



**STATE OF NEW JERSEY
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DATE: October 18, 2023

TO: Commissioners

FROM: Counsel Staff

RE: Developments in Counsel's Office since September 28, 2023

Commission Cases

Appeals from Commission Decisions

Rutgers, the State University of New Jersey, filed an appeal from the Commission's decision, P.E.R.C. No. 2024-2, 50 NJPER 127 (¶31 2023), denying Rutgers' petition to restrain binding arbitration of grievances filed by AFSCME, Local 888, alleging Rutgers terminated without just cause the employment of two unit members in violation of the parties' collective negotiations agreement.

Commission Court Decisions

The Appellate Division of the Superior Court, in an unpublished opinion, City of Newark v. Fraternal Order of Police, Newark Lodge No. 12, and Newark Police Superior Officers' Association, 2023 N.J. Super. Unpub. LEXIS 1627 (App. Div. Dkt. No. A-2993-21) (attached), affirmed the Commission's decision, P.E.R.C. No. 2022-47, 49 NJPER 17 (¶4 2022), which held that the City violated the Act when it implemented two General Orders and a disciplinary matrix that unilaterally modified negotiable disciplinary procedures and disciplinary penalty policies

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affecting union members, and that the City's voluntary Consent Decree with the Department of Justice did not supersede its collective negotiations agreements with the unions or its obligations under the Act to collectively negotiate prior to implementing any changes. Affirming "substantially for the reasons expressed by PERC in its cogent final agency decision," the Appellate Division held: (1) the disciplinary procedures at issue involved matters subject to mandatory negotiation, and the City did not show they are fully or partially preempted by statute or regulation, or that negotiation would significantly interfere with the determination of governmental policy; (2) the unions did not waive their rights to challenge the General Orders; and (3) the Consent Decree did not authorize the City to unilaterally impose disciplinary procedures and sanctions against the unions' members and sidestep its collective bargaining obligations under the Act.

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

Appellate Division finds school district properly disclosed its investigation of former teacher's inappropriate social media posts under "Pass the Trash Law"

A.B. v. Bd. of Educ. of Hackensack, 2023 N.J. Super. Unpub. LEXIS 1635 (App. Div. Dkt. No. A-0999-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the Acting Commissioner of Education (Commissioner) on the Hackensack Board of Education's (HBOE's) motion for summary decision, finding HBOE's 2019 disclosure to the Clifton Board of Education (CBOE) that A.B. had been the subject of a pending sexual misconduct investigation when she resigned from employment as a math teacher with HBOE in 2013 was proper under N.J.S.A. 18A:6-7.6 to -13 (aka the "Pass the Trash Law"). The law requires school districts to contact a job applicant's former employers to inquire whether the applicant was "disciplined, discharged, nonrenewed, asked to resign from employment, resigned from or otherwise separated from any employment while allegations of child abuse or sexual misconduct were pending or under investigation." After A.B. posted inappropriate and sexually suggestive content to her social media page (including the statements "Fuck me, I'm Irish" and "Women say Men Think with Their Penis. Ladies, don't be afraid to blow their minds"), HBOE started an investigation and asked the Hackensack Police Department to review the posts and confirm students were able to review and comment on them. Three

days later, A.B. and HBOE finalized a settlement agreement whereby A.B. irrevocably resigned before the conclusion of HBOE's investigation, and a formal police investigation did not commence. In affirming, the Appellate Division held, among other things: (1) the Commissioner did not disregard undisputed material facts in concluding that an investigation was underway - even if it was in the early stages - when A.B. resigned her teaching position in the wake of the sexual misconduct allegations; (2) the HBOE's process of responding to CBOE's statutorily mandated inquiry did not require a hearing; (3) the Pass the Trash law imposed no requirement on HBOE to notify A.B. about what it planned to report to another entity; (4) the Legislature intended the Pass the Trash Law to apply retroactively to cover any inquiry from another district concerning an individual with whom the district had an employment relationship within the last twenty years; and (5) no exception is made for settlement agreements entered prior to the June 1, 2018 enactment of the law.

Appellate Division affirms dismissal of non-renewed adjunct professor's "failure to represent" claim against college faculty union where union contract barred grievances of non-renewals

Mecaj v. AFTNJ, AFL-CIO Chapter 2222, 2023 N.J. Super. Unpub. LEXIS 1637 (App. Div. Dkt. No. A-3417-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court's order granting summary judgment to defendants American Federation of Teachers New Jersey, AFL-CIO Chapter 2222 (AFTNJ) and dismissing with prejudice plaintiff Mecaj's complaint alleging, among other things, that AFTNJ breached its duty of fair representation under AFTNJ's adjunct faculty contract with Sussex County Community College, following the College's non-renewal of Mecaj's employment as an adjunct professor there. Mecaj claimed the non-renewal was the result of discrimination and retaliation after Mecaj sued the college for money she claimed it owed her for recruiting international students. AFTNJ filed a grievance on Mecaj's behalf that was denied, and later advised Mecaj that her claims could not be grieved under the AFTNJ's collective negotiation agreement (CNA) with the college. The trial court found AFTNJ did not violate the duty of fair representation because the CNA's grievance procedure stated it was not "applicable to non-renewal[,] or any other decision of the Board of Trustees to not offer a contract to a [b]argaining [u]nit member, nor shall the reason for such decision be grievable." The trial court further noted Mecaj lacked standing to pursue her breach of contract and breach of the implied covenant of good faith and fair dealing claims,

because the CNA was between AFTNJ and the college. The Appellate Division affirmed substantially for the reasons expressed in the motion judge's opinion, and otherwise rejected Mecaj's procedural arguments, finding the motion provided the facts necessary to adjudicate summary judgment, and that an extension of the discovery end date would not have led to a different outcome because Mecaj's claims were barred by the CNA.

