



**STATE OF NEW JERSEY
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June 17, 2021

TO: Commissioners
FROM: Counsel Staff
RE: Developments in Counsel's Office since May 27, 2021

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 Lutter v JNESO, et al., Dkt No. 1:19-cv-13478, Judge Bumb issued an Order and Opinion: (1) granting the defendants' motions to dismiss; (2) denying the plaintiff's cross-motion for declaratory judgment; (3) dismissing plaintiff's amended complaint with prejudice; and (4) directed the Clerk of the Court to close the case.

Enforcement Actions

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General Counsel filed two enforcement actions with the New Jersey Superior Court, Appellate Division (App. Div. Dkt. Nos. AM-0529-20 and AM-0530-20) against the City of Newark. The motions seek enforcement of the Commission's Final Agency Order in City of Newark and Newark Police Dep't, Superior Officers Ass'n, P.E.R.C. No. 2021-2, 47 NJPER 104 (¶25 2020), wherein the Commission found the City violated the Act when it failed to honor the decisions of its Police Director to sustain the grievances of two unit members concerning lump sum payouts for unused vacation days upon retirement; and a Hearing Examiner's Order (final by reason of no appeal) in City of Newark and Newark Police Dep't, Superior Officers Ass'n, H.E. No. 2020-10, 47 NJPER 59 (¶15 2020), which found the City violated the Act when it refused to pay active unit members longevity on their accrued compensatory time payouts, pursuant to a grievance sustained by the Police Director at Step 5 of the negotiated grievance procedure.

Appeals from Commission Decisions

The City of East Orange filed an appeal in the New Jersey Superior Court, Appellate Division (App. Div. Dkt No. A-002786-20), from the Commission's decision (P.E.R.C. No. 2021-50) affirming a Hearing Examiner's grant of summary judgment to the East Orange Superior Officers' Association, Fraternal Order of Police, Lodge No. 188 a/w FOP New Jersey Labor Council (FOP), on the FOP's unfair practice charge challenging the City's policy on the use of paid leave under the Family Medical Leave Act and/or New Jersey Family Leave Act.

The Mercer County Prosecutor's Office filed an appeal in the New Jersey Superior Court, Appellate Division (App. Div. Dkt No. A-2845-20) from the Commission's decision (P.E.R.C. No. 2021-42), affirming an interest arbitration award on remand.

Commission Court Decisions

Appellate Division affirms PERC's final agency decision restraining arbitration of union's grievance alleging inadequate, unsafe staffing in county court buildings

In the Matter of Atlantic County Sheriff's Office and PBA Local 243, 2021 N.J. Super. Unpub. LEXIS 1085 (App. Div. Dkt No. A-2095-19)

The Appellate Division of the Superior Court, in an unpublished opinion (attached), affirms PERC's final agency decision, P.E.R.C. No. 2020-33, 46 NJPER 281 (¶69 2019), granting the County's request for a restraint of binding arbitration of a

grievance filed by PBA Local 243, which asserted the Atlantic County Sheriff's Office violated the parties' CNA by failing to safely and adequately staff the Civil Courts Building in Atlantic City and the Criminal Courts Complex in Mays Landing. The Court found the record did not substantiate the PBA's claim that the County's practices are unsafe or failed to comply with the Model Court Plan; and that there was nothing arbitrary, capricious, unreasonable, lacking support in the evidence, or in violation of PERC's legislative grant of authority in its decision that this staffing decision was not arbitrable.

Appellate Division reverses PERC's final agency decision denying restraint of arbitration of grievance challenging alleged disciplinary transfer of security officer

In the Matter of Rutgers, the State University of New Jersey, and Office Professional Employees International Union, Local 153, 2021 N.J. Super. Unpub. LEXIS 992 (App. Div. Dkt No. A-1228-19)

