



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

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June 19, 2019

TO: Commissioners  
FROM: Counsel Staff  
RE: Developments in the Counsel's Office since May 22, 2019

**Commission Cases**

**New Appeals**

1. The Port Authority of New York and New Jersey has appealed a decision of the Superior Court, Law Division, Hudson County (Dkt. No. HUD-L-2723-18) affirming an improper practices ruling of the Port Authority Employment Relations Panel (PAERP) based on a charge filed by the Port Authority Police Benevolent Association. The charge alleged the Port Authority failed to provide "fire-safe" uniforms as required by the parties contract. The Commission's General Counsel represents the PAERP when its decisions are challenged in New Jersey Courts.
2. Matawan-Aberdeen Regional Bd. of Ed. and Matawan-Aberdeen Regional EA, P.E.R.C. 2019-42

The Board has appealed the Commission's denial of its request to restrain arbitration of the Association's grievance asserting that the Board was obligated to pay the full cost of employee dental insurance. App. Div. Dkt. No. A-4232-18T3

3. Southampton Bd. of Ed. and Southampton Ed. Ass'n,  
P.E.R.C. 2019-41

The Board has appealed the Commission's determination that it engaged in an unfair practice by unilaterally changing the 2018-19 faculty work year so that two non-student faculty workdays no longer immediately preceded the start of the student school year, contrary to the prior practice. App. Div. Dkt. No. A-4316-18T2.

4. Rutgers, The State University and FOP Lodge 164, Superior Officers Association, P.E.R.C. 2019-44

The Superior Officers Association appeals from the Commission's order restraining arbitration of a grievance challenging the termination of a police sergeant. App. Div. Dkt. No. A-4334-18T1

5. City of Orange Tp. and PBA Local 89, P.E.R.C. 2019-40

The City has appealed the Commission's decision holding that it committed an unfair practice by adopting an ordinance providing that terminal leave would be eliminated when the City-PBA contract expires. App. Div. Dkt. No. A-4310-18T3

#### **Court Decisions/Orders**

In the Matter of Ridgefield Park Board of Education and Ridgefield Park Education Association, \_\_\_ N.J. Super. \_\_\_ 2019 N.J. Super. LEXIS 60 (Dkt. No. A-1694-17T4), reconsideration denied (Motion No. M-6588-18).

Following the denial of its motion for reconsideration, the Ridgefield Park Board of Education has filed a notice that it will petition for Supreme Court review of the Appellate Division's decision.

Gloucester Tp and FOP Lodge 206 (Patrol Unit), P.E.R.C. 2019-4.

The FOP's request to withdraw its appeal was approved by the court. The issue is identical to Ridgefield Park Board of Education.

### Cases Related to Commission Cases

Change to SHBP coverage did not impair unfair practice remedies

Essex Cty. Sheriff's Officers PBA Local 183, et al. v. Dept of the Treasury, et al., 2019 N.J. Super. Unpub. LEXIS 1368 (Dkt. No. A-1228-17T2)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms one of four declaratory rulings made by the State Health Benefits Commission in a proceeding initiated by unions representing Essex County law enforcement officers. The New Jersey State PBA also intervened. No appeal was taken from the SHBC's opinions on the other three issues raised in the proceeding. Unfair practice charges and a scope of negotiations petition filed with P.E.R.C. challenging Essex County's alleged unilateral changes in health care coverage occasioned by its adoption of the State Health Benefits Plan had been held in abeyance pending the SHBC proceeding and the appeal.

The issue remaining in dispute was:

Whether Essex County, as an SHBP-participating employer, can reimburse employees for incremental costs arising from changes in negotiated levels of health benefits.

The SHBP responded:

No, a local employer may not reimburse any out-of-pocket costs that are part of the design of an SHBP plan. . . [R]eimbursing incremental costs alters the participant's out of pocket costs in the SHBP. . . Thus[,] the [SHBC] has no authority to modify these plan components and cannot permit a participating employer to do so either.

