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DATE: August 16, 2023

TO: Commissioners

FROM: Counsel Staff

RE: Developments in Counsel's Office since June 29, 2023

Commission Cases

Appeals from Commission Decisions

The County of Essex filed, and the Appellate Division granted, a motion for leave to appeal the Commission's decision, P.E.R.C. No. 2023-60, 50 NJPER 43 (¶15 2023), which denied the County's exceptions and partially granted a union's exceptions on a Hearing Examiner's decision on consolidated unfair practice charges filed by County police and fire unions alleging the County violated the Act when it unilaterally changed health insurance carriers and thereby decreased the level of contractual health benefits. Two of the four consolidated charges were sent back to the Hearing Examiner for a hearing to resolve disputed material facts.

Commission Court Decisions

The Appellate Division of the Superior Court, in an unpublished decision, In re Lakewood Twp. Bd. of Educ., 2023 N.J. Super. Unpub. LEXIS 1325 (Dkt. No. A-2340-21) (attached), dismissed, as moot, the Lakewood Education Association's appeal from the

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status-quo result of the Commission's unbreakable tie vote on the Association's contested transfer petition (P.E.R.C. No. 2022-33). The Association alleged the Lakewood Township Board of Education transferred an administrative secretary between work sites for predominately disciplinary reasons. Due to the tie vote, the status quo of the parties was that the transfer decision remained in place. The court found the appeal moot because the Board had returned the employee to her former workaday. Despite not ruling on the merits of the appeal, the Appellate Division characterized the Commission's application of its unbreakable tie-vote protocol in this case as an unjustifiable failure to follow "PERC's own regulations for contested transfer determinations."

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

OPRA Cases

New Jersey Supreme Court holds there is no fee-shifting on common law right of access claims to public records

Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 2023 N.J. LEXIS 650, 254 N.J. 242 (Dkt No. A-63-21)

The Supreme Court of New Jersey finds the fee-shifting provision of the Open Public Records Act (OPRA) does not support an attorney's fee award to plaintiff Gannett Satellite Information Network, LLC (Gannett), the prevailing party in a common law right of access claim to internal affairs files pertaining to a former Neptune Township police officer. The Court further finds such an award does not fall within any other exception to the "American Rule" that litigants must bear the cost of their own attorneys' fees.

Appellate Division affirms school security camera footage of assault incident was not protected from public disclosure under OPRA's "security exception"

Zeza v. Evesham Twp. Bd. of Educ., 2023 N.J. Super. Unpub. LEXIS 1095 (App. Div. Dkt. No. A-0537-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court's ruling that plaintiff Zeza had the right, under both the Open Public Records Act (OPRA) and the common law right of access, to the disclosure of certain security camera video footage taken on the premises of an elementary school in Evesham Township. The requested footage was of a disorderly-persons assault on Zeza that occurred when she attended her grandson's baseball game at the school. The

Defendant, Evesham Township Board of Education, denied the request based on the security exception to OPRA established in N.J.S.A. 47:1A-1.1. The Appellate Division concluded the trial judge did not err in her finding that, in this case, defendant simply failed to satisfy its burden, under the security exception, to demonstrate that the footage would reveal "security compromising information", and that defendant failed to support its arguments with any certifications attesting to actual security concerns related to the release of the video. Further, the judge found that using the OPRA security exception to prevent evidence of criminal activity from reaching the courtroom would be an absurd result.

Appellate Division finds plaintiffs were not prevailing parties in OPRA litigation against school district that released requested documents "when circumstances permitted," as allowed by COVID-era emergency rule

C.E. & B. v. Elizabeth Pub. Sch. Dist., 2023 N.J. Super. Unpub. LEXIS 1206 (App. Div. Dkt. No. A-3016-20)

The Appellate Division of the Superior Court, in an unpublished opinion, found the plaintiffs were not entitled to attorney's fees in their Open Public Records Act (OPRA) litigation against the Elizabeth Public School District, because: (1) plaintiffs were unsuccessful on the merits at both underlying trial court hearings; (2) the District released the requested documents (financial records of prior OPRA litigation between the parties) unilaterally after the trial court denied plaintiffs' second order to show cause; and (3) there was no settlement. The Appellate Division also found the District's response was more than reasonable given the state of the COVID-19 pandemic when Plaintiffs made their OPRA request, and the COVID-era rule allowing public agencies to respond to a request for governmental records during an emergency "when circumstances permitted".

