



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

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September 10, 2020

TO: Commissioners  
FROM: Counsel Staff  
RE: Developments in Counsel's Office since August 13, 2020

**Commission Cases**

**Update on Federal Court Litigation involving the Commission**

The Chairman and several current and former members of the Commission were named as defendants in federal lawsuits that were filed after public sector agency shop arrangements were declared unconstitutional in Janus v AFSCME, 138 S.Ct. 2448 (2018).

In Smith, et al. v. NJEA, et al., 2019 U.S. Dist. LEXIS 205960 and Thulen v. AFSCME, 2019 U.S. Dist. LEXIS 221502, Judge Renee M. Bumb granted motions dismissing the PERC defendants from the litigation. Those rulings and other related cases are now pending before the United States Court of Appeals for the Third Circuit. The Court canceled the oral argument scheduled for Thulen on September 22, 2020 and will decide the case on the briefs. The oral argument in Smith is scheduled for October 1, 2020.

**Petitions for Certification**

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Within the past month the City of Orange Township filed with the Court a brief and appendix in support of its petition for certification of In the Matter of City of Orange Township and PBA Local 89, 2020 N.J. Super. Unpub. LEXIS 1047 (Sup. Ct. Dkt No. 084637, App. Div. Dkt No. A-4310-18T3), while the respondent PBA Local 89 filed an opposing brief. The Commission filed a letter response, standing by its application of agency expertise and well-settled rules of statutory construction, as affirmed by the Appellate Division. The City then filed a reply letter brief together with a motion for leave to file it as within time. In the underlying decision, the Appellate Division affirmed the Commission's decision (P.E.R.C. No. 2019-40) holding that the City engaged in unfair practices when it adopted an ordinance announcing the elimination of terminal leave payments to PBA unit members.

### **Appeals from Commission Decisions**

There were no new appeals filed since August 13.

There was activity in pending appeals from two separate final agency decisions by the Director of Arbitration on requests to appoint special arbitrators to review disciplinary terminations of college campus police officers, pursuant to N.J.S.A. 40A:14-210. In In the Matter of New Jersey Institute of Technology (NJIT), Officer Gregory DiGuglielmo and Public Employment Relations Commission (App. Div. Dkt No. A-003772-19T2), the Commission filed a brief and Rutgers, the State University of New Jersey, filed an amicus brief, in NJIT's appeal from the Director's determination (DA-2020-004) that Mr. DiGuglielmo is eligible for special disciplinary arbitration. Oral argument is scheduled for September 29, 2020.

In In the Matter of Rutgers University Police Department and Leslie Jones (App. Div. Dkt No. A-002286-19T3), Mr. Jones filed an amended brief and appendix in his appeal from the Director's determination (DA-2020-002) that he is ineligible for special disciplinary arbitration.

### **Commission Court Decisions**

Chapter 78 preempts negotiation over employee health benefit contribution levels until next collective negotiations agreement after full implementation of Chapter 78 is achieved

In the Matter of Ridgefield Park Board of Education and Ridgefield Park Education Association, 2020 N.J. LEXIS 902 (Sup. Ct. Dkt No. A-2-19)

The Supreme Court of New Jersey (opinion attached), reversing the Appellate Division and remanding to the Commission, upholds the Commission's decision (P.E.R.C. No.2018-14) granting the Ridgefield Park Board of Education's request for a restraint of binding arbitration. The Court agreed with the Commission's holding that N.J.S.A. 18A:16-17.2 (a provision of P.L. 2011, c. 78 (Chapter 78)) preempted negotiation over the health insurance premium contribution rate in the parties' 2014-2018 collective negotiations agreement (CNA), because full implementation of the four-tiered employee contributions required by Chapter 78 had been reached in the first year of that contract, and the law expressly, specifically and comprehensively prohibits negotiation over contribution levels until the next CNA after full implementation is achieved. The Court found the Commission correctly construed the law according to its plain language, and specifically rejected the Appellate Division's contention that the Association's members being required to contribute at Tier 4 levels for three additional years after achieving full implementation was an "absurd result."

#### **Non-Commission Court Decisions Related to the Commission's Jurisdiction**

Third Circuit affirms that reimbursement of public-sector fair-share fees, collected pre-JANUS, is not required, post-JANUS

Diamond v. Pennsylvania State Education Association, 2020 U.S. App. LEXIS 27475 (3d Cir. Dkt Nos. 19-2812 and 19-3906)

The United States Court of Appeals for the Third Circuit, in a precedential opinion, affirms federal District Court rulings that dismissed the claims of appellants, including current or former teachers in Pennsylvania public schools who were not members of the union that exclusively represented their bargaining unit, seeking repayment of the fair-share fees they had previously paid to their union after the Supreme Court of the United States, in Janus v. AFSCME Council 31, held that state legislation condoning public-sector fair-share fees was unconstitutional. The Third Circuit ruled that because the unions collected the fair-share fees in good faith reliance on a governing state statute and Supreme Court precedent, Aboud v. Detroit Bd. of Educ., they were entitled to, and successfully made out, a good faith defense to monetary liability under 42 U.S.C. § 1983.

