



**STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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M E M O R A N D U M

TO: Commissioners
FROM: Counsel Staff
RE: Development in the Counsel's Office Since March 20, 2019
DATE: April 17, 2019

COMMISSION CASES

No new appeals or court decisions.

OTHER CASES

PUBLIC EMPLOYEE DISCIPLINE

Teacher entitled to unemployment benefits during period of suspension prior to discharge

Mendez-Azzollini v. Board of Review, 2019 N.J. Super. Unpub. LEXIS 588 (Dkt. No. A-1150-17T3)

The Appellate Division of the Superior Court, in an unpublished ruling, reverses the Department of Labor, Board of Review's ruling denying Belinda Mendez-Azzollini unemployment compensation. A Tenured Employees Hearing Law arbitrator sustained the discharge of Mendez-Azzollini from her tenured position as a school guidance counselor. However an Appeal Tribunal ruled she was not ineligible for unemployment benefits because her actions did not constitute severe misconduct. The Board of Review overturned that decision even though the appeal to it was untimely.

The teacher appealed, arguing the Board lacked jurisdiction because of the untimely appeal. The appeals court agreed with that procedural argument and ruled that the teacher was entitled to unemployment benefits. The Court did not comment on the merits of the case.

Mendez-Azzollini v. Board of Review, 2019 N.J. Super. Unpub. LEXIS 592 (Dkt. No. A-1154-17T3)

In a related case, the Appellate Division of the Superior Court, in an unpublished ruling, holds that while tenure charges were pending, Mendez-Azzollini was entitled to unemployment compensation despite the Board of Education's decision not to have her report to work. The Court reasoned:

We conclude appellant was employed during her period of reinstatement - during which she was ready, willing and able to report for work - and contributed to the benefits fund from her wages, thus protecting its solvency. The employer's decision to keep her from employment was certainly within its prerogative. Like a coach, employers can, in most instances, pick who plays and who sits the bench. We take no issue with its choice. That choice, however, did not render appellant ineligible for benefits.

Discharge of non-civil service officer procedurally correct

Dibuonaventura v. Wash. Twp., 2019 N.J. Super. Unpub. LEXIS 672 (Dkt. No. A-2212-17T3)

The Appellate Division of the Superior Court, in an unpublished ruling, affirms the decision of the Law Division sustaining the discharge of a non-civil service police officer. The Court's opinion comprehensively reviews the pertinent statutory appeal procedures, quantum of evidence, the burdens of proof and the roles of the various tribunals.

Charges resulting in long suspension of officer timely filed

In re Hairston, 2019 N.J. Super. Unpub. LEXIS 683 (Dkt. No. A-3758-17T4)

The Appellate Division of the Superior Court, in an unpublished ruling, affirms the decision of the Civil Service Commission, upholding the 100-day suspension of an East Orange Police Officer for sick leave abuse. The Court held that the penalty was sustainable in light of the officer's prior disciplinary history. In reviewing a dispute over the timeliness of the charges the court distinguished between the 45-day time limit to file charges alleging a violation of departmental rules and disciplinary charges based on "other sufficient cause," concluding that the time limit did not apply to the latter category.

Employer did not show fired employee was insubordinate; remand for increase in counsel fees

In the Matter of Vincent Fiscella, Jr., Township of Belleville, Department of Public Works, 2019 N.J. Super. Unpub. LEXIS 716 (Dkt. Nos. A-1403-16T2/A-3953-17T2

The Appellate Division of the Superior Court, in an unpublished ruling, reverses and remands the decision of the Civil Service Commission (CSC) in a disciplinary case. Belleville charged Fiscella with two offenses, suspended him without pay, and then terminated his employment. An Administrative Law Judge (ALJ) found the Township had not proven the two disciplinary charges. The CSC upheld the ALJ's decision as to one charge, determined Fiscella had committed the other, but modified the sanction and imposed a formal written reprimand. The CSC denied Fiscella's request for reconsideration but ultimately awarded him fifty percent of his counsel fees for having prevailed on one of the disciplinary charges.