Employee Discipline/Removal Cases

Appellate Division affirms building inspector's license revocation for code violations, misconduct and gross negligence in the performance of his duties

Izzo v. Office of Regulatory Affairs, 2023 N.J. Super. Unpub. LEXIS 996 (App. Div. Dkt. No. A-0462-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms substantially for the reasons stated in the Department of Community Affairs' (DCA's) final agency decision and the initial decision rendered by an administrative law judge (ALJ), the DCA's decision to revoke Mr. Izzo's licenses as a

building inspector for violating the Uniform Commercial Code (UCC), and for gross negligence or misconduct in the performance of his duties by pre-signing and pre-dating electrical inspection approval stickers without performing the inspections himself. The Appellate Division: (1) affirmed the ALJ's credibility findings with regard to evidence that after the DCA's investigation commenced, Izzo asked a witness to sign a false statement regarding Izzo's role in the inspections; and (2) found the agency did not act arbitrarily or capriciously in concluding that Izzo's conduct violated the UCC, despite that the UCC did not expressly forbid such conduct.

Appellate Division finds campus police officer, unlike municipal officers, may not seek judicial review of his termination, but remands for trial court to consider his *Loudermill* claim

Kim v. N.J. Inst. of Tech., 2023 N.J. Super. Unpub. LEXIS 1010 (App. Div. Dkt. No. A-1055-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms in part and vacates in part the dismissal of the appeal of plaintiff Kim from the disciplinary termination of his employment as a police officer at the New Jersey Institute of Technology (NJIT), and remands for further proceedings on Kim's Loudermill claim that he was not provided with a statement of the evidence against him, which the Appellate Division found the trial court did not address. The Appellate Division otherwise affirmed the trial court's ruling that because Kim was not a municipal police officer, judicial review of his termination under N.J.S.A. 40A:14-150 was unavailable to him. The court noted that Kim did not seek special disciplinary arbitration of his termination before PERC under N.J.S.A. 40A:14-209 and -210, although it was available to him pursuant to the Matter of DiGuglielmo, 252 N.J. 350.

Appellate Division dismisses school official's appeal from School Ethics Act sanction for lack of jurisdiction

In re Brogan, 2023 N.J. Super. Unpub. LEXIS 1012 (App. Div. Dkt. No. A-1959-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the dismissal of the appeal of Ms. Brogan, a Ridgewood school official, from a final decision by the School Ethics Commission, which censured her for violating the conflict of interest provisions of the School Ethics Act. Because Brogan sought direct Appellate review of the decision while she still

had a right of appeal with the Commissioner of Education, the Appellate Division found it had no jurisdiction and was constrained to dismiss the appeal.

Appellate Division affirms dismissal of borough zoning officer's CEPA claims, finding the issuance of zoning-violation summonses against borough officials was not whistleblowing activity

Drossel v. Mayor of Franklin, 2023 N.J. Super. Unpub. LEXIS 1017 (App. Div. Dkt. No. A-1699-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court's grant of summary judgment to the Borough of Franklin defendants on plaintiff Drossel's claim that defendants terminated his employment as the Borough's zoning officer in violation of the Conscientious Employee Protection Act (CEPA), finding Drossel had not engaged in a whistle-blowing activity that is protected by CEPA. The Appellate Division agreed with the trial court that zoning-violations summonses issued by Drossel against certain Borough officials concerning their private businesses or residences "had nothing to do with anything the Borough had done or with their roles as council members and mayor," and that the summonses "were not based on any Borough-related 'workplace' activity by" those officials, within the meaning of CEPA.

Appellate Division affirms termination of bridge operator's employment due to job abandonment

In re Velazquez, 2023 N.J. Super. Unpub. LEXIS 1051 (App. Div. Dkt. No. A-2530-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a Civil Service Commission (CSC) final agency decision upholding the New Jersey Department of Transportation's (NJDOT) termination of Mr. Velazquez's employment as a bridge operator due to job abandonment upon his failure to return to work after the final disposition of criminal charges against him. The Appellate Division found the CSC correctly determined he resigned not in good standing based upon the following substantial credible evidence in the record: (1) Velazquez knew he was eligible to return to work following the dismissal of the criminal charges; (2) he learned of the dismissal of the charges many months prior to the NJDOT's issuance of the relevant notice of disciplinary action; and (3) he failed to return to work within five days of being eligible to do so.