Appellate Division rules settlement agreement resolving preliminary notice of disciplinary action is personnel record exempt from disclosure under OPRA, remands to trial court to determine whether agreement, in whole or part, is accessible under common law right of access to public records

Libertarians for Transparent Government v. Cumberland County, 2020 N.J. Super. LEXIS 211 (App. Div. Dkt No. A-1661-18T2)

The Appellate Division of the Superior Court, in a published opinion, determines that a settlement agreement between defendant Cumberland County and a former County employee resolving a preliminary notice of disciplinary action (PNDA) against the employee is not a government record, and is exempt from disclosure as a personnel record under the Open Public Records Act (OPRA). The Court rejected the argument of plaintiff Libertarians for Transparent Government that the settlement agreement was properly released in redacted form as not supported by the language of OPRA or the history of excluding personnel and pension records from public access contained in Executive Orders 9 (Hughes), 11 (Byrne) and 21 (McGreevey). The Appellate Division reversed a trial court order that released the redacted settlement agreement, and remanded for the court to consider whether Libertarians is entitled to the agreement, either in whole or in part, under the common law right of access to public records.

Final agency decision upholding disciplinary removal of police lieutenant affirmed where ALJ's contrary recommended decision failed to make specific credibility findings and was otherwise unsupported by record as a whole

In the Matter of Odalys Rastatter, City of Passaic, 2020 N.J. Super. Unpub. LEXIS 1601 (App. Div. Dkt No. A-3323-16T4)

The Appellate Division of the Superior Court, in an unpublished opinion, affirmed a final agency decision of the Civil Service Commission (CSC) which had rejected the recommended decision of an administrative law judge (ALJ) overturning the City of Passaic's disciplinary removal of Ms. Rastatter, a police lieutenant, for having been absent without leave during Superstorm Sandy, lying to her supervisor and internal affairs about her whereabouts, directing a subordinate to falsify her time records, and failing to supervise the officers and civilians under her command. The Court found the ALJ's decision was arbitrary, capricious and unreasonable where its only finding on witness credibility was a statement that Ms. Rastatter's witnesses were more credible than the City's, and further that

besides neglecting to make specific findings regarding the credibility of any of the ten witnesses who testified, the ALJ's endorsement of Ms. Rastatter's account of events was not supported by the record as a whole.

Final agency decision upholding disciplinary action against State Police lieutenant vacated, in part, where decision failed to offer adequate justification for rejecting ALJ's firsthand assessment of witness credibility, and other evidence was insufficient to support one of two charges

In re Shyner, 2020 N.J. Super. Unpub. LEXIS 1662 (App. Div. Dkt No. A-3546-18T1)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses, in part, a final agency decision by the Acting Superintendent of the New Jersey State Police (the Division) which had rejected an ALJ's recommended dismissal of two disciplinary charges imposing a forty-day suspension against a State Police lieutenant. The ALJ had found that some of the testimony presented by the Division was not credible, specifically in support of a charge that the lieutenant lied when she claimed that she was not aware she had been the principal of a domestic violence investigation. The Court vacated that violation, finding the Acting Superintendent had not offered adequate justification for rejecting the ALJ's findings that were based on a firsthand assessment of witness credibility, and the remaining evidence relating to that charge, viewed in its entirety, was insufficient to prove the lieutenant willfully lied.

School speech therapist did not cease to be employee during unpaid maternity/childrearing leave of absence, was eligible for and entitled to resumption of health benefits upon return to work, pursuant to SEHBP and applicable CNA

Danetz-Gold v. Board of Education of Englewood Cliffs, 2020 N.J. Super. Unpub. LEXIS 1629 (App. Div. Dkt No. A-3021-18T2)

The Appellate Division of the Superior Court, in an unpublished opinion, affirmed the trial court's summary judgment ruling that the plaintiff, a school speech therapist who took maternity and unpaid contractual childrearing leave for the second half of the 2012-2013 and the entire 2013-2014 school years, was entitled to a resumption of health benefits upon her return to work at a reduced rate of full-time employment working twenty-one hours per week, after she requested to re-enroll in the School Employees Health Benefits Program (SEHBP) due to her husband's potential

loss of employment (prior thereto she had waived coverage and accepted an opt-out waiver payment in lieu of coverage while being covered through her husband's insurance). The court found: (1) the plaintiff did not cease to be an employee when she went on leave; (2) the applicable CNA clearly provided that an employee who returned following leave would have benefits restored; (3) the defendant's resolution approving the leave contemplated her return; (4) the plaintiff could not be paid the opt-out waiver payment for the 2013-14 school year while she was on unpaid leave; and (5) the plaintiff was also eligible for benefits under the plain language of N.J.S.A. 52:14-17.32(g), a provision of the SEHBP.