



**STATE OF NEW JERSEY
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May 21, 2021

TO: Commissioners
FROM: Counsel Staff
RE: Developments in Counsel's Office since April 29, 2021

Commission Cases

Appeals from Commission Decisions

No new appeals from Commission decisions were filed since April 29.

Oral argument is scheduled for June 9, 2021, in In the Matter of Borough of Bergenfield and PBA Local 309 (App. Div. Dkt No. A-003495-19), in which the Borough of Bergenfield appeals from a decision and order issued by the Commission on April 30, 2020 (CO-2019-288) directing the Borough to sign a draft agreement submitted to it by PBA Local 309 that implemented an interest arbitration award.

Commission Court Decisions

Appellate Division affirms PERC's final agency decision denying an employer's scope petition in a work-schedule dispute affecting probationary firefighters

In the Matter of Borough of Carteret and FMBA Local 67, 2021 N.J. Super. Unpub. LEXIS 695 (App. Div. Dkt No. A-1845-19)

The Appellate Division of the Superior Court, in an unpublished opinion (attached), affirms PERC's final agency decision, P.E.R.C. No. 2020-23, 46 NJPER 228 (¶53 2019), denying the Borough of Carteret's request for a restraint of binding arbitration of a grievance filed by FMBA Local 67. The grievance contested the failure of the Borough's Fire Department to reschedule two probationary firefighters from a daytime, weekly work schedule to a shift (the 24-72 shift) contractually specified for those who perform firefighting duties, following the completion of their firefighter training. In affirming PERC's conclusion that the grievance was mandatorily negotiable, the Appellate Division observed that work schedules and hours of work are subjects that intimately and directly affect the work and welfare of public employees. The Court found the Borough failed to explain how scheduling the grievants to the 24-72 shift would interfere with governmental policy, since they were being trained and mentored by firefighters working that shift; and their proper work schedule, according to the relevant contractual provision, was the 24-72 shift. The Court found PERC's decision was supported by sufficient credible evidence in the record, and was neither arbitrary nor capricious.

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

Appellate Division reverses and remands Commissioner of Education's final agency decision terminating employment of school administrative assistant without tenure hearing

Saylor v. Bd. of Educ. of W. N.Y., 2021 N.J. Super. Unpub. LEXIS 873 (App. Div. Dkt No. A-0990-19)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses and remands a final agency decision of the Commissioner of Education which adopted the initial decision of an administrative law judge (ALJ) affirming the termination of appellant Saylor's employment with respondent Board of Education of the Town of West New York (Board) as an administrative assistant to the superintendent of schools, without a tenure

hearing. The Court found: (1) the evidence presented did not support the Commissioner's conclusion that various positions held by Saylor were not tenure-eligible secretarial positions under N.J.S.A. 18A:17-2(b); and (2) the ALJ's conclusion that Saylor was a "confidential employee" did not exclude Saylor from tenure eligibility. The Court concluded that Saylor achieved tenure in the secretarial position she held since beginning employment with the Board in 2010 and continuing until her termination in 2018, and was thus entitled to face tenure charges at a tenure hearing.

Appellate Division affirms trial court's dismissal of lawsuit challenging restrictions imposed by county prosecutor on police officer's work assignments in aftermath of disciplinary matter

Gilbert v. Warren County, 2021 N.J. Super. Unpub. LEXIS 759 (App. Div. Dkt No. A-1198-19)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court's dismissal of a lawsuit filed by appellant Gilbert, a police officer employed by the Township of Mansfield, after settling disciplinary charges lodged against him. The lawsuit alleged that restrictions the Warren County Prosecutor placed on Gilbert's work assignments in the aftermath of the disciplinary matter violated his due process rights and his rights under the New Jersey Civil Rights Act. In affirming the trial court's determination that Gilbert's allegations were not actionable as a matter of law, the Appellate Division found in particular that: (1) the so-called "Brady restrictions" placed on Gilbert's future participation in criminal investigations were justified in order to minimize the need for disclosure of Gilbert's disciplinary record to criminal defense counsel under Brady v. Maryland, 373 U.S. 83 (1963), and the likely resultant use of those materials to impeach his testimony as a witness for the State in criminal cases; (2) the Brady restrictions do not comprise discipline by his employer; and (3) Gilbert was already afforded a fair opportunity to have a non-departmental hearing or judicial review and elected instead to settle his case. The Appellate Division also found that Gilbert was not entitled, as an officer employed by a non-Civil Service municipality, to a retrospective hearing or judicial review of his disciplinary case under N.J.S.A. 40A:14-147 (see In re DiGuglielmo, 465 N.J. Super. 42 (App. Div. 2020)), because that statute covers suspensions, removals, fines, and reductions in rank of such officers, none of which occurred as a result of the Brady restrictions imposed on Gilbert's work assignments.

Appellate Division affirms trial court's refusal to vacate grievance arbitrator's denial of grievance asserting university police department violated 45-day rule in disciplinary action against police officer

Fraternal Order of Police, Lodge 164, Superior Officers Association v. Rutgers, the State University of New Jersey 2021 N.J. Super. Unpub. LEXIS 766 (App. Div. Dkt No. A-3199-19)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a trial court's order denying a motion by the plaintiff Fraternal Order of Police, Lodge 164 (FOP) to vacate an arbitrator's dismissal of a grievance concerning a written reprimand issued to a sergeant employed by the police department of defendant Rutgers, the State University (Rutgers or RUPD), and granting Rutgers' cross-motion to dismiss FOP's verified complaint. The Appellate Division rejected FOP's argument that the 45-day period for Rutgers to file the disciplinary complaint under N.J.S.A. 40A:14-147 should have commenced on the date that RUPD's Internal Affairs Bureau (IAB) prepared a preliminary memorandum about the underlying incident, because the person filing the complaint, RUPD's Chief, was not presented with the results of the IAB investigation until just three days before he authorized the complaint. The Appellate Division also found Rutgers was not required to file a complaint within those time parameters, even though it did, because the relevant collective negotiation agreement did not contain a 45-day Rule procedure.

New Jersey Supreme Court's authorization of virtual format for selection of grand jurors and grand jury presentations during pandemic did not violate State Constitution

State v. Vega-Larregui, __ N.J. __, 2021 N.J. LEXIS 365 (Dkt No. A-33)

The Supreme Court of New Jersey, on direct certification from the Superior Court, Law Division, Mercer County, held: (1) the Court's authorization of a virtual format for the selection of grand jurors and grand jury presentations during a lethal pandemic does not violate the State Constitution's separation of powers; (2) there was no support for a facial constitutional challenge to the temporary use of the virtual grand jury during the current public health crisis, and such proceedings do not facially violate the fundamental fairness doctrine; and (3) in individual cases where a defendant claims that an alleged error or defect undermined the fairness of the proceeding, a challenge may be mounted. But in this case, no error undermined the integrity of the grand jury proceeding; nor was there a basis for the dismissal of the criminal indictment at issue.