



**STATE OF NEW JERSEY
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November 20, 2019

TO: Commissioners
FROM: Counsel Staff
RE: Developments in the Counsel's Office since October 23,
2019

NEW APPEALS

Ocean County College and Ocean County College Faculty Ass'n,
P.E.R.C. No. 2020-6

The College is appealing the Commission's decision not to reconsider P.E.R.C. No. 2019-49, 45 NJPER 417 (¶112 2019), which found mandatorily negotiable two contract clauses concerning preservation of unit work.

COMMISSION CASES

No Decisions Received

CASES RELATED TO COMMISSION CASES/JURISDICTION

Decision to withhold nurse's increment sustained

Cecilia Mullanaphy v. Board of Education of Marlboro, 2019 N.J.
Super. Unpub. LEXIS 2274 (Docket No. A-0052-18T3)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the decision of the Commissioner of Education withholding the salary increment of a school nurse even though an Administrative Law Judge recommended that the increment be restored. The Commissioner found that the nurse did not

adequately investigate the circumstances surrounding an incident during which a fifth-grade student fainted, did not properly report the incident to the student's parents, and failed to follow the applicable guidelines for the assessment and treatment of a fainting student. The Commissioner held, as argued by the Board, that the ALJ improperly relied on the higher standard of proof applicable to tenure cases.

The nurse's appeal came before the Commissioner after PERC, in P.E.R.C. No. 2016-84, 42 NJPER 570 (¶159 2016), determined that the reasons advanced for the increment withholding predominately related to the performance of nursing duties.

OTHER CASES

RETIREE BENEFITS

Change may be sought in type of retirement if warranted

Christine Minsavage v. Board of Trustees, Teachers' Pension and Annuity Fund ___ N.J. ____, 2019 N.J. LEXIS 1345 (Docket. No. A-48-18)

Before his death the petitioner's terminally ill spouse, a math teacher with 24 years and nine months in the pension system, applied for early retirement. Two weeks after he died the TPAF board notified the teacher's spouse that an early retirement pension required 25 years of service and she could only receive his life insurance. However, the teacher would have qualified for an ordinary disability retirement that would have given his spouse and family greater benefits. The Board turned down the spouse's application to retroactively change the retirement to ordinary disability and the Appellate Division affirmed.

The Supreme Court reversed noting: (1) pension statutes should be liberally construed and administered in favor of the persons intended to be benefitted thereby; and (2) for decades the Court has maintained that the power to reopen proceedings may be invoked by administrative agencies to serve the ends of essential justice and the policy of the law. The Court held that neither membership nor prior approval of a retirement application is required for modification of a retirement selection where good cause, reasonable grounds, and reasonable diligence are shown. The case is remanded for further proceedings to allow the petitioner to argue for modification under that standard.

Officer must have 20 years by Chapter 78 effective date, as opposed to CNA expiration date for retiree contribution exemption

Hamilton Township Superior Officers Association, et al. v. Township of Hamilton, (Docket No. A-0016-18T1)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court's grant of summary judgment to the Township and holds that an officer is not exempt from making contributions toward health insurance premiums in retirement.

The specific question raised by the case is must an officer have 20 years of service on June 28, 2011, the effective date of P.L. 2011, c. 78, or by the termination date of a CNA in effect on June 28, 2011. This officer did not have 20 years by June 28, 2011, but did reach that mark before the CNA in effect when Chapter 78 took effect expired on June 30, 2013. A complicating factor is that during the four year phase-in of the Chapter 78 contribution levels, the officer was promoted (in 2014) from patrol officer to sergeant, thus moving him from the PBA Unit to the SOA unit.

The first PBA contract to which Chapter 78 applied ran from July 1, 2013 to December 31, 2016, a 3½ year CNA. That meant that Tier Four was not complete (according to the trial court) until July 1, 2017, the same date the officer retired.

TENURE

Time served in civil service post could count toward tenure in clerical position

Brenda Miller v. State-Operated School District of the City of Newark ___ N.J. ___ 2019 N.J. LEXIS ____ (Docket No. A-52-18)

The Supreme Court affirms the judgment of the Appellate Division substantially for the reasons expressed in the majority's opinion, reported at 2018 N.J. Super. Unpub. LEXIS 1805.

