



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

PO Box 429
TRENTON, NEW JERSEY 08625-0429

www.state.nj.us/perc

ADMINISTRATION/LEGAL
(609) 292-9830
CONCILIATION/ARBITRATION
(609) 292-9898
UNFAIR PRACTICE/REPRESENTATION
(609) 292-6780

For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089
EMAIL: mail@perc.state.nj.us

April 21, 2021

TO: Commissioners
FROM: Counsel Staff
RE: Developments in Counsel's Office since March 25, 2021

Commission Cases

Appeals from Commission Decisions

No new appeals from Commission decisions were filed since March 25.

Commission Court Decisions

Appellate Division affirms PERC's final agency decision denying an employer's scope petition to the extent the grievance challenged alleged reductions in the level of health benefits caused by a unilateral change in health insurance programs

In the Matter of County of Essex and Essex County PBA Local 382, 2021 N.J. Super. Unpub. LEXIS 659 (App. Div. Dkt No. A-3458-19)

The Appellate Division of the Superior Court, in an unpublished

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opinion, affirms PERC's final agency decision, P.E.R.C. No. 2020-40, 46 NJPER 359 (¶88 2020), denying, in part, Essex County's petition to restrain arbitration of Essex County PBA Local 382's grievance alleging that the County violated the parties' collective negotiations agreement (CNA) when it unilaterally entered the State Health Benefits Program (SHBP), resulting in a reduction in the level of PBA members' health benefits. The grievance also requested stipends for members who waived the County's health coverage. PERC determined that the stipends demand was preempted by statute and therefore not arbitrable, but denied the County's scope petition to the extent the grievance challenged any other alleged reductions in the level of PBA health benefits caused by the County's unilateral change to the SHBP. The Appellate Division found PERC's decision was not arbitrary, capricious, or unreasonable, finding "no basis to disturb PERC's well-reasoned decision" and affirmed "substantially for the reasons articulated therein."

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

Appellate Division overturns trial court's vacation of PERC-appointed grievance arbitrator's award

County of Cumberland v. Policemen's Benevolent Association Local 299, 2021 N.J. Super. Unpub. LEXIS 448 (App. Div. Dkt No. A-2418-19)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses a decision of the Law Division, Cumberland County, L-0779-19, which vacated a PERC-appointed grievance arbitrator's award. The arbitrator sustained a grievance filed by PBA Local 299, finding that the County violated the parties' memorandum of agreement (MOA) by not correctly advancing unit members on the negotiated salary guide. Finding the arbitrator did not exceed the scope of his authority, the award was not contrary to existing law or public policy, and his decision was a reasonably debatable interpretation of the MOA, the Appellate Division concluded that the trial judge's vacation of the arbitrator's award was arbitrary and capricious, and reinstated it.

Appellate Division reverses and remands trial court's affirmance, modification of PERC-appointed grievance arbitrator's award affecting police and fire employee health benefits

Paterson Police PBA Local No. 1, Paterson Police Local 1, Superior Officers Ass'n, Paterson Firefighters Ass'n, and

Paterson Fire Officers Ass'n v. City of Paterson, 2021 N.J. Super. Unpub. LEXIS 652 (App. Div. Dkt No. A-3937-19)

The Appellate Division of the Superior Court, in an unpublished opinion, vacates a decision of the Chancery Division, Passaic County, C-000120-19, and remands to the trial court and PERC-appointed grievance arbitrator, in a dispute over the employer City of Paterson's switch from a self-insured health benefits program to the State Health Benefits Program (SHBP). In their consolidated grievances, the police and fire bargaining units argued that the SHBP plan was not substantially equivalent to the self-insured plan, in violation of the relevant collective negotiations agreements. In sustaining the grievances, the arbitrator's award required the City to reinstate the self-insured program and transfer all fire and police employees, eligible retirees and their eligible dependents from the SHBP back into the self-insured plan, and thereafter provide reimbursements for any increased costs they incurred while under the SHBP. In reaching that decision, the arbitrator found that because such reimbursements were not permitted under the SHBP, the City could "carve out" police and fire employees and retirees from the SHBP. The trial court affirmed, then modified the arbitrator's remedy to require the City to move all of its employees (not just police/fire) back into the self-insured plan. The Appellate Division found the remedy could not include the carve out, which was unlawful under the State Health Benefits Program Act's uniformity requirement, but could include a reimbursement plan as a lawful remedy to compensate for increased out-of-pocket expenses, and remanded for the fashioning of such remedy. It also found the trial judge erred by modifying the arbitration award without proper statutory authority.

News publisher was entitled to police Internal Affairs records under common law right of access, but not under OPRA; award of attorney fees to publisher was not warranted

Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 2021 N.J. Super. LEXIS 42 (App. Div. Dkt No. A-4006-18)

The Appellate Division of the Superior Court, in a published opinion, affirms in part, and reverses in part a decision of the Law Division, Monmouth County, L-2616-17, finding that the trial court correctly held that a publisher was not entitled to access to a Neptune Township police department sergeant's Internal Affairs file pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to 47:1A-13, but that disclosure was required under the common law right of access. The Appellate Division found: (1) OPRA expressly bars public access to government personnel or pension records except in certain limited circumstances; (2) the record and the relevant case law factors under the common law right of access supported the trial court's conclusion that on balance, those factors weighed in favor of

disclosure of the Internal Affairs file to the publisher, because many of the facts therein had already been disclosed to the public, and there was little, if any, justification to withhold disclosure of the other records; and (3) the trial court's award of attorney's fees to the publisher was not warranted since access was properly denied under OPRA and the Township followed procedure. This decision will inform PERC's responses to OPRA requests, henceforth.

