



**STATE OF NEW JERSEY
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DATE: May 22, 2024

TO: Commissioners

FROM: Counsel Staff

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

Commission Cases

Appeals from Commission Decisions

No new appeals were filed since April 25.

Oral argument is scheduled for June 4, 2024, in the matter of Union County College and Union County College Chapter of the American Association of University Professors (AAUP) (PERC Dkt. No. SN-2023-002, App. Div. Dkt. No. A-2993-22T4). The College appealed from the status-quo result of Commission's April 27, 2023 meeting at which, due to a tie vote, the Commission was unable to act on the College's scope petition (on remand from the Appellate Division) seeking an order overturning a grievance arbitration award. The award sustained a grievance challenging the assignment of a tenured math professor to the College's tutoring center. In the arbitration proceeding the College presented the defense of non-arbitrability, though it did not seek to restrain arbitration prior to or during the hearings, or prior to the issuance of the award. The Law Division affirmed the award, but the Appellate Division ruled that the arbitrator

or the Law Division should have referred the case to PERC for a scope-of-negotiations determination.

Commission Court Decisions

The Appellate Division of the Superior Court, in an unpublished opinion, In re Borough of Carteret, 2024 N.J. Super. Unpub. LEXIS 710 (Dkt. No. A-1319-22) (attached), affirms the Commission's decision, P.E.R.C. No. 2023-16, 49 NJPER 266 (¶61 2022), which reversed the Director of Representation and denied the Borough's unit-clarification petition to exclude lieutenants from a negotiations unit of lieutenants and firefighters represented by FMBA, Local 67. In affirming, the Appellate Division declined to substitute its judgment for that of PERC, which, the Court found, did not act arbitrarily or capriciously in rendering its final decision. The Court further rejected the Borough's argument that a Commissioner's comments expressing his personal opinion during the PERC meeting undermined the final agency decision, finding such comments do not detract from the decision's status as the official statement of PERC's findings and conclusions.

The Appellate Division of the Superior Court, in an unpublished opinion, In re County of Essex, 2024 N.J. Super. Unpub. LEXIS 811 (Dkt. No. A-3809-22) (attached), affirms 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 County police and fire unions' consolidated unfair practice charges alleging the County violated the Act when it unilaterally changed health insurance carriers and thereby decreased the level of contractual health benefits. In affirming, the Appellate Division found that PERC properly concluded the County's change in carriers violated its CNA with FOP 106. The Court affirmed "for the sound reasons expressed in [PERC's] final decision," which "is supported by sufficient credible evidence on the record as a whole."

The Appellate Division of the Superior Court, in an unpublished opinion, In re PBA Loc. 29, 2024 N.J. Super. Unpub. LEXIS 869 (Dkt. No. A-0743-23) (attached), affirms 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 deduction of money from the final paychecks of PBA members (who resigned within five years after their start date), to recoup training costs expended by the Township. In affirming, the Appellate Division agreed with PERC that a statutory provision did not preempt the parties' CNA, making the issue mandatorily negotiable and subject to binding grievance arbitration. The Court also agreed with PERC that the amount of costs recouped is an issue

for the arbitrator; and declined to consider PBA's contention that the Township violated the Wage and Hour Law because it was not properly presented before PERC.

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

Appellate Division finds State Comptroller's Office properly denied OPRA/CLRA records requests made by CEO of company under investigation by State Comptroller

Benigno v. N.J. Off. of the State Comptroller, 2024 N.J. Super. Unpub. LEXIS 637 (App. Div. Dkt. No. A-1467-22)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court's dismissal of a verified complaint against the Office of the State Comptroller (OSC) filed by Benigno over OSC's denial of Benigno's records requests pursuant to the Open Public Records Act (OPRA) and the common law right of access (CLRA). Benigno sought records relating to the OSC's ongoing investigation of his company. In affirming, the Appellate Division held: (1) the requested records were subject to OPRA's ongoing investigation exemption at the time OSC responded to the requests, which prevented their disclosure; (2) even if the exception did not apply, plaintiff requests were overly broad; and (3) plaintiff's CLRA claims fail because he is unable to demonstrate a particularized need for the records, and OSC's interest in being able to conduct its statutory investigations outweighs any interest plaintiff may have in the records.

