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TO: Commissioners
From: Counsel Staff
Subject: Developments in Counsel's Office Since June 27, 2024
Date: August 22, 2024

Commission Cases

Commission Court Decisions

Federal Court Cases

Lutter v. JNESO, et al., 86 F.4th 111 (3d. Cir. 2023)

This is the last case to be resolved from the numerous cases of WDEA-related federal litigation in which PERC was named as a party. PERC was dismissed from the case in the above cited Third Circuit decision. However, Plaintiff recently made a motion to reactivate the case because she and JNESO (the only defendant not dismissed from the case) could not agree on damages. Plaintiff and JNESO sought to bring the dismissed defendants back into the case for purposes of assigning responsibility for damages. The District Court solicited position statements from all defendants. PERC filed a position statement strongly reinforcing that it had been dismissed from the case and asserting its position that it

should not be part of the reactivated case addressing damages. On July 25, 2024, the District Court issued an Order stating that PERC would not be required to participate in the reactivated case, agreeing with PERC that it had been properly dismissed from the case by the Third Circuit.

Appellate Division Decisions

Union County College and Union County College Chapter of the American Association of University Professors (AAUP), App. Div. Dkt. No. A-2993-22T4. On July 3, 2024, the Appellate Division issued its decision reversing and remanding the matter to PERC for entry of an order restraining arbitration.

After the Commission's inability to rule on this case due to a tie-vote, the Appellate Division conducted a *de novo* review. The Appellate Division determined that the transfer of a college professor from regular classroom duties to the Academic Learning Center, which was primarily for tutoring support, was not legally arbitrable because it was managerial prerogative outside of the scope of negotiations. The Court found that the transfer promoted the College's educational policy and objectives because it was in response to alleged poor performance by the professor.

Filings of Briefs/Motions by PERC

Neptune Bd. of Ed. v. Neptune Ed. Assn., P.E.R.C. No. 2024-29, 50 NJPER 294 (¶71 2023), OAL Docket No. EDU-04135-2024 S.

The Board appealed the above Commission decision denying the Board's scope petition to the Commissioner of Education (instead of the Appellate Division). The Neptune Education Association filed a Motion to Dismiss the petition. Counsel staff filed a statement of position in support of that motion. The matter was then transferred to OAL and a briefing schedule was set. A reply brief was filed on July 25, and a decision from the ALJ on the motion is forthcoming.

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

United States Supreme Court requires heightened standard for the issuance of a preliminary injunction against employers accused of violating National Labor Relations Act (8-1 decision, J. Jackson concurring in part, dissenting in part, and concurring in the judgment)

Starbucks Corp. v. McKinney, 602 U.S. ____ (2024).

After the National Labor Relations Board accused Starbucks of committing unfair labor practices, including illegally firing workers who had engaged in protected activity, the Board sought a preliminary injunction that, for the duration of the administrative proceedings, required Starbucks to reinstate the discharged workers (this process is similar to requests for interim relief filed with PERC). The District Court, affirmed by the Sixth Circuit Court of Appeals, granted the preliminary injunction after applying a two-part test that asked (1) whether there is reasonable cause to believe that unfair labor practices have occurred" and (2) whether injunctive relief is "just and proper." Some other circuits used this test, while other circuits used a four part test that requires the petitioner to prove they are (1) likely to succeed on the merits, (2) likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in their favor, and (4) that the injunction is in the public interest (very similar to the Crowe factors used by PERC). The Supreme Court held that the language in the National Labor Relations Act authorizing preliminary injunctions does not change the general principles that courts use when deciding whether to grant a preliminary injunction and adopted the four-part test that is applicable to most administrative agencies or plaintiffs seeking an injunction.

