disciplinary letter or withheld Sutliff's salary increase. Sutliff alleged the district retaliated against her in violation of the Conscientious Employee Protection Act (CEPA) and asserted common law claims of unlawful discharge in violation of public policy, violations of the Law Against Discrimination (LAD), and constructive termination. In affirming, the Appellate Division held, among other things: (1) Sutliff was unable to establish a CEPA whistleblower claim due to a lack of an identifiable statute or clear public policy that supports a reasonable belief the school's reporting requirements violated the law; (2) there was no adverse action against Sutliff or constructive discharge- the district never acted to discipline her and her salary was never reduced, while Sutliff made the

decisions not to meet with the assistant superintendent and to resign from her position; and (3) there was no failure to accommodate claim under LAD, as Sutliff never requested accommodation and there was no indication the district would have failed to provide one had she done so.

Appellate Division affirms teacher was statutorily entitled to paid sick leave for period of exclusion from school caused by exposure to COVID-19 from person outside immediate household

Angus v. Bd. of Educ. of Borough Metuchen, 2023 N.J. Super. LEXIS 39 (App. Div. Dkt. No. A-1979-21)

The Appellate Division of the Superior Court, in a published opinion, affirms a final agency decision of the Commissioner of Education denying appellant Metuchen Board of Education's motion for summary decision and granting a motion for summary decision filed by Board employee Angus on her claimed entitlement to paid sick leave under N.J.S.A. 18A:30-1, a school law that provides for such leave where the employee is excluded from school on account of a contagious disease. The Appellate Division held that when the school district's medical authorities excluded Angus from working at school as a consequence of her exposure to COVID-19 from a person outside her immediate household: (1) the law entitled her to sick leave and did not require that a contagious disease be present in the employee's household or that she personally have the disease; and (2) although the Board referred to the exclusion as a quarantine, because it did not actually quarantine Angus, the exclusion was for a contagious disease.

Third Circuit affirms dismissal of lawsuit seeking to enjoin COVID-19 mask mandate in schools, finding it became moot after Governor withdrew mandate

Stepien v. Governor of New Jersey, 2023 U.S. App. LEXIS 8197 (3d. Cir. Dkt. No. 21-3290)

The United States Court of Appeals for the Third Circuit, in a non-precedential decision, affirms the District Court's dismissal of plaintiffs' lawsuit (filed by New Jersey public school students, their parents, and a special education teacher) seeking to enjoin a mask mandate at schools which was imposed in New Jersey after the COVID-19 pandemic struck. The Third Circuit held: (1) the action became moot after the Governor withdrew the mandate and there was no longer a case or controversy presenting a "live dispute"; and (2) the "capable of repetition" exception to mootness did not apply because, if a mandate was reimposed at

some point in the future, that would create an altogether different controversy between the parties.

Appellate Division reverses Civil Service Commission, remands for hearing to determine whether township's decision to bypass firefighter job applicant was motivated by political retaliation

In re Salters, 2023 N.J. Super. Unpub. LEXIS 550 (App. Div. Dkt. No. A-1265-21)

The Appellate Division of the Superior Court, in an unpublished opinion, vacates and remands for further proceedings a final decision of the Civil Service Commission which denied appellant Salters' appeal of the Township of Hillside's decision not to hire him as a firefighter. The Appellate Division directed the CSC to conduct a hearing and make findings of fact on Salters' claim that he was bypassed because of political retaliation by the mayor, the person who interviewed the candidates and was responsible for making appointments. Rejecting the CSC's view that Salters presented no substantive evidence that his bypass was improper or an abuse of the appointing authority's discretion under the "Rule of Three," the appellate court found: (1) Salters made a prima facie showing of retaliation through his claim of past political conflict with the mayor, coupled with Salters's high rank on the list of eligible candidates; (2) Hillside's purportedly legitimate reasons for the bypass, that Salters lied about his residency and showed insufficient enthusiasm during the interview, were factually unsupported and questionable where Salters' employment application showed no such deception and where his interview performance was evaluated by the same person claimed to have a retaliatory motive; (3) the mayor's other unsupported allegations of Salters' criminality (not addressed by the CSC) presented a prima facie claim the mayor acted with retaliatory intent in bypassing Salters; and (4) the totality of circumstances presented "an air of pretextuality not easily disregarded," warranting a hearing.

Appellate Division affirms 15-day suspension of corrections employee for unauthorized absences

In re Abrams, 2023 N.J. Super. Unpub. LEXIS 544 (App. Div. Dkt. No. A-0327-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final administrative decision of the Civil Service Commission (CSC) denying a motion for reconsideration filed by appellant Abrams, an Operating Engineer Repairer employed by Department of Corrections (DOC) at Northern State

Prison, and affirming Abrams' 15-working-day suspension for failing to follow call-out procedures for three absences in 2017. Following a final notice of disciplinary action (FNDA) sustaining charges against Adams of chronic/excessive absenteeism/lateness, DOC terminated his employment. The CSC referred Abrams' appeal for a hearing before an Administrative Law Judge (ALJ), who reversed Abrams' removal, finding that as the FNDA failed to specify (by policy number) a violation of the call-out policy, Abrams was charged only with insufficient leave time to cover his absences. The ALJ found Abrams had sufficient compensatory time to cover them, even if not approved in advance. The CSC, disagreeing with the ALJ's reading of the FNDA and her conclusion that Abrams was not charged with violating the call-out policy, rejected the ALJ's recommendation and imposed a 15-working-day suspension. In affirming, the Appellate Division found: (1) The FNDA's statement that Abrams "violated the Sick Call Policy" provided sufficient notice that the policy was at issue in the disciplinary action; (2) because the ALJ made no credibility findings, the CSC could reject or modify her findings of fact, as the CSC's decision to do so was supported by sufficient credible evidence on the record and its reasons for the change were specifically explained; and (3) Abrams was thus unable to demonstrate the CSC's decision was arbitrary, capricious, unreasonable, or lacked fair support in the record.