



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

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DATE: June 21, 2023

TO: Commissioners

FROM: Counsel Staff

RE: Developments in Counsel's Office since May 25, 2023

Commission Cases

Appeals from Commission Decisions

Union County College filed an appeal in the matter of Union County College and Union County College Chapter of the American Association of University Professors (AAUP), Docket No. SN-2023-002. The subject of the appeal is an arbitration award that sustained a grievance challenging the assignment of a tenured math professor to the College's tutoring center. That award is the status-quo result of the Commission's April 27, 2023 meeting at which, due to an unbreakable tie vote, the Commission was unable to act on the College's scope petition (on remand from the Appellate Division) seeking an order overturning the award.

The Appellate Division issued an order dismissing the Borough of Bergenfield's appeal of a Commission decision, Borough of Bergenfield and PBA Local 309, P.E.R.C. No. 2023-1, 49 NJPER 98 (¶21 2022), which vacated a previously-remanded interest arbitration award and remanded it to another arbitrator. The dismissal was based on the Borough's failure to seek the court's leave to appeal the Commission's interlocutory decision. The

court further ordered that the Borough may file a motion for leave to appeal within twenty (20) days.

Commission Court Decisions

No new Commission court decisions were issued since May 25.

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

New Jersey Supreme Court holds teacher's voluntary transfer to temporary part-time position was not a waiver of tenure rights

Parsells v. Somerville Board of Education, 2023 N.J. LEXIS 642 (Dkt. No. A-21-22)

The Supreme Court affirms the Appellate Division's opinion finding that a tenured teacher only waives tenure rights when their actions demonstrate the waiver was clear, unequivocal and decisive, but modified the opinion by declining to require notice of a waiver of rights when a teacher transfers to a part-time position.

Parsells, a tenured teacher, expressed interest in a temporary part-time position created by the Board. She voluntarily transferred to that position and after working for a time, took a leave of absence for maternity leave. Seeking to return, Parsells applied for a full-time position, but was not selected in favor of a non-tenured teacher. She then filed a petition with the Commissioner of Education, alleging violation of the Tenure Act.

The Commissioner found that the circumstances surrounding Parsells' voluntary transfer did not show that Parsells had knowingly and voluntarily waived her right to a full-time position and required going forward that Boards of Education notify employees that switching from a full-time position to a part-time position would constitute a waiver of tenure rights.

The Supreme Court agreed with respect to the waiver issue, but modified the order, declining to extend a notice requirement that a transfer to part time would waive tenure rights because the specific portion of the Tenure Act at issue does not impose such a duty.

Appellate Division finds Plaintiff failed to allege disability discrimination due to perceived COVID-19 infection

Uriel Guzman v. M. Teixeira International Inc. and Rogerio Teixeira, 2023 N.J. Super. LEXIS 61 (App. Div. Dkt. No. A-0841-21)

The Appellate Division of the Superior Court, in a published decision, affirmed the Law Division's dismissal of an employee's complaint alleging violation of the NJ LAD, finding that Plaintiff failed to allege a prima facie case that the employer perceived he had a disability. The complaint alleged that Plaintiff Guzman was dismissed from employment because his employer believed he had contracted COVID-19. Noting that not every person who contracts COVID-19 will meet the definition of "disabled" under the law, the Appellate Division found that even if Plaintiff had contracted COVID-19, Plaintiff failed to plead an adequate factual basis supporting a finding that the employer perceived him to have been infected with the coronavirus.

Appellate Division upholds removal of parole officer following domestic violence restraining order

In the Matter of Carlos Pimentel, State Parole Board, 2023 N.J. Super. Unpub. LEXIS 782 (App. Div. Dkt. No. A-3107-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the decision of the Civil Service Commission (CSC) which upheld the removal of Carlos Pimentel from his position as a Senior Parole Officer with the New Jersey State Parole Board. Officer Pimento was removed because he was the subject of a Domestic Violence Final Restraining Order (FRO) and prohibited by law from possessing a firearm, including the state-issued firearm that was required while on-duty by Pimento's employer.

The Appellate Division held that because Officer Pimentel was solely responsible for his inability to perform his job duties based on his own misconduct resulting in the issuance of an FRO, the CSC had not abused its discretion in failing to reinstate him. The decision of the CSC was bolstered by an ALJ's decision to delay proceedings so Pimentel had the opportunity to seek rescission or modification of the FRO.

Appellate Division upholds the removal of former police officer from re-employment eligibility list following the Prosecutor's Brady-Giglio Review

In the Matter of E.A. v. Township of Lacey, et al., 2023 N.J. Super. Unpub. LEXIS 851 (App. Div. Dkt. Nos. A-0188-21 and A-1590-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the decision of the Civil Service Commission (CSC) which upheld the removal of E.A. from a police officer re-employment eligibility list. E.A. was previously employed by the Township, but was discharged following a judicial determination found E.A. had engaged in domestic violence, provided false testimony in that proceeding, and imposed a final restraining order. E.A. and the Township reached a settlement that required the Township to place E.A. on a re-employment eligibility list if the FRO was rescinded.