The Court held that SHBC's answer was "legally sound" and within its jurisdiction to make. The Court concluded that the SHBC ruling did not interfere with the Unions' ability to obtain an effective remedy if they prevailed in the PERC proceedings:

The [SHBC] did not rule that PERC cannot issue an appropriate remedy if an unfair labor practice is found by PERC. It expressed confidence PERC can fashion a

fair remedy that would not infringe on the overall SHBP plan design.

In essence, the Unions are seeking from this court an advisory opinion about whether any fair remedies - other than dollar-for-dollar reimbursements to individual employees - could be issued in the future by PERC in this matter.

We respectfully decline to do so. The questions of remedy must be decided in the first instance by PERC.

### **DISCIPLINE/PERSONNEL CASES**

Remand, not voiding of sanction, proper remedy where firing based solely on hearsay.

In re Corey Corbo, Union City Police Department, \_\_\_ N.J. \_\_\_  
2019 N.J. LEXIS \_\_\_ (Dkt. No. A-72-17)

The Supreme Court of New Jersey modifies the judgment of the Appellate Division of the Superior Court in a case involving the termination of a Union City police officer. The officer had become severely ill after ingesting cocaine five days earlier. Based upon the testimony of the officer's girlfriend, also a police officer, and hospital records, an Administrative Law Judge recommended, and the Civil Service Commission agreed, that the officer be terminated.

The Appellate Division found that the hospital records were not properly authenticated so those documents and the girlfriend's statement, the sole evidence produced, were hearsay and were not sufficient to support the CSC's decision. It ruled that the termination be vacated.

The Supreme Court concurred with the Appellate Division's conclusions about the evidence. However it held that setting aside the termination was premature, ruling "Case law demonstrates that the preferred remedy to rectify procedural errors at the administrative level is a remand." It held the case should be sent back to the Office of Administrative Law to allow the City the opportunity to demonstrate that the hospital records are admissible as business records, and the opportunity to present any other theories of admissibility.

State Police Superintendent could terminate, rather than suspend, trooper for shoplifting.

In re Carvounis, 2019 N.J. Super. Unpub. LEXIS 1261 (Dkt. No. A-4438-17T2)

In an unpublished opinion, the Appellate Division of the Superior Court affirms the decision of the Acting Superintendent of State Police to terminate the employment of a State Trooper who was arrested for shoplifting in Pennsylvania in 2014 on his day off. An Administrative Law Judge reasoned that because the Trooper, a member of the Executive Protection Bureau of the Governor's Security Unit was off-duty when he committed retail theft, one of the three charges did not apply and he should be suspended rather than terminated. Concurring that termination was appropriate, the appeals court noted:

Unfortunately, Carvounis's misconduct did not end with the theft. He compounded his misconduct by falsely claiming the stolen items belonged to him, and then claiming the stolen items were needed for work due to budgetary cutbacks. He further compounded his misconduct by requesting special treatment in the form of professional courtesy by virtue of his position.

We recognize that Carvounis was never previously disciplined and was respected in the Division. While the absence of prior discipline was considered by the Acting Superintendent, the serious nature of Carvounis's conduct led to the decision to terminate him.

Removal from a rehire list did not violate constitutional rights

Tundo v. Cty. of Passaic, 923 F.3d 283, 2019 U.S. App. LEXIS 13283 (3<sup>rd</sup> Cir 2019)

In a published, thus precedential opinion, the United States Court of Appeals for the Third Circuit affirms the ruling of the United States District Court dismissing, on summary judgment, claims of former Passaic County Correction Officers who were removed from a rehire list. The appellate court held that the district court properly granted summary judgment to the county on former civil service employees' 42 U.S.C.S. § 1983 claims, stemming from their removal from a rehire list after lay-offs, because even though they reasonably expected that they would stay

on the list forever, they did not have a property interest protected by U.S. Const. amend. XIV in staying on the rehire lists where the New Jersey Civil Service Commission had significant discretion to take former employees off its rehire lists, and neither promised nor suggested that it would constrain its discretion to remove them.