Appellate Division upholds corrections officer's termination for offensive social media posts

In re Farley, 2023 N.J. Super. Unpub. LEXIS 1098 (App. Div. Dkt. No. A-0656-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the Civil Service Commission (CSC) upholding appellant Farley's removal from his position as a correctional police lieutenant with the New Jersey Department of Corrections (DOC), based upon an administrative law judge's determination that Farley's conduct involving the use of technology, the internet, and social media was egregious, demonstrated poor judgment and character, and was incompatible with his duties as a corrections lieutenant and undermined the public's confidence and faith in the DOC. The removal resulted from an investigation into the following publicly-accessible statement made by Farley on his Facebook page in response to a citizen's comment favorable to President Biden: ". . . hey stupid, shut the fuck up and go kill yourself you ignorant sack of shit. You support a traitor and a coward and then invoke Jesus's name[]. Fuck you! Oh, by the way, I am a [p]olice [s]upervisor and I don't want scum like you backing me." In affirming, the Appellate Division found: (1) the penalty of removal was warranted and not so disproportionate to the offense as to be shocking to one's sense of fairness; (2) considering Farley's significant disciplinary history, the CSC did not fail to adhere to the principles of progressive discipline in upholding his removal; and (3) the decision of the CSC was not arbitrary, capricious, or unreasonable.

Appellate Division reverses trial court's reinstatement of sewerage authority commissioner after removal for offensive Facebook message, remands to address merits and legal issues

Maloney v. Borough of Carlstadt, 2023 N.J. Super. Unpub. LEXIS 1146 (App. Div. Dkt. No. A-0190-21)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses and remands a Law Division order that granted plaintiff Maloney's summary judgment motion and reinstated him to his position as a commissioner with the Carlstadt Sewerage Authority following his removal for posting an explicit message in a Facebook messenger group that included other borough officials. Maloney's message consisted of "a recording of a naked male defecating in the mouth and onto the face of a topless female, who appears on her knees in a bathroom." The video was accompanied by text, which read, "Shit Happens, Thug Life, Dug Life, and Bitch." Plaintiff sent the video along with the

message, "Don't say nothing. Keep it going lmao!" followed by several emojis. A hearing officer found Maloney's behavior constituted misconduct and neglect of duty, warranting removal, but referred his decision to the governing body as required by both a Borough ordinance and N.J.S.A. 40:14A-5©, which governs statutory appointments such as Maloney's. The Mayor and Borough Council then passed a resolution removing Maloney. The trial court found the hearing officer's determination was contrary to law because, since Maloney was a statutory commissioner, the Borough ordinance did not apply to him. The Appellate Division found the judge was correct that Maloney's removal was governed by the statute, and not the ordinance, but he erred in concluding the hearing officer's determination was predicated solely on the municipal ordinance. Because of this error, the Appellate Division: (1) found the judge did not address the merits and resolve the substantive legal issue of whether an appointed public official's private conduct can constitute misconduct in office under N.J.S.A. 40:14A-5©; and (2) reversed and remanded for the judge to address the dispositive legal issue on the merits.

Appellate Division upholds forfeiture of deferred retirement rights based on corrections officer's removal for misconduct

Smith v. Bd. of Trs., 2023 N.J. Super. Unpub. LEXIS 1198 (App. Div. Dkt. No. A-0611-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the Board of Trustees, Police and Firemen's Retirement System, which adopted an administrative law judge's (ALJ's) summary decision that appellant Smith is ineligible for deferred retirement benefits under N.J.S.A. 43:16A-11.2, because of Smith's removal from his position as a senior corrections officer in 2010 for misconduct. The removal decision was appealed and was upheld by the Appellate Division. On Smith's appeal from the denial of deferred retirement benefits, the ALJ found that because Smith did not dispute he was removed "for cause on charges of misconduct" in 2010, Smith's right to deferred retirement benefits was automatically forfeited under the express language of N.J.S.A. 43:16A-11.2 (which permits deferred retirements only when the applicant's separation from service is "not by removal for cause on charges of misconduct or delinquency"). In affirming, the Appellate Division held: (1) the statute under which Smith applied for deferred retirement benefits expressly disallows a claim for deferred retirement to members fired for misconduct – as Smith was here; and (2) Smith is not entitled to relitigate the finding of egregious misconduct, which resulted in his removal more than ten years ago.

Appellate Division affirms teacher was collaterally estopped from relitigating tenure charges in appeal from subsequent revocation of teaching certificates

In re Certificates of Lesley Etheridge, 2023 N.J. Super. Unpub. LEXIS 1195 (App. Div. Dkt. No. A-1068-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a New Jersey Commissioner of Education final agency decision affirming an administrative law judge's (ALJ's) determination that appellant Etheridge is collaterally estopped by a tenure arbitrator's award from challenging the subsequent revocation of her teaching certificates. On tenure charges brought against Etheridge by the Passaic County Vocational School District, the arbitrator sustained one charge of inefficiency in the performance of her teaching responsibilities, and twenty-one charges of conduct unbecoming a teacher. In affirming the subsequent decision to revoke her teaching certificates, the Appellate Division: (1) found no error in the ALJ's application of the doctrine of collateral estoppel to preclude Etheridge from relitigating the identical unbecoming conduct charges that were fully litigated before the arbitrator during the tenure proceedings; and (2) found her remaining arguments to be without sufficient merit to warrant discussion.

