



**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)

December 20, 2018

TO: Commissioners  
FROM: Counsel Staff  
RE: Counsel's Office Developments since November 20, 2018

**COMMISSION CASES**

Englewood B/E and Englewood Teachers' Ass'n, I.R. No. 2019-9, CO-2019-085, leave to appeal denied, App. Div. Dkt. No. AM-000139-18, Motion No. M-2026-18

The Board sought leave to appeal an interim relief order directing the payment of salary increments following expiration of the parties' expired contract. The Appellate Division of the Superior Court has denied that application and has lifted a stay of the interim relief order.

**CASES RELATED TO COMMISSION CASES**

Restraint of disciplinary arbitration bars suit based on contract

Edward Ruff v. Rutgers, the State University of New Jersey, et al. 2018 N.J. Super. Unpub. LEXIS 2717 (Dkt. No. A-2549-16T3)

The Appellate Division of the Superior Court affirms a trial court's dismissal of a lawsuit filed by a Rutgers campus police officer who had been given a 10-day disciplinary suspension. In Rutgers, The State University and FOP Lodge 62, P.E.R.C. No. 2015-8, 41 NJPER 101 (¶35 2014), aff'd 43 NJPER 87 (¶25 App. Div.

2016), the Commission and the Appellate Division reaffirmed that police officers could not challenge major discipline through binding grievance arbitration, restraining arbitration of the FOP's grievance challenging Ruff's suspension. Referring to the prior litigation, the Court holds:

In our view, however, the Law Division judge's dismissal of the complaint was mandated, given our prior interpretation of the statutory scheme. This appeal is moot because the issues Ruff raised by way of complaint were resolved by our decision regarding the statute.

#### OTHER CASES

Seniority provisions of Union contract must be honored over broad religious accommodation request

Miller v. Port Auth. of N.Y. & N.J., 2018 U.S. Dist. LEXIS 193633

The United States District Court for New Jersey holds that viewing the options offered to Miller, and the inconvenience to the Authority in granting his request not to work on the Jewish Sabbath and holidays, the employer did not violate his civil rights. The Court recites that the Port Authority is bound by a collective bargaining agreement. The opinion holds that giving a permanent shift schedule to Miller to release him from work on the Sabbath and the Jewish holidays, without first offering that option to senior employees, would have violated the agreement's seniority provision and past practices requiring that the established rotational schedule be maintained. The Court holds:

On this record, the religious accommodation offered by Port Authority (option to swap shifts with other employees, and use vacation, personal excused time, or compensatory time) was reasonable. And because the blanket exemption proposed by Miller would have imposed more than a *de minimis* hardship, the employer was not required to accept it.

EMPLOYEE DISCIPLINE AND DISCHARGE

Lengthy working suspension rather than discharge appropriate for officer who left to aid sibling while on-duty during his shift

In re Montella, 2018 N.J. Super. Unpub. LEXIS 2585 (Dkt. No. A-3143-16T4)

The Appellate Division of the Superior Court affirms the Civil Service Commission's decision to impose a 120-day working suspension, rather than a discharge, for an officer involved in an unusual incident while on duty near the end of his shift for the Borough of Stanhope. Montella was called by his younger sister who asked for his assistance because she had been in a car accident in a nearby town. The officer kept his, and another department, advised of his actions. But, on the way to the accident scene, he turned on his flashing lights and exceeded the speed limit three times while going through another town. His report of the incident was not fully accurate. An Administrative Law Judge had recommended a 60 day working suspension but the CSC increased it to 120 days taking into account all of the facts of the case, including Montella's desire to assist his sister and his prior disciplinary record. Stanhope appealed seeking the discharge and the officer cross-appealed seeking the 60-day sanction recommended by the ALJ. The Court reasoned:

Under the idiosyncratic circumstances of this case, the Commission reasonably found that removal of Montella was too severe a discipline action, especially where the Borough Chief of Police knew that Montella had gone to the scene of his sister's accident prior to his completion of the [incident] report. In the ordinary case, an officer would have been permitted to correct the report if it was misleading or incomplete. . . [T]he Chief did not give [him] that opportunity here. . .

\* \* \*

Although we do not condone Montella's actions, we believe that in light of the unique facts of this case, the Commission struck an appropriate balance between the competing concerns involved. The 120 working day suspension, which was the most severe penalty short of suspension that the Commission could impose, N.J.A.C. 4A:2-2.4(a), was clearly not so disproportionate to the infractions involved in this case as to be shocking to one's sense of fairness.