On appeal Fiscella argued he should not have been found insubordinate for failing to attend a medical appointment scheduled by a case manager for the Township's workers' compensation carrier and asserts the counsel fee award was inadequate. The Court held:

- Given the facts (which showed that Fiscella had implicit consent to see his own physician), the Township did not sustain its burden of proving Fiscella had been insubordinate. Nor, given the circumstances, did Fiscella's conduct constitute other sufficient cause for his discipline.
- As both charges had been dismissed Fiscella's request for full attorneys' fees was remanded for consideration.

Post discharge hearing only for probationary police officer

S.B. v. State, 2019 N.J. Super. Unpub. LEXIS 867 (Dkt. No. A-2930-16T1)

The Appellate Division of the Superior Court, in an unpublished ruling, exercises jurisdiction over an appeal taken directly from New Jersey Transit's (NJT) dismissal, without a hearing of a probationary police officer. The collective negotiations agreement between NJT and the police union provides The CNA provides that NJT police officers serving probationary periods of employment "may be discharged with or without cause and for any reason without recourse to the grievance/arbitration provisions" of the CNA. The officer was accused of racially and sexually offensive remarks that were corroborated by multiple witnesses.

The Court held that as a probationary employee S.B. had no continued expectation of employment. But, it remanded for a post-discharge hearing, reasoning:

In considering the nature of S.B.'s liberty interest in obtaining future employment free from the stigmatic nature of the charges, NJT's interest in discharging probationary employees during their probationary periods without the burdens attendant to permanent employees' terminations, and the risk for error in NJT's decision-making, we conclude that pre-termination notice, an opportunity to respond, and a post-discharge hearing offers adequate procedural safeguards under these circumstances. At the post-discharge hearing, S.B. may invoke any applicable statutory defenses that he claims warrant dismissal of the underlying charges.

BENEFITS AND JOB ACCOMMODATION

Disability Benefits not payable; injury not during public service

Murphy v. Bd. of Trs., 2019 N.J. Super. Unpub. LEXIS 872, (Dkt. No. A-4998-16T1)

The Appellate Division of the Superior Court, in an unpublished ruling, affirms the decision of the Board of Trustees of the Public Employees Retirement Systems denying ordinary disability

retirement benefits (ODRB) to Bonnie Murphy, a former Information Technology technician employed by the Wall Township Board of Education. In 2006, Wall fired Murphy, an act found to be an unfair practice. See Wall Tp. Bd. of Ed. and Wall Tp. Information Technology Ass'n, P.E.R.C. No. 2010-24, 35 NJPER 373 (¶126 2009), recon. den. P.E.R.C. No. 2010-63, 36 NJPER 52 (¶24 2010), aff'd 2011 N.J. Super. Unpub. LEXIS 179, 37 NJPER 61 (¶23 2011). After her reinstatement was ordered, Murphy agreed to resign her position with Wall in exchange for payment of \$485,000. She then took a job in the private sector and became disabled. Because she qualified based on age and years of service and, by law remained a member of PERS for two years after leaving public employment, Murphy sought ODRB under N.J.S.A. 43:15A-42. However, the PERS board held that the disability must have occurred during public employment. The Court agreed.

Employer had to conduct inquiry before denying light duty request

Del. River Port Auth. v. FOP Penn-Jersey Lodge No. 30, 2019 N.J. Super. Unpub. LEXIS 694 (Dkt. No. A-3324-17T2)

The Appellate Division of the Superior Court, in an unpublished ruling, affirms a trial court decision upholding an arbitration award. The arbitrator, sustaining an FOP grievance, held that before denying a pregnant officer's request for light duty, the DRPA was required to engage in an "interactive process" to determine what accommodation, if any, should be provided. That process requires communication between the employer and the employee to determine whether a reasonable accommodation of the employee is possible without causing undue hardship on the employer. Contract language providing that the DRPA had discretion to determine if light duty was available, did not relieve the employer from making the investigation as to what activities the employee could perform. The contract also incorporated by reference the provisions of the Americans with Disabilities Act and the Family Medical Leave Act.