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DATE: February 23, 2024

TO: Commissioners

FROM: Counsel Staff

RE: Developments in Counsel's Office since January 25, 2024

Commission Cases

Appeals from Commission Decisions

No appeals were filed since January 25.

Following a settlement conference conducted by the Appellate Division, PBA Local 11 (Superiors) withdrew its appeal from a letter decision of the Deputy Director of Unfair Practices denying the PBA's motion to reopen an unfair practice complaint against the City of Trenton due to the PBA's lack of responsiveness to two status letters from the Hearing Examiner, the second of which advised the PBA that the matter would be dismissed if it failed to respond. The PBA's withdrawal is pending its filing of an appeal with the Commission.

Commission Court Decisions

No Commission court decisions were issued since January 25.

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

Appellate Division finds former city employee's suit challenging disciplinary termination was properly dismissed for failing to exhaust administrative remedies with Civil Service Commission

Bridgeforth v. City of Newark, 2024 N.J. Super. Unpub. LEXIS 51(App. Div. Dkt. No. A-3587-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court's summary decision dismissing the complaint of Bridgeforth, a former lead inspector employed by the City of Newark, that (among other things) alleged the City (a Civil Service (CS) employer) denied him due process when it dismissed him on disciplinary charges during Bridgeforth's nearly 2-year jail detention while facing charges for multiple drug possession crimes, allegedly committed during work hours. CS rules required Bridgeforth to file an administrative appeal within 20 days of receipt of a final written determination from the appointing authority or, if no written determination is given, within a "reasonable time." Because Bridgeforth never filed a CS appeal, and absent proof in the record that the City provided him a final written determination, the Appellate Division asked: if he filed his CS appeal today, would a delay of nearly ten years (from when the court found he had actual notice) be considered reasonable? It held: (1) the answer is an unequivocal no, Bridgeforth was well beyond the time for filing the proper administrative appeal; (2) consequently, the trial court did not err when it dismissed his claims under CS law and the employee handbook for failure to exhaust administrative remedies. The Court also rejected Bridgeforth's other remaining claims that were based on theories of breach of contract and unjust enrichment.

Appellate Division affirms school board must indemnify member for costs incurred in defending against ethics complaint over acts taken in course performance of duties as board member

Skowronski v. Bd. of Educ. of the Twp. of E. Greenwich, 2024 N.J. Super. Unpub. LEXIS 69 (App. Div. Dkt. No. A-3602-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final decision of the Acting New Jersey Commissioner of Education (Acting Commissioner) requiring the Board of Education of the Township of East Greenwich to indemnify Skowronski for his legal fees and costs incurred in defending a

school ethics complaint. Skowronski was charged with violating the Code of Ethics for school board members when he wrote an email to the entire Board with a copy to a member of the public that contained negative comments on District personnel. The email addressed a parent's safety concerns over the District's response to a shooting incident at a nearby business. The Acting Commissioner adopted the School Ethic Commission's (SEC's) final decision that the information disclosed was confidential, with a recommended a penalty of reprimand. Skowronski then sought to compel the Board to indemnify him under a school law requiring boards to do so for all costs in defending against civil actions, including ethics complaints. The Acting Commissioner upheld an administrative law judge's (ALJ's) initial summary decision in favor of Skowronski. In affirming, the Appellate Division held, among other things: (1) the Acting Commissioner's decision was not arbitrary, capricious, or unreasonable, and is supported by substantial credible evidence in the record; and (2) the Acting Commissioner applied the correct legal standard under the law, entitling Skowronski to indemnification because his actions arose out of or were in the course of performance of his duties as a Board member.

