



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

PO Box 429
TRENTON, NEW JERSEY 08625-0429

www.state.nj.us/perc

ADMINISTRATION/LEGAL
(609) 292-9830
CONCILIATION/ARBITRATION
(609) 292-9898
UNFAIR PRACTICE/REPRESENTATION
(609) 292-6780

For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089
EMAIL: mail@perc.state.nj.us

DATE: May 17, 2023
TO: Commissioners
FROM: Counsel Staff
RE: Developments in Counsel's Office since April 27, 2023

Commission Cases

Appeals from Commission Decisions

No new appeals were filed since April 27.

The Appellate Division issued an order dismissing the appeal of Old Tappan Borough from the Commission's decision, P.E.R.C. No. 2023-22, 49 NJPER 304 (¶72 2022), which found the Borough violated the Act by refusing to implement an interest arbitration award. The court dismissed the Borough's appeal based on its failure to file a timely brief.

Commission Court Decisions

No new Commission court decisions were issued since April 27.

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

Appellate Division reverses order compelling city to disclose police records under OPRA where county had taken over city's

policing services under shared services agreement

Owoh v. City of Camden, 2023 N.J. Super. Unpub. LEXIS 597 (App. Div. Dkt. No. A-1210-21)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses a Government Record Council (GRC) order compelling the City of Camden, pursuant to the New Jersey Open Public Records Act (OPRA) and the common law right of access, to produce Camden County Police records requested by Rotimi Owoh on behalf of the African American Data and Research Institute. In reversing, the court agreed with the City's argument that Owoh did not serve the requests on the proper party because the County of Camden had taken over policing services from the City in 2013 under a shared services agreement. Under such facts, the court held: (1) the custodian of record for the City did not unlawfully deny access to records which were made and maintained by the County; and (2) once the City custodian received the request which was properly meant for the County, the custodian complied with OPRA by directing the requestor to the County.

Appellate Division reverses, vacates trial court's OPRA order, finding it should not have ruled on merits where complaint challenging denial of OPRA request was procedurally deficient

African Am. Data & Research Inst. (AADARI) v. Hitchner, 2023 N.J. Super. Unpub. LEXIS 599 (App. Div. Dkt. No. A-1592-20)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses and vacates a trial court's order denying defendants Hitchner, the City of Millville, and the City of Millville Police Department's motion to dismiss an Order to Show Cause (OTSC) and "unverified" complaint against defendants alleging their denial of document requests filed by plaintiff African American Data and Research Institute (AADARI) violated the Open Public Records Act (OPRA) and the common law, and requiring defendants to provide AADARI with certain requested internal affairs records. On appeal, defendants contended the trial court erred in denying their motion for involuntary dismissal based on AADARI's unverified complaint and lack of proofs submitted at the OTSC hearing. The Appellate Division agreed, finding the lack of a verified pleading and supporting affidavit was a fatal procedural deficiency, and holding: (1) an OPRA complaint must comply with Court Rule 4:67-2(a) which requires the filing of an OTSC and verified complaint in a summary action and specifically requires that the complaint be verified by affidavit made on personal knowledge; (2) AADARI's failure to file and serve on defendants a verified complaint

rendered its OPRA complaint a “nullity” that was “insufficient” to invoke the trial court’s subject matter jurisdiction; (3) in the absence of affidavits supporting a verified complaint, the trial judge had only counsels’ representations, which cannot—and do not—provide support of factual allegations; (4) the procedural aspects of the Rules governing OPRA summary actions are critical and may not be bypassed by plaintiffs, and the trial judge should have determined procedural compliance as a prerequisite to consideration of the merits of the records request; and (5) because defendants raised the issue of the sufficiency of the unverified complaint, the trial judge should not have concluded defendants waived the defense of lack of subject matter jurisdiction.

Third Circuit enforces NLRB order compelling non-profit healthcare network to disclose to nurses union certain information regarding sale of assets to for-profit corporation, as being relevant to collective bargaining

Crozer Chester Med. Ctr. v. NLRB, 2023 U.S. App. LEXIS 9393 (3d. Cir. Dkt. Nos. 22-2608, 22-2778)

The United States Court of Appeals for the Third Circuit, in a non-precedential decision, denies a petition for review filed by Crozer-Chester Medical Center and Delaware County Memorial Hospital (Petitioners), and grants a cross-application filed by the National Labor Relations Board (NLRB) for enforcement of the NLRB’s order (on remand from the Third Circuit’s review of a prior related order) requiring Crozer-Keystone Health System (Crozer) to provide to the Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP) certain specific documents relating to the purchase of Crozer’s assets by Prospect Medical Holdings, Inc., a for-profit corporation. Petitioners are divisions of Crozer, while PASNAP was one of five unions representing Crozer’s employees while Crozer was a non-profit healthcare network. Crozer informed its employees by letter in January 2016 that it was selling its assets to Prospect, that unionized employees would be offered employment subject to initial terms set by Prospect, that certain services would stay in place or be expanded, and that Prospect would assume Crozer’s pension liability. When Crozer denied PASNAP’s request for a copy of the complete Asset Purchase Agreement between Crozer and Prospect, PASNAP filed an unfair labor practice charge claiming the denial violated the National Labor Relations Act, and asserting the Agreement contained information relevant to collective bargaining including the effect of the sale on the terms and conditions of union members’ employment. An Administrative Law Judge initially ordered Crozer to produce the entire Agreement and all attachments. On review of that order, requested by Crozer, the Third Circuit held Crozer must produce only the relevant parts, and remanded to the NLRB to determine

