



STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PO Box 429  
TRENTON, NEW JERSEY 08625-0429

[www.state.nj.us/perc](http://www.state.nj.us/perc)

ADMINISTRATION/LEGAL  
(609) 292-9830  
CONCILIATION/ARBITRATION  
(609) 292-9898  
UNFAIR PRACTICE/REPRESENTATION  
(609) 292-6780

*For Courier Delivery*  
495 WEST STATE STREET  
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089  
EMAIL: [mail@perc.state.nj.us](mailto:mail@perc.state.nj.us)

October 24, 2018

TO: Commissioners  
FROM: Counsel Staff  
RE: Developments in the Counsel's Office since September 18, 2018

COMMISSION CASES

No Court Decisions Received

New Appeals

Tp of Gloucester and FOP Lodge 206 (Patrol Unit), PERC 2019-004, SN-2018-039, App. Div. Dkt. No. A-0420-18T4

The FOP has appealed the Commission's determination, applying prior similar rulings, that health insurance premium contribution levels are not negotiable until the next contract following the one during which the top tier of statutorily mandated contribution amounts have been satisfied.

Motion for Leave to Appeal

Tp of Irvington and Irvington FF Ass'n, IAFF Local 305, IR 2019-7, CO-2019-0789, App. Div. Dkt. No. AM-000096-18

The IAFF seeks leave to appeal the portion of the Commission Designee's interlocutory ruling that did not grant its request for interim relief that sought to restore a prior work schedule.

Withdrawals

The Division of State Police has withdrawn its application seeking Supreme Court review of State (Div. of State Police) v.

State Troopers Fraternal Ass'n, 2018 N.J. Super. Unpub. LEXIS 1613, App. Div. Dkt. No. A-0526-16. That decision vacated and remanded to the Commission P.E.R.C. No. 2017-20, 43 NJPER 133 (¶42 2016) that modified an interest arbitration award. The parties have reached a resolution and will be withdrawing all pending litigation.

#### OTHER CASES

#### Union membership/office/activity covered by Freedom of Association

Palardy v. Twp. of Millburn, \_\_\_ F. 3d. \_\_\_ 2018 U.S. App. LEXIS 27959 (3<sup>rd</sup> Cir), Dkt. No. 17-2597

The United States Court of Appeals for the Third Circuit, issues a published, thus precedential, decision that analyzes whether a public employee's union activity is protected by the freedom of speech and freedom of association provisions of the First Amendment. Palardy asserted that the Township retaliated against him for his union activity by declining to consider him for Chief of Police. During his 16 year career, he had advanced from patrol officer to captain and was active in both the PBA and the Superior Officers Association. The lower court analyzed the freedom of speech and freedom of association claims together, concluding that Palardy neither acted as a private citizen nor spoke out on a matter of public concern (as required for a public employee to gain First Amendment protection in the workplace) when conducting his union activity. The Third Circuit court agreed with the lower court with regard to Palardy's freedom of speech claim. However, it found that Palardy's freedom of association claim should be analyzed separately and that union membership is worthy of constitutional protection, thus remanding that claim for further proceedings.

#### Layoffs, Discipline and Discharge

#### Initiation of covert investigation without prior authorization warranted working suspension

In re Batten, 2018 N.J. Super. Unpub. LEXIS 2247 (Dkt. No. A-2252-16T2)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a disciplinary decision of the Civil Service Commission. The agency adopted an administrative law judge's ruling sustaining a 70 day working suspension imposed on a department of environmental protection employee. Contrary to

published department protocol the employee, without prior authorization, initiated an investigation into suspected marijuana growth in a State Wildlife Management Area.

As permanent title had been abolished, fired provisional employee had no right to prior job.

City of Newark Pub. Sch. v. OPEIU Local 32, 2018 N.J. Super. Unpub. LEXIS 2220, Dkt. No. A-4539-16 T1

The Appellate Division of the Superior Court, in an unpublished opinion, vacates an arbitration award sustaining a grievance filed by OPEIU Local 32. After an employee was separated from her permanent position, pursuant to a Civil Service approved layoff plan, she accepted a provisional job. But, within a few weeks of starting work in the new post, she was first counseled and then terminated for twice leaving her work location without prior permission. The arbitrator agreed that the employee had no right to remain in the provisional post but directed that she be reinstated to the prior permanent position she had previously held. The appeals court noted that the layoff plan had eliminated all of those positions and reasoned that the employee could not be reinstated to an abolished position.

Procedural errors insufficient to overturn discharge of poorly performing tenured teacher

Dodson v. State-Operated Sch. Dist. of Newark, 2018 N.J. Super. Unpub. LEXIS 2230, Dkt. No. A-306-16 T4

The Appellate Division of the Superior Court, in an unpublished opinion, affirms an arbitration award, issued pursuant to the Tenured Employees Hearing Law (TEHL) that a trial court confirmed. Dodson, a tenured teacher employed by Newark since 1999 was removed from his position. Although the Court found Newark committed some procedural errors, it rejected the teacher's claim that the arbitrator misapplied the burden of proof and noted:

[The teacher] would have been subject to dismissal even if defendant had correctly followed the evaluation procedures. His scores were so low in all of the considered categories that a perfect rating in competency . . . would not have sufficed to raise his score to an "effective" rating. Therefore, . . . the tenure charges were warranted.

## Employee Benefits

After arbitrator restored free bridge and rail trips, DRPA could not assess service fees

Del. River Port Auth. v. FOP Penn-Jersey Lodge No. 30, 2018 N.J. Super. Unpub. LEXIS 2186, Dkt. No. A-4473-16T2

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a supplemental arbitration award, which had been confirmed by the Chancery Division of Superior Court. A collective bargaining agreement in effect from January 1, 2010 through December 31, 2011, provided that employees represented by the FOP would annually receive passes for 100 free trips over DRPA bridges and 10 free rides on the DRPA rail line. In July 2010, Governor Chris Christie directed that the benefit be eliminated and the FOP filed a grievance. After a 2011 arbitration award restored the benefit, the DRPA reinstated the free trips, but charged each employee a \$1.00 per month service fee, the same amount paid by DRPA EZ pass holders. In a supplemental award the arbitrator held that the employees do not have to pay the service fee. The FOP's request for attorneys' fees and costs was rejected.

Employee entitled to severance pay and retiree health care; proposed discipline not pertinent

City of Camden v. CWA Local 1014, 2018 N.J. Super. Unpub. LEXIS 2135, Dkt. No. A-3864-16T4

The Appellate Division of the Superior Court, in an unpublished opinion, affirms an arbitration award, which had been confirmed by the Law Division of the Superior Court. The award sustained CWA's grievance asserting that a 25-year plus employee was entitled to severance pay and retiree health benefits. The Court agreed with the arbitrator that the employee submitted his retirement letter prior to service of a disciplinary notice and that the record did not show that his retirement was prompted by a desire to avoid discipline.