Appellate Division upholds county's removal of human services specialist for misuse of State's paternity/child-support database

In re Sales, 2023 N.J. Super. Unpub. LEXIS 1193 (App. Div. Dkt. No. A-2838-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the Civil Service Commission (CSC) upholding Ms. Sales's termination from the position of Human Services Specialist II (HSS) with the Union County Department of Human Services (County). A State investigation concluded that Sales misused NJKIDS, a database that serves as the official case record for all State programs that rely on paternity and child support information, by falsifying information in the system. The State found this constituted a breach of the system, and permanently terminated Sales's access to it. An administrative law judge (ALJ) subsequently found that access to NJKIDS is an essential function of Sales's position, and termination her employment was warranted because she could not perform it. In affirming, the Appellate Division found the CSC did not act in an arbitrary, capricious or unreasonable manner when it adopted the ALJ's decision, based upon: (1) ample support in the record for the ALJ's finding that

Sales is unable to perform an essential duty of her position; and (2) sufficient support in the record for the ALJ's conclusion that Sales committed breaches of the NJKIDS protocols by entering inaccurate information. The Appellate Division further found termination was appropriate in these circumstances, despite the absence of prior disciplinary action against Sales.

Appellate Division affirms applicant's removal from county correctional police officer eligibility list for false statements on application

In re Jeffrey Adams, 2023 N.J. Super. Unpub. LEXIS 1287 (App. Div. Dkt. No. A-0567-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency determination of the Civil Service Commission (CSC) upholding the decision of the Essex County Department of Corrections to remove Mr. Adams from the list of eligible candidates for the position of county correctional police officer because of false statements on his application. The CSC upheld Essex County's decision to remove Adams from the eligible list, finding that even if there was no intent to deceive, the sheer number and scope of the moving violations, parking tickets and license suspensions that Adams did not mention made his failure to disclose them a material omission under the controlling regulation, and the County needed the information in order to properly evaluate his candidacy. In affirming, the Appellate Division found: (1) there is no question that Adams made material omissions in his background questionnaire; and (2) Adams cannot foist his disclosure responsibility onto the County by contending his answers put it "on notice" that his driving record was "something the investigators should look into."

Appellate Division, reversing trial judge, dismisses defamation count against Governor Murphy in ex-staffer's wrongful termination suit

Neuwirth v. State, 2023 N.J. Super. LEXIS 80 (App. Div. Dkt. No. A-3695-21)

The Appellate Division of the Superior Court, in a published opinion, reverses and remands a trial court order denying defendants' motion to dismiss a defamation count against the Governor of New Jersey in Mr. Neuwirth's fourth amended complaint alleging the State wrongfully terminated his employment as an assistant commissioner for the Department of Health (DOH) in retaliation for Neuwirth's ethics complaint about a member of the Governor's staff. Neuwirth alleged the Governor, during a press

conference, took a "public position" which was "demonstrably false," that Neuwirth had been terminated for failing to disclose to the State his private consulting work. The trial judge found Neuwirth pleaded sufficient facts showing Governor Murphy acted with actual malice, a required element of a defamation claim. The Appellate Division found the motion judge erred and reversed, holding, among other things: (1) Neuwirth's allegation of actual malice, i.e., knowledge of falsity or reckless disregard for truth or falsity, was unsupported by factual contentions offered to substantiate the assertion; (2) Neuwirth asserted no facts from which a factfinder could conclude that Governor Murphy knew, or had serious doubts about, the veracity of the allegedly defamatory statements he made; and (3) repeated, conclusory allegations that Governor Murphy was "aware" of the truth and made the statements "recklessly and/or with actual knowledge of their falsity" are mere recitations of the applicable legal standard, not factual assertions.

