



**STATE OF NEW JERSEY
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DATE: November 15, 2023
TO: Commissioners
FROM: Counsel Staff
RE: Developments in Counsel's Office since October 26, 2023

Commission Cases

Update on Federal Court Litigation involving the Commission

The Chairman and several current and former members of the Commission were named as defendants in federal lawsuits that were filed after public sector agency shop arrangements were declared unconstitutional in Janus v AFSCME, 138 S.Ct. 2448 (2018).

In Lutter v. JNESO, 2023 U.S. App. LEXIS 29489, Dkt No. 21-2205, the Third Circuit Court of Appeals, in a precedential opinion, affirmed in part, and vacated and remanded in part, the District Court's dismissal (previously reported in the June 2021 General Counsel Report) of Lutter's Janus-based claims. The Third Circuit affirmed that Lutter lacked standing to pursue her claims against various state officials including the PERC Commissioners, because she failed to identify any action taken by these officials to enforce the Workplace Democracy Enhancement Act (WDEA), which allegedly prolonged the deductions of union dues from her paycheck. The Third Circuit otherwise vacated the District Court's dismissal of Lutter's damages claims against her former union, JNESO, finding that JNESO's issuance of a check to

cover those deductions after Lutter's resignation from the union did not moot her claim that her payment of those dues violated her First Amendment right by compelling her to subsidize union speech. The Third Circuit remanded for resolution of Lutter's damages claims (and potentially attorney's fees and costs) against JNESO.

Appeals from Commission Decisions

PBA Local 29 filed an appeal from the Commission's decision, P.E.R.C. No. 2024-8, 50 NJPER 189 (¶42 2023), denying the PBA's petition for a restraint of binding arbitration of its grievance challenging the Township of Irvington's reliance on a provision of the parties' collective negotiations agreement (CNA) to unilaterally deduct money from the final paycheck of PBA members who resigned within five years after their start date, to recoup training costs expended by the Township.

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

Appellate Division affirms police officer's removal for witness tampering in departmental disciplinary hearing

Hand v. Borough of New Providence, 2023 N.J. Super. Unpub. LEXIS 1786 (App. Div. Dkt. No. A-1097-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a Law Division order affirming an administrative determination of misconduct resulting in the termination of Mr. Hand from his employment as a Borough of New Providence police officer. Hand was terminated following a departmental hearing that found he engaged in witness tampering (by texting other officers to influence their testimony) in connection with a prior disciplinary hearing over Hand's alleged failure to respond in a timely manner to a domestic incident call. Hand sought de novo review by the Law Division, which affirmed the termination following a hearing and a review of the departmental hearing transcripts. In affirming, the Appellate Division held, among other things: (1) substantial credible evidence in the record supported the charges, including uncontroverted evidence of Hand's repeated communications with a witness to get him to change his prior statement and to influence his testimony; (2) by such behavior Hand knowingly violated departmental rules and ethical standards; and (3) the disciplinary charges did not violate Hand's constitutional rights to due process.

Appellate Division reverses trial court's ruling that certain evidence should have been excluded from police officer's departmental disciplinary removal hearing, remands for new de novo review before different trial judge

Lopresti v. Twp. of Old Bridge, 2023 N.J. Super. Unpub. LEXIS 1870 (App. Div. Dkt. No. A-1664-22)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses a trial court's judgment that reversed Plaintiff Lopresti's disciplinary termination from his employment as an Old Bridge Township police officer and reinstated him with back pay. The trial court ruled that certain evidence (a conversation recorded by another officer between Lopresti and other officers while on duty that included a number of "sexist, harassing and discriminatory comments" by Lopresti) should have been excluded from the departmental disciplinary hearing. In reversing and remanding, the Appellate Division found: (1) evidence illegally obtained is generally deemed inadmissible only in a criminal prosecution; (2) a departmental disciplinary proceeding is in no way a criminal or quasi-criminal proceeding; and (3) thus, the trial judge should not have invoked the "exclusionary rule" in this civil proceeding. The Appellate Division remanded the matter for a new de novo hearing before a different trial judge.

