



STATE OF NEW JERSEY
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DATE: December 14, 2023
TO: Commissioners
FROM: Counsel Staff
RE: Developments in Counsel's Office since November 21, 2023

Commission Cases

Appeals from Commission Decisions

No new appeals were filed since November 21.

Commission Court Decisions

No Commission court decisions were issued since November 21.

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

Appellate Division affirms pension board's denial of disability pension to teacher who resigned to resolve tenure charges, and recoupment of benefits received

Lowery v. Bd. of Trs., 2023 N.J. Super. Unpub. LEXIS 1976 (App. Div. Dkt. No. A-3256-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision by the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) finding plaintiff Lowery ineligible for ordinary disability retirement benefits, and requiring her to repay \$90,047.10 in benefits. While Lowery was employed as a public-school teacher by the Paulsboro Board of Education (PBOE), tenure charges were brought against her alleging conduct unbecoming toward a student; chronic absenteeism; incapacity; and conduct unbecoming a teacher. The parties entered a separation agreement and release to resolve the charges, by which Lowery would be returned to the active payroll on sick leave with pay and medical benefits through the end of the school year, and she would then tender her irrevocable resignation. The PBOE further agreed that if Lowery decided to apply for a disability retirement, it would cooperate in that application. Lowery, without mentioning the settlement agreement and resignation, then filed for ordinary disability retirement, which was approved. The PBOE subsequently notified the pension board of the settlement and release. Three years later TPAF notified Lowery she was ineligible because disability was not the reason for her separation, and ordered Lowery to repay the benefits she had received. In affirming, the Appellate Division found TPAF's decision was not arbitrary, capricious, or unreasonable, and did not constitute a mistake of law, noting: (1) although in her answer to the tenure charges Lowery asserted her conduct was, in part, due to her health, she abandoned that assertion and it was never proved when she entered the settlement and resigned; (2) there was no evidence she resigned for health reasons, let alone a disability, and the plain language of the agreement showed she resigned in consideration for dismissal of the tenure charges; and (3) N.J.A.C. 17:3-6.1(g)(3) provides for a party to memorialize that the settlement was the result of a disability, which Lowery did not do.

Appellate Division affirms in part, reverses in part, dismissal of class action lawsuit against school district in dispute over entitlement to paid vacation under Civil Service Act

Torian v. Newark Sch. Dist., 2023 N.J. Super. Unpub. LEXIS 1984 (App. Div. Dkt. No. A-3006-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms in part and reverses in part a trial court's summary dismissal of a class action lawsuit filed by employees of the Newark School District for alleged violations of the Civil Service Act (the Act), contending the District failed to provide

class members with paid vacation leave as required by the Act and its associated administrative regulations. The primary issue on appeal was whether the District was entitled to summary judgment dismissing all the claims related to all class members. The Appellate Division affirmed the grant of summary judgment dismissing all claims concerning per diem employees. It reversed the order granting summary judgment on the basis that non-per diem employees were not part of the class. The Appellate Division further found there were material issues of disputed fact, concerning whether the class members (including 10-month employees) received paid vacation, that will require fact-finding at either an evidentiary hearing or trial.

Appellate Division affirms dismissal of substitute teacher's wrongful termination, injunctive relief claims against school district arising from students' use of cellphones to videotape him in classroom

Dalnoky v. Pinelands Reg'l Sch. Dist., 2023 N.J. Super. Unpub. LEXIS 2020 (App. Div. Dkt. Nos. A-3411-21, A-0396-22)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a Law Division order dismissing plaintiff Dalnoky's amended complaint against defendant, Pinelands Regional School District, alleging breach of contract, breach of the covenant of good faith and fair dealing, invasion of privacy, intentional infliction of emotional distress, and violation of a state regulation against harassment and bullying in schools; and a Chancery Division order dismissing his complaint seeking an injunction requiring that defendant make and strictly enforce a no-cell-phone-use-by-students policy in its schools and classrooms. Dalnoky alleged the defendant wrongly terminated his employment as a substitute teacher based upon wrongful acts of students in surreptitiously videotaping him in the performance of his duties. In affirming the Law Division order, the Appellate Division found: (1) no breach of contract because Dalnoky was an employee at will whose employment could be properly terminated for good cause, bad cause, or no cause at all; (2) no breach of good faith and fair dealing because, even if defendant encouraged students to record Dalnoky's actions, such conduct is not unconscionable and no factual allegations established the recordings were taken with a bad motive or intent; (3) no invasion of privacy claim, based on the alleged videotaping, because it alleged no facts establishing a violation of any of the four interests the tort of invasion of privacy protects against (appropriation of likeness, placing private information in the public eye, intrusion on physical solitude, and placing one in a false light); (4) the student videotaping allegations do

