



**STATE OF NEW JERSEY
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December 18, 2019

TO: Commissioners
FROM: Counsel Staff
RE: Counsel's Office Developments since November 19, 2019

NEW APPEALS

Rutgers, The State University of New Jersey and OPEIU Local 153

Rutgers has appealed from P.E.R.C. No. 2020-021 declining to restrain arbitration over the alleged disciplinary transfer between work locations of a campus security officer.

COMMISSION CASES

Federal Court dismisses agency shop suit against PERC members

Smith et. al. v. N.J. Educ. Ass'n et. al., 2019 U.S. Dist. LEXIS 205960, (D.N.J. Civil No. 18-10381 11/27/2019)

On November 27, 2019, the U.S. District Court for the District of New Jersey, in an unpublished opinion, dismissed a lawsuit filed against the NJEA, several NJEA locals, Boards of Education, Governor Murphy and the Chair and members of the Public Employment Relations Commission.^{1/} The plaintiffs to the lawsuit, filed on the heels of the U.S. Supreme Court's decision in Janus v. AFSCME, Council 31, et al., 138 S.Ct. 2448 (2018), declaring public sector agency shop arrangements unconstitutional, were both members and non-members of the

^{1/} The Court's opinion also covers, Fischer and Speck v. Murphy et. al., which was not filed against the PERC Chair and Commission members.

Associations who were their exclusive majority representatives for collective negotiations with the Boards of Education that employed them. Earlier in the litigation, all but one Board was dropped from the lawsuit as defendants, as were the members of the Public Employment Relations Commission Appeal Board.

The Associations honored the requests of those plaintiffs, who were members prior to Janus and of the non-members, to no longer have either Association dues or agency shop fees deducted from their salaries. The Court made these rulings:

- Janus did not invalidate dues authorizations made by plaintiffs who were Association members. Those employees agreed to be bound by the authorizations and the opt-out procedure set by statute. The Court rejected the argument of a plaintiff who had not yet resigned her membership, who argued that, post-Janus, the Association had to get her consent before continuing deductions. The Court ruled that because the Member Plaintiffs' resignations were all processed under the terms of their agreements, or under more advantageous terms, they were not entitled to reimbursement of union dues deducted in the months before their resignations took effect.
- Because the Associations did not strictly require adherence to the opt-out deadlines set by N.J.S.A. 52:14-15.9e as it read either before or after it was amended by Section 6 of the Workplace Democracy Enhancement Act (WDEA), there was no violation of the Member Plaintiffs right to no longer be Association members. The Court however opined that the more narrow window (10-days after anniversary date instead of January 1 and July 1) set by the WDEA amendments to N.J.S.A. 52:14-15.9e, had it been used, might "unconstitutionally restrict an employee's First Amendment right to opt-out of a public-sector union."
- Non-members were not entitled to a refund of agency fees collected prior to Janus as the Associations who received those fees did so based on their good faith reliance on Aboud v. Detroit Bd. Of Ed., 431 U.S. 209 (1977), which had authorized public sector agency shop.

(decision attached)

Teacher can arbitrate sick pay denial on day of Super Bowl Parade

City of Burlington Bd. of Educ. v. City of Burlington Educ. Ass'n, 2019 N.J. Super. Unpub. LEXIS 2422 (Dkt No. A-2440-18T3)

In a decision that briefly drew nationwide media attention, the Appellate Division of the Superior Court, in an unpublished opinion, affirms P.E.R.C. No. 2019-27. That ruling declined the Board's application to restrain arbitration of a teacher's grievance challenging the Board's decision to deny him a day's paid sick leave because he did not bring in a doctor's note to verify his illness. The date in question coincided with the date of the Philadelphia Eagles victory parade for winning Super Bowl LII. The teacher asserted that he had the flu both before and after the parade and had not been required to produce a note for those absences. The media have described the case as the "football flu dispute." (decision attached)

OTHER CASES

Officer's completion of PTI program did not warrant back pay

In the Matter of Clifton Gauthier, ____ N.J. Super. ____, 2019 N.J. Super. LEXIS 169 (Dkt. No. A-4015-17T4)

In a published, thus precedential opinion, the Appellate Division of the Superior Court affirms the ruling of the Civil Service Commission, that the successful completion of a Pre-Trial Intervention (PTI) program resulting in dismissal of criminal charges, was not the legal equivalent of an acquittal. Hence a reinstated police officer was not entitled to back pay, except from the date of PTI completion until reinstatement. After criminal charges were lodged against him, Rockaway Township suspended Gauthier, a police officer, without pay. Gauthier successfully completed the PTI, and the charges were dismissed. The Township reinstated him, and paid him withheld wages from the date of the PTI dismissal to the date of reinstatement. The Township refused to pay him wages from the time the charges were filed to the date of dismissal. The Civil Service Commission affirmed.

The court affirmed the Commission, as Gauthier's successful PTI completion was not one of the favorable dispositions of criminal charges which mandate payment of back wages enumerated in N.J.S.A. 40A:14-149.2. The statute predated PTI by years.

Applicant's bad driving and conduct justified removal from list

In the Matter of Ramon Camilo, 2019 N.J. Super. Unpub. LEXIS 2409
(Dkt No. A-4150-17T1)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the decision of the Civil Service Commission to remove an applicant for police officer in Jersey City from the eligible list based on past incidents detailed in a background investigation report. These included three accidents in a short period of time, failing to appear in court on a motor vehicle matter and a domestic violence restraining order. The Commission, taking into account the high standards of conduct required of a police officer, found that the applicant was an adult at the time of these incidents and concluded that not enough time has elapsed to show that he has been rehabilitated.