Appellate Division finds "threatened but uncharged disciplinary action" did not disqualify teacher from applying for accidental disability retirement benefits following voluntary resignation

Nappe v. Bd. of Trs., 2023 N.J. Super. Unpub. LEXIS 1877 (App. Div. Dkt. No. A-0828-22)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses and remands for further processing a final agency decision of the Teachers' Pension and Annuity Fund (TPAF) which held that Mr. Nappe, a former teacher employed by the Linden Board of Education (Linden), was ineligible for accidental disability (AD) retirement benefits under N.J.A.C. 17:1-6.4 because he left employment not for reasons of disability but due to impending disciplinary actions. Nappe resigned pursuant to a settlement agreement by which Linden agreed it would not institute formal disciplinary action against Nappe following an altercation with another teacher, and Nappe would receive a one-year paid leave of absence, subject to Nappe providing a medical note to support the need for such leave. The matter had previously been remanded by the Appellate Division for a hearing before an administrative law judge (ALJ) to resolve the limited factual dispute of whether Nappe resigned because of his mental

disability. The ALJ concluded Nappe's AD retirement application should be considered and accepted, based on credible testimony of Nappe, his therapist and psychiatrist about his mental health issues and work-related stress, and the fact that the Board never brought discipline or tenure charges against Nappe. TPAF rejected the ALJ's ruling. In reversing, the Appellate Division held: (1) TPAF's findings were not sufficiently supported by the evidence where Linden agreed not to bring any formal disciplinary action, and also agreed Nappe would provide a medical note to support the need for a leave; (2) the regulation is not meant to include "threatened uncharged disciplinary action" as a reason "other than a disability" that would bar Nappe from applying for AD retirement benefits; and (3) the rule would only bar Nappe from applying for AD benefits if his separation agreement was reached due to "pending" disciplinary action.

Appellate Division affirms Education Commissioner's dismissal of employment discrimination claims on jurisdictional grounds

Willingboro Educ. Ass'n v. Bd. of Educ. of Willingboro, 2023 N.J. Super. Unpub. LEXIS 1893 (App. Div. Dkt. No. A-1825-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision by the New Jersey Commissioner of Education (Commissioner) dismissing, for lack of jurisdiction, a petition of appeal filed by Plaintiff Willingboro Education Association on behalf of a member whose hostile work environment claims against Willingboro Township and its Board of Education arose under the New Jersey Law Against Discrimination (NJLAD). The Commissioner concluded her jurisdiction was limited to controversies and disputes arising under the State's school laws, and because the hostile work environment claims did not involve New Jersey school law, they belonged before the Division on Civil Rights (DCR). In affirming, the Appellate Division held, among other things: (1) Plaintiff asserted an employment discrimination claim, which did not concern school curricula, courses, or school law; (2) thus jurisdiction belonged in the DCR; and (3) the petition was properly dismissed.

Appellate Division upholds city's removal of employee's name from list of certified eligibles for police officer position based on employee's long disciplinary history

In re Trejo, 2023 N.J. Super. Unpub. LEXIS 1937 (App. Div. Dkt. No. A-3025-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final administrative action of the Civil Service Commission (CSC) upholding the removal of Ms. Trejo's name from the certified eligibility list for the position of police officer with the Union City Police Department (UCPD). In affirming, the Appellate Division found: (1) the CSC did not abuse its discretion in declining to reconsider Trejo's appeal and upholding Union City's decision to remove her from the list without an evidentiary hearing, based on her long history of employment disciplinary actions while she was employed by UCPD as a public safety telecommunicator (including minor disciplines for absenteeism, a reprimand for imparting confidential police information, and a major discipline for inappropriate conduct towards UCPD officers); (2) Trejo failed to demonstrate a prima facie showing of disparate treatment based on her claims of Union City's unlawful favoritism in hiring other individuals with similar or worse disciplinary histories, and discrimination against her as a Hispanic woman in a protected class by hiring only men, as these were speculative statements insufficient to create factual disputes warranting a hearing; and (3) no new evidence or clear material error was shown.