The Third Circuit affirms District Court's vacatur of private sector arbitration award, finding the grievance was untimely

Stonemor, Inc. v. IBT Local 469, 107 F. 4th 160 (3d. Cir. 2024)

The Third Circuit affirms the District of New Jersey's decision to vacate a private sector grievance arbitration award, finding that the arbitrator evinced manifest disregard for the collective bargaining agreement when she held that a grievance was timely filed. During negotiations, the union and the company came to a tentative agreement, contingent on ratification by the bargaining unit. The parties disputed the meaning of one of the terms in regard to wages, and the parties discussed arbitrating the issue. Over 90 days from ratification, but less than 10 days from full execution of the agreement, the union filed a grievance, and later, the arbitrator determined it was timely based on the date of execution. The award was vacated, with the Court finding that since the agreement stated "time [was] of the essence" in filing grievances, and the dispute was known to the union for some time and effectively related back to the date of ratification, that the grievance was untimely.

The New Jersey Supreme Court reverses the Appellate Division's opinion that affirmed a CSC order reinstating a correctional police officer formerly employed at the Edna Mahan Correctional Facility

In re Ambroise, 2024 N.J. LEXIS 770.

The Court found that the CSC wrongly mitigated the DOC's punishment against a CPO who was found responsible for engaging in a kiss with an inmate and failing to report it, and also improperly passing messages between inmates, including the inmate he kissed. The Court found that while progressive discipline is an important concept, it was not applicable in a case such as this, where the infractions went to the heart of the officer's ability to be trusted to function appropriately in the position, and therefore, was inapplicable in this instance.

Appellate Division, upholds ALJ and CSC determinations that Elmwood Police Department had cause to remove police officer for conduct unbecoming, neglect of duty, failure to perform sworn duties and insubordination even where the Officer had a 13-year unblemished disciplinary record.

In re Johnson, 2024 N.J. Super. Unpub. LEXIS 1256 (App. Div. 2024)

The Appellate Division of the Superior Court dismissed an appeal from a CSC decision finding that the employer had carried its burden to establish that a police officer, with the Department for three years and an officer for 13, had committed offenses that justified termination in the first instance. The ALJ determined that the officer, as a favor for another officer, pulled a motorist over without reasonable suspicion or probably cause to deliver a message to the motorist. The officer was also found to have improperly deactivated video recording of the stop. Additionally, the ALJ found that, without authorization, used Department letterhead to write a letter on behalf of a motorist to which he had written a summons, stating that he made a mistake and that the driver had a good drivers history. Both of these assertions were deemed to be untrue. Lastly, the ALJ found in a recording of a phone call between Johnson and another officer, that he had referred to his superiors using anti-gay slurs. The ALJ, affirmed by the CSC and the Appellate Division, found that his conduct warranted removal from his position and that while progressive discipline is a recognized and accepted principle, the infractions here were so serious that no lesser punishment

would have been appropriate.

Appellate Division finds that appeal to CSC after more than 60 days to be untimely, even where Hillsdale Township failed to provide notice of appeal rights, his right to request a hearing, or a Preliminary Notice of Disciplinary Action.

In re Davis, 2024 N.J. Super. Unpub. LEXIS 1343 (App. Div. 2024)

The Appellate Division of the Superior Court affirmed a CSC decision rejecting an appeal by a Township Code Enforcement officer challenging the termination of his employment. The Court found that the CSC did not act arbitrarily when it denied the appeal on procedural grounds, because it had been filed more than 20 days after the employer knew his employment had ended. The Court found that his explanation that he was "confused by the Township's position" was not sufficient to excuse the delay in filing the appeal, even where the Township did not notify him of his appeal rights or the timeframe to do so.

Appellate Division affirms Law Division's denial of OSC seeking to vacate grievance arbitration award that ordered the Township to negotiate unilateral changes to COVID-19 Leave by adding a booster requirement.

Twp. of Hamilton v. PBA Local 66, 2024 N.J. Super. Unpub. LEXIS 1340 (App. Div. 2024)

The Appellate Division of the Superior Court dismissed an appeal from a Law Division decision denying Hamilton Township's request to vacate an arbitration award finding that the Township violated the parties' CNA when it refused to negotiate and discuss a change in workplace policy with the PBAs governing the use and availability of special COVID-19 leave. The arbitrator determined that the decision to require a booster shot in order to access COVID leave, along with the length of time employees had to become additionally vaccinated, amounted to a change in working conditions and ordered the Town to negotiate over the issue and make certain employees whole who were forced to use regular sick leave instead of COVID leave. The Law Division, affirmed by the Appellate Division, determined that the arbitrator did not exceed his authority because he did not add a benefit to the CNA, nor did the award violate public policy.