which attachments were relevant. On remand, an NLRB panel ordered Crozer to produce 21 attachments, including 11 that were presumptively relevant because they appeared to relate to unit employees' wages, conditions of employment, benefits, and potential layoffs, and 10 more as to which PASNAP established relevancy. Crozer again petitioned for review, the NLRB cross-applied for enforcement, and PASNAP intervened. The Third Circuit held, among other things, that substantial evidence supported the NLRB's conclusions that: (1) certain attachments were presumptively relevant because there was a probability that they contained information related to wages, benefits, potential layoffs, or permanent department closures, and that Crozer failed to rebut this presumption; (2) PASNAP established the relevance of 11 other attachments, including those relating to (a) the real-property interests of Crozer as there was a probability such information would clarify any expansion of healthcare services, which is relevant to PASNAP's bargaining as to the effect of the sale on the work sites of members, (b) litigation or other claims and complaints, as these would be relevant to PASNAP's role as the employees' representative in such disputes, and (c) certain grants, because Prospect is a for-profit entity, and there is a probability that such information could affect the funding of projects or employees that require nonprofit status, and thus impact collective bargaining efforts.

Appellate Division upholds summary dismissal of judiciary employee's NJLAD claims of disability discrimination, retaliation following disciplinary termination

Onukogu v. New Jersey State Judiciary Essex Vicinage, 2023 N.J. Super. Unpub. LEXIS 654 (App. Div. Dkt. No. A-3536-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms trial court orders granting summary judgment to defendants New Jersey State Judiciary, Essex Vicinage, et al (Judiciary), on Mr. Onukogu's complaint alleging he suffered disability discrimination and retaliation in violation of the New Jersey Law Against Discrimination (LAD) while employed as a Financial Specialist by the Judiciary. Onukogu filed his complaint after the Judiciary terminated his employment in 2017 on disciplinary charges stemming from his unauthorized use, in his personal divorce case, of printouts from the Judiciary's Family Automated Case Tracking System (FACTS), and his admitted refusal to identify the Judiciary employee who provided him the FACTS printouts. A final notice of disciplinary action (FNDA) cited the FACTS incident and Onukogu's prior disciplinary history, including a 2015 last-chance agreement (by which Onukogu waived LAD claims accruing after December 21, 2015 in resolving

prior major disciplinary charges of job abandonment due to an alleged temporary disability), as grounds for termination. Onukogu's subsequent court complaint alleged the Judiciary in 2015 violated the LAD by refusing to extend his medical leave despite a doctor's note, by issuing a preliminary notice of disciplinary action (PNDA) disciplining him for failing to return to work, and by thereafter subjecting him to alleged retaliation and a hostile environment, up to and including his 2017 termination for the FACTS incident. The Appellate Division held, among other things: (1) the claims regarding the Judiciary's denial of Onukogu's request for a medical leave extension and its issuance of the 2015 PNDA are barred by the 2015 settlement by which Onukogu expressly waived and released all LAD claims related to those matters; (2) Onukogu failed to sustain his burden of presenting evidence it was more likely than not that the alleged conduct resulting in the purported hostile environment would not have occurred but for his 2015 temporary disability or in retaliation for his request for temporary disability leave; (3) the motion record lacked competent evidence that the alleged conduct was severe or pervasive enough to make a reasonable employee believe the conditions of employment are altered and the working environment is hostile; and (4) the investigation of the FACTS printouts incident, and the resulting termination, could not support a hostile environment claim, as it was prompted by a report from an individual in another vicinage with no apparent knowledge of Onukogu's 2015 temporary medical leave claims and issues, and the decision to terminate was based solely on Onukogu's undisputed refusal to respond to requests for the identity of the Judiciary employee who supplied the FACTS printouts.

Appellate Division upholds Civil Service Commission's termination of corrections officer's employment for racist social media posts

