



**STATE OF NEW JERSEY
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January 10, 2019

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

COMMISSION CASES

No new appeals

No decisions in Commission cases

OTHER CASES

Tenure did not apply to stipended extra-curricular job not requiring additional certification

Melnyk v. Bd. of Educ. of the Delsea Reg'l High Sch. Dist., 2018 N.J. Super. Unpub. LEXIS 2750 (Dkt. No. A-1095-17T1)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the decision of the Commissioner of Education holding that a tenured special education teacher who voluntarily taught in an after school program for special ed students could not achieve tenure in that extra-curricular position as she received a stipend separate from her normal salary and the assignment did not require an additional certification. The teacher sought a determination that she also had tenure in the after-school job after she was terminated from that program.

Arbitration Award dismissing tenure charges vacated; Case remanded to new arbitrator

Somerset County Voc. & Tech. Sch. Bd. of Educ. v. Vingara, 2018 N.J. Super. Unpub. LEXIS 2825 (Dkt. No. A-5456-16T4)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court decision which vacated an arbitration award dismissing tenure charges filed against a Culinary Arts teacher. The Court holds that a court decision vacating an arbitration award can be reviewed de novo. The trial court listed several errors made by the arbitrator including that although the case was governed by a preponderance of the evidence standard, "the arbitrator incorrectly found plaintiff did not establish evidence beyond any possible explanation, notwithstanding that defendant offered no alternative explanation for his conduct." The appeals court agreed with the trial court's order that the case be heard by a different arbitrator.

Discipline of employee who used union to complain about co-employee's gun threat not retaliation under CEPA

Gaughan v. Deptford Twp. Mun. Utils. Auth., 2018 N.J. Super. Unpub. LEXIS 2835 (Dkt. No. A-5044-16T3)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court decision granting summary judgment and dismissing a disciplined employee's lawsuit alleging his employer violated the Conscientious Employee Protection Act (CEPA). Gaughan contended that he established a prima facie case under CEPA because he held an objectively reasonable belief that an often disciplined co-employee engaged in unlawful conduct, and the DMUA acted contrary to the clear mandate of public policy to provide a safe workplace by failing to curb that unlawful conduct. Among the co-employee's acts was allegedly pointing a gun at the father of another co-employee. Gaughan alleged that after the Union complained the DMUA retaliated against him by filing disciplinary charges and ultimately suspending him. After reviewing the elements of a CEPA violation and assuming only for the sake of argument that Gaughan had complained about actions covered by CEPA, the court concluded:

[N]o reasonable fact-finder could conclude by a preponderance of the evidence on the motion record that plaintiff's suspension "was caused by [DMUA's] purposeful or intentional [retaliation]" for the complaint about B.N.'s possession of a gun.

Chief municipal public defender was managerial executive;
financial disclosure required

Milsted v. Local Fin. Bd., 2018 N.J. Super. Unpub. LEXIS 2834
(Dkt. No. A-2311-17T1)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a ruling of the Department of Community Affairs (DCA) imposing a \$100 fine on Milsted, the Chief Public Defender for the City of Hoboken for failing to file a 2016 Financial Disclosure Statement (FDS). The DCA adopted a recommendation of an Administrative Law Judge. Though the position of Chief Municipal Public Defender is not identified in the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 to -22.25, it includes "managerial executive" in the listing of local public officials who are required to submit a FDS. The opinion refers to the New Jersey Employer-Employee Relations Act as a reference for determining whether Milsted was a managerial executive:

The City was required to appoint a chief municipal public defender having "authority over other municipal public defenders serving that court with respect to the performance of their duties." N.J.S.A. 2B:24-3. The chief public defender serves as the "head" of the Office of the Municipal Public Defender. City Ordinance § 39-23. We conclude the chief municipal public defender is a managerial executive within the meaning of N.J.S.A. 34:13A-3(f).

Excessive absenteeism discipline warranted where employee did not seek extended FMLA leave

In re Diaz, 2019 N.J. Super. Unpub. LEXIS 1
(Dkt. No. A-0587-17T2)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a ruling of the Civil Service Commission (CSC) which adopted an Administrative Law Judge's recommendation to sustain a six-day suspension for excessive absenteeism by a corrections officer. The officer had received notice that he had Family Medical Leave Act days available before the unauthorized absences occurred, but he did not take any action to have his leave extended for another six months beyond the initial period granted by his employer.