Appellate Division affirms remand to grievance arbitrator to clarify whether police officers out on FMLA leave should be counted in manpower levels when other officers take personal days

Twp. of Piscataway v. Policemen's Benevolent Ass'n Loc. 93, 2024 N.J. Super. Unpub. LEXIS 73 (App. Div. Dkt. No. A-3175-22)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court's remand to a grievance arbitrator for further consideration of whether the calculation of applicable staffing levels within the grievant police officer's squad should have included an officer who was out on family medical (FMLA) leave. The dispute arose in the context of whether the employer had an obligation under the applicable collective negotiations agreement (CNA) to find a replacement for an officer who took a personal day. In affirming, the Appellate Division noted the CNA contained no explicit language resolving this question, and held: (1) the arbitrator's decision is not entirely clear on this point; and (2) the trial court sensibly recognized that and directed the FMLA question to be analyzed more closely by the arbitrator on remand.

Appellate Division upholds correction officer's termination after positive result on random workplace drug test

In re Griffin, 2024 N.J. Super. Unpub. LEXIS 82 (App. Div. Dkt. No. A-0678-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the Civil Service Commission (CSC) which adopted an administrative law judge's (ALJ's) recommended termination of Griffin's employment as a Hudson County correction officer after a positive random workplace drug test. In affirming, the Appellate Division rejected Griffin's argument that she was deprived of due process because the drug test failed to comply with the Attorney General's (AG's) Law Enforcement Drug Testing Policy by not mandatorily collecting a second urine sample. The Appellate Division held, among other things: (1) the technical deviations from the AG's policy did not deprive Griffin of her due process rights or render the testing process fundamentally flawed, because (a) Griffin was informed of her option to provide a second sample but refused to provide one, and (b) Griffin does not challenge the validity of the initial test results, the efficacy of the testing procedures or the chain of custody of that sample; and (2) notwithstanding certain errors made by the ALJ, the determination that Griffin violated the drug policy was supported by substantial credible evidence.

Appellate Division upholds denial of deferred retirement benefits to former State employee who was ineligible due to his conviction for official misconduct while in office

Winkler v. Bd. of Trs., 2024 N.J. Super. Unpub. LEXIS 136 (App. Div. Dkt. No. A-1226-22)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the Board of Trustees of the Public Employees' Retirement System (PERS) denying Winkler's application for deferred retirement benefits after finding him ineligible due to his convictions stemming from official misconduct while a State of New Jersey employee. In affirming, the Appellate Division rejected Winkler's argument that the doctrine of equitable estoppel applies because PERS failed to act when initially notified of his criminal conviction and subsequent judge's order of forfeiture of employment. It held, among other things: (1) because Winkler failed to raise this argument before the Board, it was not properly before the court; (2) the Board had no duty to inform Winkler of his ineligibility upon his conviction; and the estimate of retirement benefits Winkler received was not a misrepresentation but a projection of available benefits if he was eligible, therefore any reliance by Winkler was misplaced and not induced; and (3) the Board correctly declined to grant an evidentiary hearing because there were no material facts in dispute, thus, its decision was not arbitrary, capricious, or unreasonable.

Appellate Division affirms removal of correction officer for conduct unbecoming during an off-duty domestic violence incident

In re Baron, 2024 N.J. Super. Unpub. LEXIS 151 (App. Div. Dkt. No. A-1546-22)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the Civil Service Commission (CSC) removing Baron as a correctional police officer with the Hudson County Department of Corrections based on sustained charges of conduct unbecoming a public employee while off duty. The charges stemmed from a domestic violence incident on mother's day when Baron assaulted the wife and mother of another correction officer (with whom Baron had been romantically involved and had children with) at the mother's home. The CSC adopted an administrative law judge's (ALJ's) findings that sustained the charge of unbecoming conduct while dismissing charges of neglect of duty and other sufficient cause. The ALJ recommended removal based upon Baron's extensive disciplinary history (involving prior similar incidents with the other correction officer) that included a 97-day unpaid suspension and a 99-day working suspension. In affirming, the Appellate Division held, among other things: (1) the CSC's imposition of termination was in accordance with applicable law, supported by sufficient credible evidence, and was neither arbitrary, capricious nor unreasonable; and (2) the decision to terminate Baron was consistent with progressive discipline principles.