In re Pearson, 2023 N.J. Super. Unpub. LEXIS 701 (App. Div. Dkt. No. A-0494-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the Civil Service Commission (CSC) removing him as a senior corrections police officer with the New Jersey Department of Corrections (DOC). While employed at South Woods State Prison, and less than one month after the murder of George Floyd, Pearson while off duty publicly posted on Facebook a picture of an African American man standing on the gallows, surrounded by Caucasian males and a crowd of onlookers, and added the written comment "[w]e need to bring this back." A civilian complaint about the Facebook posts prompted an investigation, preliminary charges, a departmental

hearing, and a Final Notice of Disciplinary Action, removing Pearson on charges of conduct unbecoming an employee; other sufficient cause; and violation of DOC policy prohibiting discrimination, harassment or hostile environments in the workplace. Pearson appealed, and an administrative law judge (ALJ) sustained all of the charges but modified the penalty to a 180-day suspension without pay, and directed that Pearson complete mandatory diversity and tolerance training and undergo a fitness for duty examination before reinstatement. The CSC upheld the ALJ's decision sustaining the charges, but determined removal was appropriate given the egregious nature of Pearson's conduct. In affirming, the Appellate Division held, among other things: (1) where a CSC regulation provided for employee discipline including for off-duty behavior or speech, the removal decision involved the agency's understanding of the nature of Pearson's position as a corrections officer and the public perception that he may harbor racist beliefs, and thus fell well within its expertise and superior knowledge in this field; (2) Pearson did not provide any law to support that an employer must provide training on social media for personal use, which was not an essential function of his job; and Pearson was capable of distinguishing between public and private settings on his Facebook account; (3) the CSC appropriately determined progressive discipline need not be employed since Pearson's inappropriate and racial content was egregious and unbecoming to his position as a senior corrections officer; and (4) the penalty of removal was not disproportionate to the charges, considering Pearson's position, the high standard of conduct expected of law enforcement officers, his prior disciplinary record, and the seriousness of the departmental charges.

Appellate Division affirms dismissal of instructor's civil rights claims against college following her removal for use of foul language in class and unauthorized cancellation of class

Tawwater v. Rowan College at Gloucester County, 2023 N.J. Super. Unpub. LEXIS 700 (App. Div. Dkt. No. A-0895-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a Law Division order denying Ms. Tawwater's requests to reinstate her claims against Rowan College under the New Jersey Civil Rights Act (NJ CRA) for partial summary judgment on her NJ CRA claims, and to return the case to the active trial list. The order was entered following resolution of Tawwater's contract-based claims in binding arbitration over the termination of her probationary employment at Rowan as a sociology instructor, upon her refusal to sign a last-chance-agreement as an alternative to discharge for her use of foul language in class

and her unauthorized cancellation of a class. The arbitrator found Tawwater's termination was not arbitrary or capricious, but Rowan breached the covenant of good faith and fair dealing by failing to comply with its own policies and procedures for termination. As a remedy, the arbitrator awarded Tawwater full salary payment for the first semester of the year she was terminated, including all emoluments under the collective bargaining agreement. Tawwater's subsequent NJCRA claims against Rowan were based on: an asserted violation of her rights under the Open Public Meetings Act (OPMA) because she was not given a Rice notice of the termination decision; an asserted property right in continued employment at Rowan; asserted violations of her First Amendment free speech rights; and an asserted violation of her academic freedom. In affirming, the Appellate Division noted the NJCRA provides a cause of action to any person who has been deprived of any rights under either the Federal or State constitutions by a person acting under color of law, but it is not a source of rights itself. The Appellate Division held: (1) Tawwater had no basis for recovery under the OPMA, which is remedial in nature but provides for limited remedies inconsistent with those available under the NJCRA, and OPMA does not create a private cause of action under the NJCRA; (2) as Tawwater failed to assert facts to establish Rowan promised her unconditional employment, and she was subject to a ninety-day probationary period during which she was an at-will employee, the trial court did not err in denying her motion to reinstate her property right claim; (3) as the speech at issue was spoken by Tawwater in her capacity as a sociology instructor employed by Rowan, and not as a citizen, Tawwater failed to show Rowan violated her First Amendment rights and failed to raise a genuine issue of material fact as to this claim; and (4) as Rowan was permitted to restrict Tawwater's speech and activities to achieve its educational goals, the trial court did not err in denying Tawwater's request to reinstate her academic freedom claim.

Appellate Division affirms 5-day suspension of Motor Vehicle Commission employee on charges of conduct unbecoming, workplace violence, and failure to follow MVC policies and procedures

In re Otterbine, 2023 N.J. Super. Unpub. LEXIS 711 (App. Div. Dkt. No. A-3772-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the Civil Service Commission (CSC) imposing a five-day unpaid disciplinary suspension on Mr. Otterbine, an investigator employed by the New Jersey Motor Vehicle Commission (MVC), on charges of conduct unbecoming a public employee, workplace violence, and failure to

follow MVC policies and procedures. At a departmental hearing on the charges, Otterbine was found to have entered an MVC facility without identification by pushing past a security officer while refusing repeated commands to stop and present identification; and that Otterbine never presented his identification at work that day. The CSC adopted the hearing officer's decision as final, noting Otterbine elected to present no evidence. On appeal, Otterbine argued he was denied due process because: the security officer did not testify in person; the MVC's investigator improperly narrated the surveillance video at the hearing; and there was insufficient evidence to establish two of the three disciplinary charges against him. In affirming, the Appellate Division found: (1) the admitted hearsay evidence as well as the five-day suspension was supported by a residuum of legal and competent evidence in the record, including a detailed and comprehensive investigative report, testimony of three eyewitnesses, and four surveillance videos, each showing different angles of the incident; and (2) the CSC's final decision was not arbitrary, capricious, or unreasonable.