Appellate Division affirms Civil Service Commission's disciplinary termination of police chief, remanding to decide issue of back pay after his acquittal on related criminal charges

In the Matter of Benjamin Ruiz, City of Perth Amboy, Dep't of Public Safety, 2021 N.J. Super. Unpub. LEXIS 591 (App. Div. Dkt No. A-5280-18)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms in part, and remands in part a final agency decision of the Civil Service Commission (CSC), which adopted an Administrative Law Judge's (ALJ) initial decision recommending the termination of appellant Ruiz's employment as Chief of Police for the City of Perth Amboy, due to misuse of public property, insubordination, and conduct unbecoming of a public employee. The Appellate Division affirmed the termination for substantially the reasons set forth by the ALJ, who found the City proved the charge of misuse of public property by establishing that Ruiz used taxpayer money to order parts for his personal motorcycle and used municipal personnel and facilities to repair and store his personal property; and that the City proved the charges of insubordination, conduct unbecoming of an employee, and other sufficient cause, by establishing that Ruiz, while suspended, presented his badge to show he was a law enforcement officer to certain convenience store workers. The Appellate Division remanded to the CSC to determine whether Ruiz was entitled to any back pay after his acquittal on related criminal charges.

Temporary disability benefits are not "base salary" for purposes of calculating Chapter 78 employee healthcare contributions

Grillo, et al, v. State of New Jersey, 2021 N.J. Super. Unpub. LEXIS 548 (App. Div. Dkt No. A-1038-19)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a decision of the Law Division, Mercer County, L-0495-19, which dismissed with prejudice the appellants' complaint seeking a judgment declaring that the calculation of their employee healthcare contributions, required of public employees under L. 2011, c. 78 (Chapter 78) and the State Health Benefits Program premium cost contribution statute, N.J.S.A.

52:14-17.28c, should be based not on their "base salary," but on the rate of temporary disability benefits they received through workers' compensation during periods of leave following work-related injuries. The Appellate Division found, "section 17.28c expressly states that '[b]ase salary shall be used to determine what an employee earns for the purposes of this provision' and therefore must contribute," and found "no basis in principles of statutory construction to substitute temporary disability benefits . . . for collectively bargained salary, pensionable or not."

Retired public employee who lacked 20 years of creditable service as of Chapter 78's enactment was ineligible for free healthcare benefits in retirement, and was not intentionally misled, promised or guaranteed that his purchase of additional service credits thereafter would secure those benefits

Yakup v. State, Dep't of the Treasury, Div. of Pensions and Benefits, 2021 N.J. Super. Unpub. LEXIS 527 (App. Div. Dkt No.

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the State Health Benefits Commission (Commission). The Appellate Division affirmed facts found by an Administrative Law Judge that, as of Chapter 78's effective date, Yakup lacked the twenty years of service required to obtain free health coverage; and that Yakup was not provided with inaccurate information, intentionally misled, or promised or guaranteed that his purchase of additional service credits after Chapter 78's enactment would entitle him to free health coverage after he retired. The court further found that a billing error that permitted Yakup to receive \$18,600 in health care benefits at no cost to him was merely a mistake that the Commission properly and promptly corrected when revealed by an audit, and the Commission was not equitably estopped from ensuring that Yakup paid his required monthly contribution going forward.

Appellate Division finds Department of Labor and Workforce Development's misclassification of independent contractors as employees warrants recalculation of amount company owes for contributions to State unemployment/temporary disability funds

East Bay Drywall, LLC, v. Dept. of Labor and Workforce Development, 2021 N.J. Super. LEXIS 47 (App. Div. Dkt No. A-2467-19)

The Appellate Division of the Superior Court, in a published opinion, affirms in part, reverses in part, and remands for recalculation of amounts owed, a final agency decision of the Commissioner of the Department of Labor and Workforce Development

(Department) which applied the so-called "ABC Test," the applicable legal standard for determining employee status in New Jersey, to determine contribution liability under the New Jersey Unemployment Compensation and Temporary Disability Insurance Laws (the "UCL"). East Bay disputed the Department's monetary assessment for unpaid UCL contributions as a result of a routine audit which determined that sixteen of East Bay's drywall installers were employees, not independent contractors, during one or more audit years. Following a hearing, an Administrative Law Judge (ALJ) rejected the auditor's findings except for three individuals. After considering written exceptions to the ALJ's ruling, the Commissioner reinstated in full the auditor's findings, and East Bay appealed. The Appellate Division found that, except for two entities singled out and analyzed in the Commissioner's decision, the record generally supported the ALJ's findings, and did not establish that East Bay illicitly coordinated with the installers to evade UCL payment obligations.