The Appellate Division of the Superior Court, in an unpublished opinion (attached), reverses PERC's final agency decision denying the request of Rutgers, the State University of New Jersey, to restrain arbitration of a grievance filed by the Office and Professional Employees International Union, Local 153 (Local 153), which asserted that Rutgers violated the parties' collective negotiations agreement by transferring a security officer from his assignment at University Hospital (UH) to the Rutgers-Newark campus. PERC found the transfer was arbitrable because it was predominantly disciplinary in nature and because Rutgers did not present any operational justification for it. Notwithstanding that there was an "incident" (an altercation between the security officer and the UH president's driver) that caused UH to request that the security officer no longer be assigned at UH's facility, the Appellate Division found: (1) the evidence showed "that UH determined, for reasons known only to it," that it would not permit Rutgers to assign the officer at UH's facility; (2) "Rutgers was contractually obligated to provide UH with the security services UH requested"; (3) the evidence showed the transfer was "solely to accommodate UH's requirement" that the officer "no longer be allowed at its facility"; and (4) "[t]hat issue is non-negotiable and therefore not arbitrable."

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

Appellate Division reverses trial court's confirmation of arbitrator's award that denied grievance alleging city violated CNA by failing to pay members double time for working during state of emergency

Jersey City Public Employees, Inc., Local 245, v. City of Jersey City, 2021 N.J. Super. Unpub. LEXIS 1018 (App. Div. Dkt No. A-4558-19)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses the Law Division's confirmation of a PERC-appointed grievance arbitrator's award which denied a grievance filed by Jersey City Public Employees, Local 245, alleging the City of Jersey City violated the parties' collective negotiations agreement (CNA) by failing to pay members double time for working through a weather-related state of emergency. The arbitrator found the disputed CNA provision to be ambiguous, and construed it to require double time pay only when a declaration of a state of emergency actually alters City operations and only to essential workers. The Law Division found the arbitrator's analysis to be reasonably debatable and confirmed it. In reversing, the Appellate Division found the arbitrator's award was not reasonably debatable because: (1) neither the arbitrator nor the trial court explained why the state-of-emergency language in the CNA was ambiguous, requiring testimony outside the four corners of the contract; (2) the negotiated language was precise, simply stating if the Governor issued a declaration of a state of emergency, then City employees were entitled to double time pay; (3) there was no support in the wording of the provision's plain language for the City's position that it should be interpreted to be a reference to normal operations, nor that it distinguished between essential and non-essential workers, or required City operations be disrupted; and (4) the City's argument that public policy militates in favor of affirming the arbitrator's award falls outside the scope of the standard rules of interpretation applicable to employment contracts, even where a governmental entity is involved.

Appellate Division affirms trial court's summary dismissal of claims against public-sector union, finding they fundamentally concern PERC's primary jurisdiction

Angela Vargas, Zaheer Aziz, et al, v. Independent Service Workers of America, 2021 N.J. Super. Unpub. LEXIS 1135 (App. Div. Dkt No. A-3426-19)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms the Chancery Division's grant of a motion for summary judgment, dismissing the plaintiff's two-count complaint against their union, the defendant Independent Service Workers of America (ISWA), which represents blue and white collar personnel employed by the Jersey City Housing Authority. The Appellate Division found the case fundamentally concerns PERC's primary

jurisdiction and affirmed, subject to the filing and consideration of the plaintiffs' claims before PERC. Count one of the complaint was similar to an unfair practice charge plaintiff Aziz previously filed with PERC. PERC initially did not decline jurisdiction of that charge, but wrote to Aziz, inviting him to amend it with more specificity so that PERC could determine whether its jurisdiction was appropriate. Aziz filed no timely response to PERC's letter, instead pursuing his claims in court. The Appellate Division found that the issues in count one were within the purview of PERC, but expressed no opinion as to whether N.J.A.C. 19:14-1.5(e) (requiring that a motion to reinstate a dismissed charge must be made within fifteen days of the dismissal) barred Aziz from reinstating his unfair practice charge with PERC. The court directed that PERC must evaluate that timeliness issue in light of the plaintiffs' attempt to bring their claims in the Chancery Division and the ensuing passage of time. The allegations in count two of the complaint were not included within the unfair practice charge filed by Aziz. Count two alleged that plaintiff Vargas was unfairly expelled from her ISWA membership and position through an internal union disciplinary proceeding. The Appellate Division found that the allegations in count two implicated the Employer-Employee Relations Act's prohibition against "interference with a . . . [public employee's] right to 'assist' in a labor organization," N.J.S.A. 34:13A-5.4b(1), and thus are also suitable to be considered before PERC.