Petitioner, a former employee of the Newark school district, appealed from a Commissioner of Education decision finding that time she was employed in various classified Civil Service secretarial positions could not be used to calculate her entitlement to tenure under N.J.S.A. 18A:17-2. The statute provides that board of education employees holding secretarial or clerical positions obtain tenure after employment for three consecutive years and the beginning of the next succeeding school year. Although petitioner was employed in secretarial positions

for more than three consecutive years, the Commissioner determined petitioner did not obtain tenure because under N.J.S.A. 18A:28-2 petitioner's employment in classified Civil Service secretarial titles did not satisfy the requirements of N.J.S.A. 18A:17-2.

Reversing, the appellate court noted that N.J.S.A. 18A:28-2 "renders Chapter 28's tenure provisions inapplicable to persons holding classified Civil Service positions." The court explained, however, that "Chapter 28 pertains exclusively to the tenure rights of teaching staff members in public school districts," and that, although "[t]he plain language of N.J.S.A. 18A:28-2 exempts persons employed in classified Civil Service titles from the 'provisions of' Chapter 28, [it] does not exempt employees in classified titles from the tenure provisions in other chapters of Title 18A." The court thus concluded that N.J.S.A. 18A:28 "is inapplicable to tenure rights earned under N.J.S.A. 18A:17-2," and stressed that "N.J.S.A. 18A:17-2 does not exempt secretarial employees in Civil Service positions from its tenure protections."

EMPLOYEE DISCIPLINE

Ten day suspension for failure to attend sexual harassment training upheld

In re Sha-Keana Davis, Mercer County Correction Center, 2019 N.J. Super. Unpub. LEXIS 280 (Docket No. A-4642-17T4)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the decision of the Civil Service Commission (CSC) imposing a 10-day suspension on a corrections officer who failed to attend mandatory sexual harassment training.

On November 5, 2016, MCCC informed all Correction Officers that they were required to attend one session of sexual harassment training between November 28, 2016 and January 19, 2017. There were eight dates for the training for non-supervisory COs, with two sessions on each day. All officers had to attend the training on their own time. Davis did not attend any of the training sessions.

Davis stated she could not attend several of the training dates because she was working mandatory overtime shifts, and she was absent from work on Family Medical Leave Act (FMLA) leave. However, Davis also testified she took several voluntary overtime shifts that prevented her from attending the training sessions. Although appellant intended to attend the January 18 training,

she sustained a work-related injury on January 17 and was placed on medical leave for the last two days training was offered.

The CSC found appellant committed conduct unbecoming a public employee and violated Mercer County Correction Center (MCCC) administrative procedures and regulations involving safety and security.

Eschewing protocols in search for missing high risk child, lying during internal investigation, warranted officer's discharge

In the Matter of Joseph Maglione, Ewing Township Police Department , 2019 N.J. Super. Unpub. LEXIS 2187 (Docket No. A-4086-17T3)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the decision of the Civil Service Commission (CSC) upholding the discharge of a police Lieutenant based on his conduct during and after a search for a missing "high risk" child.

The Department received a telephone call, reporting a missing eleven-year old child. Lieutenant Maglione, the on-duty supervisor on the date of the incident, and a patrol officer responded to the missing child call. Both officers spoke to the missing child's parents, but they did not follow or implement several required protocols. Maglione told the patrol officer to call the Mercer County Prosecutor's Office and the officer who worked in the child's school. Maglione did not instruct the officer to contact the Child Abduction Response Team (CART) to ensure their involvement in the missing child investigation. Nor did Maglione call his superiors regarding the child's disappearance.

The next day, the Department first learned the child was missing. The on-call detective contacted CART. The staff at CART said they were not contacted the prior evening by either Maglione or the patrol officer. The on-call detective called the child's school seeking to contact the missing child's friends. Within hours thereafter, the juvenile was found unharmed.

An internal affairs investigation concluded Maglione edited the patrol officer's incident report several times and determined significant information was missing from that report despite Maglione's approval of the document. The internal affairs investigator found Maglione had been untruthful many times during the course of the Department's investigation.