Appellate Division affirms Commissioner of Education decision to suspend teaching license for two years even where tenure arbitrator ordered the teacher be reinstated to teaching position

In re Cilento, 2024 N.J. Super. Unpub. LEXIS 1342 (App. Div. 2024).

The Appellate Division of the Superior Court affirms a decision of the Commissioner of Education that suspended a teacher's certificate for two years. That decision was predicated on an incident that also resulted in tenure charges filed by the teacher's employer. In that case, the tenure arbitrator determined a lengthy suspension and reinstatement on a last chance agreement was the appropriate punishment for the teacher. In reliance on the recent Morison v. Willingboro Board of Education, 478 N.J. Super. 229, 234 (App. Div. 2024), this panel found that the Board of Examiner's revocation of a teaching certificate, and the tenure charge process were independent and involved different parties, therefore, the two-year suspension was valid.

Appellate Division upholds CSC finding that Firefighter candidate was improperly removed from academy after instructor falsified test results

In re Ekladious, 2024 N.J. Super. Unpub. LEXIS 1418 (App. Div. 2024).

The Appellate Division of the Superior Court affirms the CSC's decision reinstating Ekladious to his position as a Firefighter after being improperly removed from the Fire Academy. The opinion determined that the ALJ, as affirmed by the CSC, made appropriate credibility findings and conclusions of law that were supported by the record when it determined Ekladious had passed numerous physical fitness tests that an instructor at the Fire Academy had said he failed.

Appellate Division affirms dismissal of private cause of action against Township where the legal issues were already litigated before the CSC

Ingrassellino v. Foligno, 2024 N.J. Super. Unpub. LEXIS 1422 (App. Div. 2024).

The Appellate Division of the Superior Court affirms the dismissal of CEPA and constitutional claims asserted by a former police officer against his former employer. Prior to the filing of this lawsuit, the Officer challenged his dismissal with the

CSC by claiming he was retaliated against, where he was unsuccessful. The Court held that the claims in the Law Division were properly dismissed because they had already been raised as part of the CSC appeal process, and to litigate the claims again would be improper.

Appellate Division Upholds ALJ's reinstatement of police officer who tested both positive and negative for THC in two split sample urine tests

In re Ferro, 2024 N.J. Super. Unpub. LEXIS 1483 (App. Div. 2024).

The Appellate Division of the Superior Court affirms in part and reverses and remands in part a CSC decision that reinstated and provided partial backpay to SO Ferro. After a drug test, Ferro tested positive for THC. Some time later, a split sample was tested in which he tested positive for THC but below the allowable limit. The employer terminated Ferro's employment, and a CSC appeal ensued. After an ALJ ordered reinstatement, while also limiting Ferro's backpay award to three months because he had not sought employment during 2020 and 2021 during the COVID-19 pandemic, the appeal was affirmed by the CSC (via tie-vote procedures) and then appealed to the Appellate Division. That court affirmed the CSC decision, but remanded the matter because Ferro was entitled to additional workplace benefits not provided by the CSC or ALJ.

Appellate Division declines to vacate arbitration award that found City agreed to maximally absorb cost of retiree healthcare and reformed CNA to comply with Chapter 78

Plainfield v. FMBA Local 7, 2024 N.J. Super. Unpub. LEXIS 1509 (App. Div. 2024)

The Appellate Division of the Superior Court affirms the Law Division's confirmation of an arbitration award finding that Plainfield violated the parties CNA when it sought to charge retirees for health insurance premiums. As part of the award, the arbitrator determined that the City had agreed to pay those premiums at its sole expense, but, noting the preemptive effect of Chapter 78, crafted the award so that it complied with the statute. The arbitrator required a return of any health insurance premiums paid by employees who were hired before chapter 78's effective date, and ordered the City to comply with the chapter 78 requirements for other retirees. The Appellate Division, agreeing with the Law Division, found that all of the

arbitrator's findings were "reasonably debatable" and rejected the City's contention that the arbitrator was partial towards the union.