Appellate Division affirms correction officer's removal for conduct unbecoming in connection with her violation of staff/inmate over-familiarity policy

In re Pollock, 2024 N.J. Super. Unpub. LEXIS 149 (App. Div. Dkt. No. A-4042-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the Civil Service Commission (CSC) which upheld Pollock's removal from the position of senior corrections police officer with the New Jersey Department of Corrections (DOC), based on charges of conduct unbecoming or other sufficient cause. The CSC adopted an administrative law judge's (ALJ's) findings that Pollock engaged in an unduly familiar relationship with a former inmate within weeks of his release from custody, intentionally made false statements in connection with the DOC's related investigation, possessed contraband in the prison, and divulged confidential information to the former inmate. In affirming, the Appellate Division held: (1) Pollock's undisputed violations sufficiently support that she engaged in conduct unbecoming a public employee; (2) the ALJ was not required to conduct an evidentiary hearing to

determine whether Pollock knowingly violated the DOC's staff/inmate over-familiarity policy; (3) The sanction of removal does not shock one's sense of fairness considering the numerous serious violations at issue and Pollock's prior disciplinary history; and (4) the CSC's decision was supported by sufficient, credible evidence in the record.

Third Circuit affirms grievance arbitrator's reinstatement of Comcast employee terminated for one-time use of racial slur during virtual meeting while he believed he was muted

Comcast of N.J. LLC v. IBEW Loc. Union No. 827, 2024 U.S. App. LEXIS 2092 (3d. Cir. Docket No. 22-3239)

The Third Circuit Court of Appeals, in a non-precedential opinion, affirms the District Court's denial of Comcast's petition to vacate a grievance arbitrator's award in favor of the employee union, IBEW. The grievance challenged the disciplinary termination of an employee for his use of a racial slur (the "n" word) during a virtual work meeting. The employee, who is African-American, apologized for the conduct but claimed he believed he was on mute during the meeting while he sang along to a rap song that contained the word. The grievance arbitrator, applying principles of progressive discipline and mitigating factors, concluded termination was an excessive penalty inconsistent with "just cause" principles, and ordered Comcast to reinstate the employee with an unpaid five-day suspension. In affirming, the Third Circuit held: (1) an arbitrator may construe a "just cause" provision to include progressive discipline whereby penalties increase upon repeat occurrences; (2) the employee's one-time utterance of the term, not directed at anyone and when he believed himself to be muted, was an offhanded comment and isolated incident that falls short of harassment; and (3) the arbitration award did not violate public policy.

Appellate Division affirms denial of sick leave request of school teacher who asserted pre-existing auto-immune conditions put him at higher risk of more severe illness if he contracted COVID-19

Strauss v. Bd. of Educ. of the Borough of Metuchen, 2024 N.J. Super. Unpub. LEXIS 166 (App. Div. Dkt. No. A-1492-22)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final decision of the Commissioner of Education (Commissioner) in favor of the Metuchen Board of Education. The Commissioner adopted an administrative law judge's (ALJ's) finding that plaintiff Strauss, a tenured Metuchen teacher, was not personally disabled by his auto-immune conditions. At issue on appeal was whether statutory sick leave

may be utilized when an employee is at substantial risk of a more severe illness because of his pre-existing illnesses if he were to contract COVID-19. In affirming, the Appellate Division held: (1) the risk of becoming more affected by COVID-19 is not the same as being disabled, and if it were, the statute would include language entitling those at a high risk of such result to sick leave; (2) Strauss suffered from these illnesses prior to the pandemic, yet was still able to attend work and carry out his teaching duties in-person; (3) while the added risk of potentially worse health conditions if he were to contract COVID-19 should not go unappreciated, it is not equivalent to experiencing actual worsened health conditions or being truly unable to work.