N.J. Supreme Court finds non-profit association of county prosecutors is not subject to OPRA or common law right of access

ACLU of N.J. v. Cnty. Prosecutors Ass'n of N.J., 2024 N.J. LEXIS 365 (S.Ct. Dkt. No. A-33-22 (087789))

The Supreme Court of New Jersey, affirming the judgment of the Appellate Division, holds: (1) a nonprofit association of county prosecutors is not a "public agency" and therefore was not required to disclose records under the Open Public Records Act; and (2) plaintiff ACLU did not have a common law right of access to the association's records, as it did not identify any law requiring the association to create or maintain the records at issue and did not allege that the association maintained public documents in a public office.

Appellate Division upholds termination of county police sergeant for not following bereavement leave procedures and untruthfulness in resulting IA investigation

In re Bagby, 2024 N.J. Super. Unpub. LEXIS 658 (App. Div. Dkt. No. A-2514-22)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final Civil Service Commission (CSC) decision upholding the disciplinary termination of Bagby from his employment as a sergeant with the Camden County Police Department, in connection with Bagby's failure to follow the proper procedure for taking bereavement leave. Internal affairs (IA) investigators concluded Bagby's conduct reflected an attempt to make it look as if he was coming into work or was on the clock, and that Bagby was untruthful in the IA investigation. An administrative law judge (ALJ) sustained all departmental charges but recommended a suspension and demotion rather than removal, based upon Bagby's disciplinary record. The CSC adopted the ALJ's factual findings but upheld the removal penalty, based upon the finding that Bagby's misconduct jeopardized the lives of others. In affirming, the Appellate Division found no basis to disturb the CSC's decision, which was firmly grounded in the governing legal principles, and supported by sufficient credible evidence in the record.

Third Circuit upholds dismissal of unvaccinated State workers' challenge to COVID-19 testing protocols during pandemic

Wright-Gottshall v. New Jersey, 2024 U.S. App. LEXIS 10158 (3d Cir. Dkt. No. A-2726-22)

The Third Circuit Court of Appeals, in a non-precedential opinion, substantively affirms the District Court's dismissal of a complaint filed by unvaccinated State workers who challenged policies requiring them to comply with testing protocols during the COVID-19 pandemic. In affirming, the Third Circuit held: (1) Appellants asserted no clearly established right "to be free from government-mandated workplace testing of an infectious disease"; and (2) the District Court correctly held that the State's rescission of the policies in August and September 2022 render moot the Appellants' claims for declarative and injunctive relief. The Third Circuit otherwise remanded to the District Court to issue an order dismissing those claims without prejudice, as opposed to with prejudice.

Appellate Division finds grievance arbitrator exceeded authority by effectively adding terms to CNA to exclude "stepparent" from definition of "parent" under bereavement leave provision

PBA Loc. No. 258 v. County of Ocean, 2024 N.J. Super. Unpub. LEXIS 755 (App. Div. Dkt. No. A-2129-22)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court's order vacating and reversing an arbitration award entered in favor of the County of Ocean and against plaintiff PBA Local 258. The PBA's underlying grievance challenged the County's denial of an officer's request to use contractual bereavement leave for the death of a stepfather, where the collective negotiations agreement (CNA) did not list stepparent deaths as among those qualifying for such leave. The CNA made it expressly available for the death of a "parent," among many others (including parental in-laws). The arbitrator denied the grievance, applying a "legal distinction" between biological/adoptive parents and stepparents for the purpose of bereavement leave. The trial court vacated the award, finding it "anomalous" that the CNA would allow someone to bereave a father-in-law but not their own mother's dead spouse. In affirming, the Appellate Division found the arbitrator exceeded his authority by effectively adding terms to the CNA to exclude "stepparent" from the definition of "parent" under the bereavement leave article.

Appellate Division upholds disciplinary removal of corrections officer whose severe misconduct contributed to violent physical assault on inmate by other prisoners