The Appellate Division finds that pension regulations prohibit disability pension applicant from collecting benefits where employment relationship was severed as part of a settlement of disciplinary charges

Trotter v. Board of Trustees, PFRS, 2024 N.J. Super. Unpub. LEXIS 1684 (2024)

The Appellate Division of the Superior Court upheld the PFRS denial of disability benefits, finding that a voluntary separation of employment to settle disciplinary charges that irrevocably separated him from employment was fatal to the disability retirement application, because he could no longer return to work should his condition improve. The Appellate Division found that the ALJ had reasonable grounds to determine that the employee had left employment, not because of his disability, but because he sought to avoid disposition of pending disciplinary action, and thus, he was ineligible for benefits notwithstanding the language of the settlement agreement.

Appellate Division declines to vacate tenure arbitration award of teacher with poor performance ratings whose class contained a small number of IEP and ESL students

DiPaolo v. Newark Board of Ed., 2024 N.J. Super. Unpub. LEXIS 1692 (2024)

The Appellate Division of the Superior Court affirms an arbitration award upholding tenure charges against a teacher, finding that the teacher's assignment of certain students who required ESL supplementary classes or possessed IEPs was not contrary to DOE regulations. After three consecutive years of partially effective or ineffective performance ratings, the Board brought tenure charges against the teacher, which conformed to the TEACHNJ Act. The arbitrator upheld the charges, finding that the performance evaluations were conducted properly and in accordance with the Act, while also rejecting the teacher's assertions that he was not qualified or properly certificated for the classes he was assigned. The Court affirmed for substantially similar reasons.

The Appellate Division of the Superior Court affirms a trial de novo of a disciplinary hearing conducted by the Superior Court that upheld the removal of a police officer who twice tested positive for anabolic steroids

Forcinito v. Borough of Clayton, 2024 N.J. Super. Unpub. LEXIS 1764 (2024)

The Court found that the trial court's decision upholding the removal was not arbitrary, capricious or unconscionable because it considered sufficient legally competent evidence, including by finding that the employee tested positive for anabolic steroids at a body building competition and again subsequently when tested by the appointing authority. Those positive tests, in addition to conduct unbecoming a police officer for cheating in an off-duty competition, was sufficient to justify the employee's removal where the attorney general policies require termination of employment for a positive drug test. The trial court's consideration of some hearsay evidence was not improper where other competent evidence provided sufficient basis for the decision.

The Appellate Division of the Superior Court affirmed the CSC order upholding a 28-day suspension for a Correctional Sergeant who failed to supervise subordinates who had failed to complete their assigned rounds of the unit, which resulted in the delayed discovery of a suicide.

In re Alvarez, 2024 N.J. Super. Unpub. LEXIS 1784 (App. Div. 2024).

The Appellate Division of the Superior Court found that the CSC's decision to uphold a 28-day suspension of a correctional sergeant was reasonably supported by the record. The ALJ, as affirmed by the CSC, determined that the Sergeant failed to notice that his subordinates had failed to complete 80% of their assigned rounds on the day in question, which likely resulted in the delayed findings of an inmate who had committed suicide. The Court determined that while the Sergeant had no disciplinary history, that fact was taken into consideration by the DOC and the CSC when implementing the discipline.

Appellate Division upholds removal of firefighter from his position where he held a second full-time position as a military recruiter without informing Kearny Fire Department

In re Tayag-Kosky, 2024 N.J. Super. Unpub. LEXIS 1829 (2024).

The Appellate Division of the Superior Court finds that the CSC, which adopted an ALJ's conclusions, had a reasonable basis supported by the record to remove a firefighter from employment because he had intentionally concealed a second full-time position as a firefighter and active-duty military status. The firefighter essentially admitted that he never told his superiors about other employment because there was no standing rule that he was obligated to do so. He also claimed that since his superiors never asked, he had not lied. The Appellate Division found that the record showed the officer deliberately deceived the Department in an effort to gain personal advantage from both positions and that termination of employment was not shocking to the court's sense of fairness so that it warranted reversal.