Third Circuit finds there is no First Amendment right to refuse to wear a face mask as required by valid health and safety orders put in place during COVID-19 emergency

Falcone v. Dickstein, 2024 U.S. App. LEXIS 2522 (3d. Cir. Docket Nos. 22-2701 and 22-2702)

The Third Circuit Court of Appeals, in a precedential opinion, rejects consolidated claims that the enforcement of mandatory indoor masking policies in public spaces during the COVID-19 pandemic violated the plaintiffs' First Amendment rights. "Like all courts to address this issue," the Third Circuit concluded, refusing to wear a face mask, as required by valid health and safety orders put in place during a recognized public health emergency, is not expressive conduct protected by the First Amendment. The two plaintiffs, Falcone and Murray-Nolan, respectively alleged they were unlawfully retaliated against for exercising First Amendment rights in connection with their maskless attendance at several meetings of the boards of education of Freehold Township (Falcone), and Cranford Township (Murray-Nolan). This caused the boards to cancel meetings and resulted in a summons (Falcone) and an arrest (Murray-Nolan). Separate District Courts respectively dismissed Falcone's case for lack of standing, and Murray-Nolan's case for failing to state a claim for First Amendment retaliation. The Third Circuit affirmed the dismissal of Murray-Nolan's complaint, but found the District Court erred in dismissing Falcone's claims for lack of standing. It reversed and remanded for consideration of the Freehold defendants' "failure to state a claim" defense, while doubting that Falcone's claims "are likely to survive."

Appellate Division affirms negotiability of employee healthcare premium contributions after full implementation of Chapter 78

PBA Local No. 260 v. Twp. of Pemberton, 2024 N.J. Super. Unpub. LEXIS 186 (App. Div. Dkt. No. A-1340-22)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a Law Division order declining to set aside an arbitration award and a corresponding confirmation of such award in favor of the PBA. The arbitration resolved a grievance over the Township of Pemberton's obligation to pay the health care expenses of certain retirees under a collective negotiation agreement (CNA) that was executed well after the parties had completed full implementation of the employee healthcare premium contributions required by P.L. 2001, c. 78 (Chapter 78). It stated the Township would "pay all premiums" for eligible retirees, who would receive the same benefits under the "same terms and conditions" as current active employees. It also stated that active employees were required to pay contributions based on Chapter 78 rates. The Township construed this "same terms and conditions" language to require retirees to contribute along Chapter 78 rates. The arbitrator found the CNA unambiguously required the Township to assume the entire cost of eligible retirees' health benefits premiums. In affirming, the Appellate Division held: (1) the arbitrator's interpretation was justifiable, supported by the record, and meets the "reasonably debatable" standard of review; (2) the relevant CNA provision is neither unlawful nor contrary to a clear mandate of public policy; and (3) contribution levels were fully negotiable for any CNA executed after 2015 when full implementation of the tier four rates was complete.

N.J. Supreme Court finds tenured teacher arbitration hearing law does not limit possible penalties an arbitrator may impose

Sanjuan v. Sch. Dist. of W. N.Y., 2024 N.J. LEXIS 156 (S. Ct. Dkt. No. A-45)

The Supreme Court of New Jersey reinstates an arbitrator's award that sustained tenure charges against Sanjuan, an assistant principal in the West New York School District, and imposed a penalty that terminated her tenured administrative position but allowed her to retain her tenured teaching role. Sanjuan filed a court action seeking to vacate the award, and to be reinstated as a tenured administrator with backpay. The trial court denied that relief and confirmed the award. The Appellate Division reversed and remanded, finding that under the statute, tenure charges that are sustained can only result in termination or deprivation of salary. In reversing and reinstating the award, the Supreme Court held, among other things: (1) the statutory conditions under which a matter must be referred to arbitration

by the Commissioner of Education (i.e. that the charges are "sufficient to warrant dismissal or reduction in salary") do not limit the penalties that may be imposed by an arbitrator to whom a matter is referred; (2) no contractual agreement set limits beyond those imposed by the Tenured Employee Hearing Law; and (3) thus the arbitrator did not exceed his powers in demoting Sanjuan.