Civilian Review Board could not usurp Chief of Police's Authority

Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark,  
\_\_\_ N.J. Super. \_\_\_, 2019 N.J. Super. LEXIS \_\_\_ (Dkt. No.  
A-3298-17T3)

The Appellate Division of the Superior Court, in a published, thus precedential, decision upholds with two limited exceptions, the validity of a City Ordinance which created a civilian complaint review board (CCRB) in response to a Department of Justice probe that found an alarming "pattern or practice of constitutional violations" by the Newark Police Department. First, the Ordinance improperly required the Chief of Police to accept the CCRB's findings of fact, absent clear error; and second, it allowed for disclosure of complainant and police officer identities. The practical impact of upholding the Ordinance means that the CCRB can function as intended - providing a vital oversight role - by investigating alleged police misconduct, conducting hearings, developing a disciplinary matrix, making recommendations, and issuing subpoenas.

### **INSURANCE/BENEFITS CASES**

Claim for payment of retiree health premiums was untimely

Loneragan v. Twp. of Scotch Plains, 2019 N.J. Super. Unpub. LEXIS  
1221 (Dkt. No. A-4531-17T2)

In an unpublished opinion, the Appellate Division of the Superior Court affirms a trial court ruling dismissing as untimely a retired police officer's claim seeking to have Scotch Plains reimburse him for payment of health insurance premiums. The appeals court holds that the officer was required to file suit within six years of his 2007 disability retirement.

Injuries suffered while performing paid duties as coach qualified for accidental disability pension

Mulcahey v. Board of Trs., 2019 N.J. Super. Unpub. LEXIS 1260  
(Dkt. No. A-5146-16T2)

In an unpublished opinion, the Appellate Division of the Superior Court modifies the decision of the pension board awarding a teacher who received paid coaching stipends a disability retirement, but denying him accidental disability benefits. The Board noted that the coaching stipends are not considered pensionable salary and concluded that coaching was not part of the teacher's regular duties for the Freehold Regional High School District. An Administrative Law Judge had recommended that injuries suffered by Mulcahey as a softball coach in 2007, and as a volleyball coach in 2009 qualified him for an accidental disability retirement based on the language of the applicable statute and an interpreting court decision. In concluding that the teacher was eligible for an accidental disability requirement, the Court reasoned:

[T]here are several practical reasons why eligibility for accidental disability benefits should exist under these circumstances. Common experience recognizes that at the high school level, athletic coaches are routinely teachers in the same school or another school in the same district. That relationship permits the coach to interact with other educators, [and advance] the District's goal that its athletic programs be "part of the educational whole" and "in conformity with the District's objectives."

Further, in this particular case, the stipend the District paid was an item negotiated and incorporated in the parties' collective negotiations agreement. We might assume that if teachers, who were part of a bargaining unit that negotiated an additional stipend for its members, became ineligible for accidental disability benefits by accepting that stipend, they may decline the opportunity to apply for coaching positions.

N.J. and N.Y. laws on review of grievance arbitration (sick leave issue) were complimentary and parallel

Port Auth. of N.Y. & N.J. v. Port Auth. of N.Y. & N.J. Police Benevolent Ass'n, \_\_\_ N.J. Super. \_\_\_, 2019 N.J. Super. LEXIS 72, (Dkt No. A-3104-17T2)

In a published, thus precedential, opinion, the Appellate Division of the Superior Court reverses a trial court decision that vacated a grievance arbitration award. The award was made pursuant to the grievance procedure in the contract between the Port Authority P.B.A. and the Port Authority, a bi-state agency. The appeals court finds that New York and New Jersey have "complimentary and parallel" laws pertaining to review of grievance arbitration awards. Accordingly, New Jersey's law applied and the Port Authority's application to vacate the award was untimely. The award was reinstated.