Appellate Division finds school board members did not violate School Ethics Act when voicing controversial personal opinions at meeting while making clear they did not speak on behalf of board

Schwartz v. Abedrabbo, 2023 N.J. Super. Unpub. LEXIS 1682 (App. Div. Dkt. No. A-2006-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final decision of the School Ethics Commission (Commission) dismissing Ms. Schwartz's complaint alleging respondents Awwad and Abedrabbo violated the Code of Ethics for School Board Members when they made anti-Israel and allegedly antisemitic comments during a virtual public meeting of the Clifton Board of Education. The Commission acknowledged Awwad and Abedrabbo's comments were "highly controversial" and "likely perceived as offensive, and hurtful to members of the District's Jewish Community." But in light of a District policy that "permits Board members to make personal comments on any matter a member sees fit, so long as the member makes clear the opinion does not represent that of the Board," which Awwad and Abedrabbo did, the Commission found their comments, standing alone, did not give rise to a violation of the School Ethics Act. In affirming, the Appellate Division agreed that regardless of whether it is a wise policy to allow Board Members to stand up at Board meetings and comment on any issue, so long as they make clear they are expressing their own views and not speaking on behalf of the Board, as Awwad and Abedrabbo did, their statements can't be characterized as private action that could compromise the Board in violation of the School Ethics Law.

Appellate Division upholds revocation of special ed instructor's teaching certificates for failing to properly administer tests

In re Certificates of O'Malley, 2023 N.J. Super. Unpub. LEXIS 1686 (App. Div. Dkt. No. A-0237-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the New Jersey Commissioner of Education (Commissioner) upholding a

determination by the New Jersey State Board of Examiners (Board) to revoke Ms. O'Malley's teaching certificates, following uncontested tenure charges (O'Malley resigned without responding to them). The charges alleged that in connection with her duties as a special education teacher for the Woodbridge Township School District, O'Malley failed to administer certain tests and created false scores and write-ups, failed to include or submitted incorrect test results for tests actually administered, and misplaced or failed to complete testing protocols. The Commissioner summarily adjudicated the tenure charges, finding O'Malley engaged in conduct unbecoming a teacher, and dismissed her from the District. The Board then filed an order to show cause why O'Malley's teaching certificates should not be revoked or suspended, O'Malley answered, and the matter was transferred to the Office of Administrative Law and assigned to an administrative law judge (ALJ) as a contested case. The ALJ recommended that O'Malley's certificates be suspended for three years rather than revoked, because she had already been sanctioned by the loss of tenure and her prior record was "without blemish." Disagreeing with the recommended penalty, the Board found O'Malley's failures demonstrated a significant and pervasive pattern of conduct warranting revocation. The Commissioner upheld the Board's decision. In affirming, the Appellate Division held: (1) there was sufficient credible evidence in the record supporting the determinations by the Board and Commissioner; (2) O'Malley's failures affected students who required additional educational services, her actions directly related to her fitness to discharge her duties, and the Board had the power to revoke her teaching certificates under the circumstances; and (3) the decision to revoke rather than suspend was not so egregious as to shock one's sense of fairness given the severity and extent of O'Malley's errors.

Appellate Division vacates grievance arbitration award, remands for appointment of new arbitrator, in dispute over firefighter EMS duties

Int'l Ass'n of Firefighters, Local 1197 v. Twp. of Edison, 2023 N.J. Super. Unpub. LEXIS 1715 (App. Div. Dkt. No. A-1747-21)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses a trial court's order confirming a grievance arbitration award, and remands to the trial court to issue an order vacating the award and remanding to PERC to appoint a new

arbitrator. The grievance claimed Edison Township violated its collective negotiations agreement (CNA) and a prior memorandum of agreement (MOA) with IAFF Local 1197 by dispatching firefighters to emergency medical services (EMS) calls. The arbitrator denied the grievance, finding this was part of the firefighters' duties and that although the MOA removed all EMT language from the parties' CNAs, it did not expressly relieve firefighters of such duties. In so ruling, the arbitrator excluded evidence proffered by the IAFF that Edison's business administrator (BA) stated before the parties entered into the MOA that the Fire Department was no longer needed for EMS response due to the police department responding to all 911 calls. The arbitrator found such evidence inadmissible under PERC rules governing the confidentiality of settlement discussions because the BA's alleged statement was made in the presence of an interest arbitrator appointed by PERC, and under a court rule governing the inadmissibility of settlement offers. In reversing and remanding, the Appellate Division found the arbitrator engaged in misconduct by excluding pertinent and material evidence of what Edison allegedly said to induce the IAFF to enter the MOA, and the trial court erred in not vacating on that basis, finding: (1) the PERC regulations did not support the exclusion of the BA's alleged statement because it was not disclosed by a party to a mediator, fact-finder or arbitrator functioning in a mediatory capacity, but was made by a representative of one party purportedly to induce another party; (2) nothing in the PERC regulations renders inadmissible testimony about such a statement; and (3) the testimony was not offered as evidence, under the court rule, of Edison's 'liability' or to resolve a dispute about the validity or amount of a claim.