Other Cases

Appellate Division vacates, remands Civil Service Commission's ruling in overtime pay dispute as being inconsistent with controlling Wage and Hour Law

In re McManus, 2023 N.J. Super. Unpub. LEXIS 1318 (App. Div. Dkt. No. A-0845-20)

The Appellate Division of the Superior Court, in an unpublished opinion, vacates and remands for further proceedings a final agency decision of the New Jersey Civil Service Commission (CSC) concerning Mr. McManus's claims that the New Jersey Department of Environmental Protection (DEP) improperly calculated his overtime pay while he was employed by the DEP as a Conservation Officer. McManus claimed 2019 legislation (N.J.S.A. 34:11-56(a)(1)(g)) designated the State as an employer subject to the New Jersey Wage and Hour Law (WHL), and the DEP's method of calculating his overtime compensation (pursuant to its interpretation of existing CSC regulations) conflicted with WHL provisions that defined "regular hourly wage" a certain way. In vacating and remanding, the Appellate Division held, among other things: (1) the CSC applied the wrong figures in calculating McManus's overtime pay; (2) the CSC improperly excluded his earnings when he worked between hours thirty-five and forty in a given week; and (3) when calculating McManus's overtime, the CSC must use the WHL framework.

Appellate Division reverses, remands Civil Service Commission's scoring of police sergeant exam to explain why scoring the last 10 questions would adversely impact racial minority candidates

Spallacci v. Civil Serv. Comm'n, 2023 N.J. Super. Unpub. LEXIS 1355 (App. Div. Dkt. No. A-2369-20)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses and remands a final agency decision of the Civil Service Commission (CSC) that denied a challenge to the validity of the scoring of a police sergeant exam administered by the CSC. After the exam, the CSC's Division of Test Development and Analytics recommended that the last ten questions should not be scored, in accordance with a consent decree by which the State agreed to develop a new scoring process to address a complaint by the United States Department of Justice (DOJ) that the selection process between 2000 and 2008 had a disparate impact on racial minority candidates. The Commission agreed and released the scoring results, minus the last ten questions. Fifteen of those who took the test, thirteen of whom are racial minorities, argued the CSC's action was arbitrary and capricious, adversely impacting examinees who followed the instructions, managed their time properly, and completed the exam in the allotted time. The Appellate Division reversed, because the raw data supplied by the CSC to support its decision was indiscernible, and was lacking explanation and interpretation regarding the adverse impact. The court remanded for the CSC to provide an explanation and interpretation of how the raw data demonstrates racial minorities were adversely impacted, in violation of the consent decree and existing law, if the last ten exam questions were scored.

U.S. Supreme Court sets new standard for workplace religious accommodations under Title VII of the Civil Rights Act of 1964
Groff v. DeJoy, 143 S. Ct. 2279, 2023 U.S. LEXIS 2790 (S. Ct. Docket No. 22-174)

In a case involving a former Postal Service employee who believed for religious reasons that Sunday should be devoted to worship and rest and not secular labor, the Supreme Court of the United States rejects its prior holding (in Trans World Airlines Inc. v. Hardison, 432 U.S. 63 (1977)) that an employer's failure to provide a religious accommodation does not violate Title VII of the Civil Rights Act of 1964 if it involves more than a "de minimis cost" to the employer. In Groff, the Court adopted a new standard: Under Title VII, an employer that denies a religious accommodation must show that the burden of granting it would result in "substantial increased costs in relation to the conduct of its particular business."

Third Circuit upholds local union's right to its assets after disaffiliating from national union to form independent local

Util. Workers United Ass'n, Loc. 37 v. Util. Workers' Union of Am., 2023 U.S. App. LEXIS 20014 (3d. Cir. Docket Nos. 22-2142 & 22-2262)

The Third Circuit Court of Appeals, in a precedential opinion, affirms the District Court's grant of summary judgment, equitable relief, and denial of attorneys' fees to the plaintiff in a dispute between labor unions that began when Local 537 of the Utility Workers' Union of America, AFL-CIO (UWUA) sought to disaffiliate from UWUA. UWUA learned of Local 537's planned disaffiliation vote and imposed a trusteeship the same day that an overwhelming majority of Local 537 members voted to form a new union: Utility Workers United Association, Local 537 (Independent 537). UWUA obtained a preliminary injunction to enforce its trusteeship over Local 537 and keep its assets. Independent 537 then brought a civil action under the Labor Management Relations Act (LMRA) to recover those assets. In affirming, the Third Circuit held: (1) the District Court had jurisdiction over the suit under the LMRA because there was a contract between the labor organizations; (2) the independent union had standing to sue on behalf of the national union's former members because it was a labor organization that represented employees in an industry affecting commerce; (3) the independent union had a right to equitable distribution of the union's assets because the national union breached the fiduciary duty it owed to former union members under the Labor Management Reporting and Disclosure Act; and (4) the District Court did not abuse its discretion in its equitable distribution of the union's assets.