Once placed on the list, the Township consulted the County Prosecutor as part of an updated background check. The Prosecutor recommended E.A. not be rehired because the misconduct and his lack of credibility during the FRO proceeding would undermine every criminal case in which he would be required to testify since the information from the FRO hearing was discoverable Giglio impeachment evidence. As a result, E.A. was removed from the re-employment list. E.A. appealed the removal to the CSC, which upheld the removal.

The Appellate Division found that E.A.'s placement on the re-employment eligibility list entitled him to nothing more than "a right to be considered for appointment" and was otherwise supported by substantial evidence, affirming the CSC.

United States Supreme Court finds Union's intentional destruction of Company property not arguably protected by NLRA

Glacier Northwest, Inc., dba Calportland v. International Brotherhood of Teamsters Local Union No. 174, 539 U.S. ____ (2023).

The United States Supreme Court, on writ of certiorari from the Washington Supreme Court, determined that the National Labor Relations Act (NLRA), which provides a right to strike for private sector employees, did not arguably protect the actions of Teamsters Local Union No. 174 in its labor dispute with ready-mix concrete producer Glacier Northwest.

Glacier filed a complaint in state court, alleging that the Union had purposely called a strike at a time that would result in the destruction Company property. Since the strike was called immediately after employees filled trucks with wet concrete, Glacier had to waste the concrete and sought damages from the Union.

The Supreme Court held that the NLRA does not arguably protect the alleged conduct of the Union because the danger to the Company's property was foreseeable, imminent, and the Union failed to take reasonable precaution to protect against damage. The Court notes that the allegations in this case involve much more than a strike causing an employer's perishable product to spoil, writing that by reporting for duty, the employees prompted the creation of the product and then abandoned it as opposed to beginning the strike before the workday began or after finishing their deliveries. Because of this, the state court action was not preempted and could proceed.

Third Circuit finds District Court applied wrong standard in determining whether speech of off-duty police officers was protected by First Amendment

Christian Fenico, et al., v. City of Philadelphia, 2023 U.S. App. LEXIS 14305, ___ F.4th ___, (3d. Cir. Dkt. No. 22-1326)

The Third Circuit Court of Appeals, in a precedential opinion, reverses and remands for further proceedings the Eastern District of Pennsylvania's dismissal of a complaint filed by twelve Philadelphia police officers alleging retaliation by the City of Philadelphia for exercise of their First Amendment rights.

In 2019, the Police Department conducted a widespread investigation of violations of its social media policy by employees, triggered by the public disclosure of Facebook posts that "openly denigrate[d] various minority groups and glorif[ied] the use of violence." As a result of that investigation and in reliance on the content of the Facebook posts, the Plaintiffs in this action were disciplined, with some being dismissed from employment.

The District Court dismissed the complaint, after assuming that each and every post was made by a private citizen on a matter of public concern for the purposes of the City's motion to dismiss, bypassing an individualized approach that balances the rights of the speaker with the interest of the public employer. The Third Circuit reversed, stating that it was improper to make such an

assumption when considering whether speech was protected by the First Amendment. Instead, the District Court was ordered to examine the statements again, performing a post-by-post analysis to determine whether speech was protected because the inquiry “involves a sliding scale in which the amount of disruption a public employer has to tolerate is directly proportional to the importance of the disputed speech to the public.”

Third Circuit finds Federal Bureau of Prisons did not allow hostile work environment where it took immediate action against perpetrator of gender-based discrimination

Jennifer Stein v. Attorney General United States of America, 2023 U.S. App. LEXIS 14753 (3d. Cir. Dkt. No. 22-2862)

The Third Circuit Court of Appeals, in a non-precedential decision, affirmed the Middle District of Pennsylvania’s order granting summary judgment in favor of the Federal Bureau of Prisons (BOP) after Plaintiff alleged she was subject to a hostile work environment in violation of Title VII of the Civil Rights Act.

Plaintiff, a correctional officer, ended a personal relationship with a coworker, Jory Eisenmann. Unable to regulate his behavior, Eisenmann had an outburst in the workplace where he threatened Plaintiff. Plaintiff reported the incident and BOP separated the two employees, changing the work location and hours of Eisenmann so the two would no longer interact. Two years later, Eisenmann had several interactions with Stein at work, including staring, verbal comments and email correspondence. These interactions prompted her to file a complaint alleging a hostile work environment based on her sex.

The Third Circuit affirmed the grant of summary judgment because it found that the subsequent actions by Eisenmann did not amount to sex discrimination and since Eisenmann was a coworker, and not a supervisor, and BOP took immediate action after the 2017 incident that prevented further sex discrimination, BOP was not liable under Title VII.