In re Porter, 2024 N.J. Super. Unpub. LEXIS 792 (App. Div. Dkt. No. A-0036-22)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Civil Service Commission's (CSC's) adoption of the findings and sanctions imposed by an Administrative Law Judge (ALJ) which upheld the charges against and removal of Porter, a Senior Correctional Police Officer at Northern State Prison, in connection with Porter's involvement with a fight among prisoners that caused serious injury to an inmate. The ALJ found that Porter had prior knowledge of the fight, and his delay in calling a "Code 33" emergency was purposeful and supported sustaining the charges of conduct unbecoming, inappropriate physical contact or mistreatment of an inmate, other sufficient cause, and negligence in performing duty resulting in injury. Further, the ALJ found Porter's inconsistent testimony about his prior knowledge of the fight was not credible, and thus sustained the charge of falsification, or intentional misstatement of material fact in connection with work. In affirming, the Appellate Division held: (1) the ALJ's findings were supported by sufficient and credible evidence at the hearing; (2) removal was appropriate, as the charges concerned the physical safety of inmates, and Porter was found to be part of a plan or conspiracy which enabled a violent physical assault on an inmate; and (3) a

lesser sanction than removal based on progressive discipline was not supported, because Porter's actions easily fit into the category of severe misconduct.

Appellate Division upholds major disciplinary action against NJDOT employee for failing to report driver's license suspension

In re Bennette, 2024 N.J. Super. Unpub. LEXIS 759 (App. Div. Dkt. No. A-0894-22)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final administrative decision of the Civil Service Commission (CSC) upholding the New Jersey Department of Transportation's major disciplinary action against Bennette, an NJDOT construction and maintenance technician whose job required a valid driver's license. The CSC adopted an administrative law judge's (ALJ's) determination that Bennette: failed to report his driver's license suspension; falsified travel expense invoices by certifying to possessing a valid driver's license; and engaged in conduct unbecoming of a public employee. In affirming, the Appellate Division held: (1) it was incumbent on Bennette as a public employee to report his driving privileges suspension regardless of a COVID-19-related cancellation of his hearing (to contest the suspension) due to the MVC's closure; (2) Bennette's candid admission that he knew his license was suspended, but believed it was in error, did not negate the violations; and (3) the CSC's decision accepting and adopting the ALJ's determination was sufficiently supported by the record and consistent with applicable law.

N.J. Supreme Court finds rule requiring confidentiality in workplace harassment/discrimination investigations is constitutionally overbroad, chills employees' free speech

Usachenok v. State Dep't of the Treasury, 2024 N.J. LEXIS 376 (S.Ct. Dkt. No. A-40-22 (086861))

The Supreme Court of New Jersey, reversing the judgment of the Appellate Division, holds that a regulation which required investigators in state workplace harassment/discrimination complaints to "request" that anyone interviewed "not discuss any aspect of the investigation with others," was invalid because it was overbroad in violation of the protection to free speech in the state Constitution. The Court found that although it sought to advance legitimate interests (in ensuring the integrity of investigations, minimizing the risk of retaliation, and protecting privacy interests), the regulation reached too far in trying to achieve those aims: it extended broadly, it contained

no time limits, and it chilled constitutionally protected speech. The Court found an amendment to the regulation issued while the case was pending (replacing the word "direct" with "request") did not correct these problems. The Court thus struck that portion, as the Court found it was unable to alter the regulation without improperly adding substantial language to it.

Appellate Division affirms dismissal of public works employee's disability-based LAD, CEPA claims against town over adequacy of personal protective equipment provided during COVID-19 pandemic

Bohnyak v. Town of Westfield, 2024 N.J. Super. Unpub. LEXIS 800 (App. Div. Dkt. No. A-3257-22)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Law Division's grant of summary judgment to the Town of Westfield, dismissing with prejudice Bohnyak's claims under the New Jersey Law Against Discrimination (LAD) and the Conscientious Employee Protection Act (CEPA). Bohnyak, an employee of the Town's Department of Public Works (DPW), alleged that during the COVID-19 pandemic the Town discriminated against him based on his cardiac disability, specifically by refusing to provide reasonable accommodations, including medical-grade personal protective equipment (PPE) to clean Westfield's public park restrooms. In affirming, the Appellate Division held, among other things: (1) the Town accommodated Bohnyak's social distancing request by allowing him to clean the restrooms in isolation; (2) Bohnyak posited no material facts disputing that the available PPE was adequate for the assignment and his disability; (3) Bohnyak demonstrated no material facts disputing that defendants acted in good faith by engaging in discussions regarding his requested medical-grade PPE; (4) the record did not support a causal link between Bohnyak's email alleging disability discrimination and employment actions taken by defendants in response to his refusals to accept the assignment; (5) summary judgment on the CEPA claim was appropriate because Bohnyak failed to factually dispute defendants' nondiscriminatory reason for the adverse employment actions.