Tenured psychologist's conduct warranted termination; award was reasonably debatable and based on substantial evidence.

Brett D. Holeman v. Freehold Reg. H.S. Dist. Bd. of Ed., 2018 N.J. Super. Unpub. LEXIS 2617 (Dkt. No. A-1778-17)

The Appellate Division of the Superior Court affirms a trial court's order confirming an arbitration award issued under the Tenure Employees Hearing Law that determined a tenured school psychologist should be removed from his position. Holeman appealed, arguing that the award should be vacated: "as it was procured by undue means; the arbitrator exceeded or imperfectly executed his powers in applying the proper standard and burden of proof; the Award was not based on substantial credible evidence; and the Award was inconsistent with public policy.

Citing N.J.S.A. 2A:24-8 the Court determines: (1) the award was reasonably debatable; (2) it was supported by substantial evidence; and (3) given the teaching staff member's conduct, there was no obligation to apply a progressive discipline analysis. The charges included allegations that Holeman had used profanity and made sexual comments in front of students and staff and had publicly demeaned colleagues and supervisors.

After acquittal on criminal charge officer was required to seek reinstatement via civil service appeal

Robert Smith v. City of Bridgeton, et al., 2018 N.J. Super. Unpub. LEXIS 2607 (Dkt. No. A-1453-16T3)

The Appellate Division of the Superior Court affirms a trial court's order dismissing the lawsuit of an officer seeking reinstatement after his acquittal on a criminal charge. Both courts agreed that the officer failed to exhaust administrative remedies available under civil service laws and regulations.

The Civil Service Commission (Commission) has primary jurisdiction over this matter. Plaintiff could assert the City's alleged statutory and regulatory violations as defenses at a disciplinary hearing and thereafter in a timely-filed appeal to the Commission. Plaintiff's allegations that the City failed to timely hold a hearing and reinstate him following his acquittal clearly and logically implicate civil service concepts, . . . Accordingly, the judge properly granted summary judgment to the City

and dismissed the complaint for plaintiff's failure to exhaust his administrative remedies.

Dismissal of tenured teaching staff member based on lapse of required license did not require tenure hearing.

Dorit Snow Vs. Board of Education of the Township of Brick, Ocean County, 2018 N.J. Super. Unpub. LEXIS 2681 (Dkt. No. A-1347-17)

The Appellate Division of the Superior Court affirms the Commissioner of Education's decision of an Occupational Therapist employed by the Board because her professional license had expired. It rejected the Therapist's claim that tenure charges and a hearing were required before she could be removed.

Snow went out on sick leave early in the 2015-2016 school year and left the country to recuperate. Responding to an e-mail from Snow, her supervisor advised she had paid sick leave up until the end of September. On September 30, 2015, her license as an Occupational Therapist expired.

During then following months Snow provided contradictory information concerning her fitness to return to work. In January, 2016, the Board terminated her employment on the grounds that she did not have a valid license for her position. The Commissioner relied upon N.J.S.A. 18A:28-14 and an implementing regulation, N.J.A.C. 6A:9B-14.11(b), setting the qualifications (including licensing) for an Occupational Therapist. The statute provides:

The services of any teaching staff member who is not the holder of an appropriate certificate, in full force and effect, issued by the state board of examiners under rules and regulations prescribed by the state board of education may be terminated without charge or trial.

Discipline of corrections officer for security lapses upheld

In the Matter of Matthew Calio, Camden County Department of Corrections, 2018 N.J. Super. Unpub. LEXIS 2706 (Dkt. Nos. A-5183-16T3/A-5189-16T3)

In a case involving two separate disciplinary sanctions imposed by the Civil Service Commission stemming from two separate incidents, the Appellate Division of the Superior Court remands

a 30-day suspension and affirms a 180-day suspension. The 30-day penalty was issued because Calio, a correctional officer, failed to properly supervise inmates working in a kitchen, allowing them to lounge and/or run unsupervised in a hallway outside the kitchen. The appeals court found that the evidence did not support a violation of one of the nine charges stemming from the kitchen incident and remanded to the CSC for reconsideration of the sanction. The 180-day suspension was imposed because during a five-hour period on one day, Calio was observed using improper technique in performing pat-down searches and failing to perform pat-down searches on another 40 inmates. The Commission had increased that penalty from a 150-day suspension first imposed.