Appellate Division affirms Civil Service Commission's final agency decision upholding disciplinary removal of police officer related to his religious-belief-based failures/inability to appear for assignments and work shifts

In the Matter of Clinton Bloomfield, City of Newark, 2021 N.J. Super. Unpub. LEXIS 1032(App. Div. Dkt No. A-1405-19)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a Civil Service Commission (CSC) final agency decision upholding petitioner Bloomfield's disciplinary removal from his conditional employment as a police officer with the respondent City of Newark, Department of Public Safety, related to the petitioner's failure to appear for, and unavailability to appear for, required assignments and work shifts because of his religious beliefs. The tenets of Bloomfield's religion did not permit him to work on the Sabbath, sundown on Friday nights to sundown on Saturday nights, for which he requested different accommodations at various times, including through the proposed use of vacation leave time and through proposed swapping of shifts with other officers. Despite the fact that an

Administrative Law Judge (ALJ) erroneously treated the removal as a dismissal at the end of a working test period rather than a disciplinary removal, the CSC adopted the ALJ's findings and conclusions, including that the requested accommodations could not be made due to vacation-use limitations and seniority provisions governing shift-swapping in the relevant collective negotiations agreement (CNA), and due to the operational burden the proposed accommodations would impose. In affirming, the Appellate Division found that the CSC properly considered the record and the ALJ's initial decision, made an independent evaluation of the record, accepted the ALJ's findings of fact, and applied the burden of proof applicable to a disciplinary removal. The Appellate Division concluded that Bloomfield failed to demonstrate the CSC's decision was inconsistent with applicable law, unsupported by substantial credible evidence, or based on a misapplication of legislative policies to the facts.

New Jersey Supreme Court upholds State Attorney General directives calling for release of names of law enforcement officers who committed disciplinary violations that resulted in the imposition of major discipline

In re Attorney General Law Enforcement Directive Nos. 2020-5 and 2020-6, 2021 N.J. LEXIS 486 (S.Ct. Dkt No. A-26/27/28/29/30)

The Supreme Court of New Jersey, affirming as modified the judgment of the Appellate Division, 465 N.J. Super. 111 (App. Div. 2020), upholds two Attorney General directives calling for the release of the names of law enforcement officers who committed disciplinary violations that resulted in the imposition of major discipline. The Court found: (1) the directives were consistent with legislative policies and rest on a reasonable basis; (2) the Directives satisfied the deferential standard of review as they were designed to enhance public trust and confidence in law enforcement, to deter misconduct, to improve transparency and accountability in the disciplinary process, and to identify repeat offenders who may try to move from one sensitive position to another.

Third Circuit affirms District Court's summary dismissal of employee's hybrid breach of contract/duty of fair representation claims against employer and union, finding no evidence union breached its duties

Clowney v. URS/AECOM, 2021 U.S. App. LEXIS 16563 (3d Cir. Dkt No. 19-3516)

The United States Court of Appeals for the Third Circuit, in a

non-precedential decision, affirms the District Court's grant of summary judgment in an employee's hybrid suit, against her employer and her union, alleging breach of a collective bargaining agreement (CBA) under § 301 of the Labor Management Relations Act, 29 U.S.C.S. § 185. The federal courts treat such suits as two separate causes of action: the claim against the employer rests on Section 301 for breach of the collective-bargaining agreement, and the claim against the union is implied under the National Labor Relations Act for breach of the union's duty of fair representation. To recover, the employee must prevail on both claims. The Third Circuit found Clowney could not prevail on her claims against the union because of insufficient evidence that the union breached its duty of fair representation by not standing up for her in a grievance proceeding and by excluding her from an arbitration settlement. The court observed that the union proceeded with filing a grievance on Clowney's behalf despite the fact that she did not respond to the union's request that she produce evidence, pertinent to the grievance, of her former position as an equipment cleaner. The court found that the union's request for that information was not unreasonable. The court further found that Clowney failed to provide evidence of anyone who was included in the settlement agreement who should not have been; and without that evidence, the court could not infer that Clowney was unfairly excluded from the settlement agreement.