not exceed the bounds of decency such that they support the intentional infliction of emotional distress claim; and (5) the regulation does not require that a school district enact a policy prohibiting the harassment or bullying of a teaching staff member. In affirming the Chancery Division order, the Appellate Division found no basis in the law supporting Dalnoky's claim that a board of education may be compelled to adopt a policy prohibiting students from having cell phones in school.

Appellate Division affirms police officer's termination in connection with unsafe high-speed vehicular pursuit

Cherry v. Tuckerton Borough Police Dep't, 2023 N.J. Super. Unpub. LEXIS 2017 (App. Div. Dkt. No. A-0913-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms in part and reverses in part a judgment of the Law Division affirming plaintiff Cherry's disciplinary termination as a sworn law enforcement officer with defendant Tuckerton Borough Police Department, a non-civil service employer. The disciplinary charges centered on Cherry's involvement in a high-speed vehicular pursuit. The Appellate Division reversed the trial court with respect to two of the disciplinary charges, finding those alleged violations of the Township's vehicle pursuit policy did not apply as they pertained to stolen vehicles, and there was no record evidence that the vehicle Cherry pursued was stolen. The court otherwise found sufficient support in the record for the removal sanction imposed, affirming the trial court's conclusions that: (1) Cherry engaged in a high-speed pursuit for thirteen miles through five municipalities that he should have terminated because of the threat it posed to public safety; (2) at the conclusion of the pursuit, Cherry released a canine on a suspect that was face down on the ground with visible hands and being arrested by two officers; and (3) the seriousness of Cherry's infractions were magnified by his failure to properly document the use of the dog and numerous misrepresentations he made in his reports of the incident intended to obscure the true circumstances of the pursuit, which Cherry likely knew was not justified. The Appellate Division concluded the record established that Cherry's position of trust as a police officer was irreparably harmed by his dishonesty, warranting his termination.

Appellate Division affirms removal of applicant from police officer eligibility list for providing inaccurate information in pre-employment background check

In re W.D., 2023 N.J. Super. Unpub. LEXIS 2031 (App. Div. Dkt. No. A-3041-20)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the Civil Service Commission (CSC) upholding North Brunswick Township's removal of W.D.'s name from an eligible list for the position of police officer, after he provided inaccurate answers to questions on his pre-employment background check application. In affirming, the court held: (1) the CSC's final agency decision was adequately supported by the record and was not arbitrary, capricious, or unreasonable; (2) W.D.'s purported reliance on the MVC driver history abstract did not excuse his failure to fully disclose his extensive history of motor vehicle violations; and (3) W.D.'s involvement in two, and possibly three, domestic incidents that triggered a police response, along with his long-term and repeated violations of the motor vehicle laws are incompatible with the position of police officer.

Appellate Division affirms denial of deferred retirement benefits to former public employee who was fired for misconduct

Thorpe v. Bd. of Trs., 2023 N.J. Super. Unpub. LEXIS 2093 (App. Div. Dkt. No. A-3371-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final decision of the Board of Trustees of the Public Employees' Retirement System (PERS) finding that Thorpe was not eligible for deferred retirement benefits because she was removed from her prior employment with the Juvenile Justice Commission for cause on charges of misconduct or delinquency directly related to her employment. In affirming, the court found: (1) no basis for disturbing PERS' well-reasoned determination that Thorpe was not eligible for deferred retirement benefits where N.J.S.A. 43:15A-38 expressly disallows a claim for such benefits to members fired for misconduct or delinquency, as Thorpe was here; (2) Thorpe was not entitled to relitigate the finding of insubordination, failing to follow sick leave procedures, and other sufficient cause, which resulted in her removal from employment; and (3) the statute makes forfeiture automatic where, as here, the employee has been removed for misconduct or delinquency related to her employment.