



STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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DATE: June 19, 2024

TO: Commissioners

FROM: Counsel Staff

RE: Developments in Counsel's Office since May 30, 2024

**Commission Cases**

**Appeals from Commission Decisions**

No new appeals have been filed since May 30.

The County of Essex filed a motion for leave to appeal (S. Ct. Dkt No. 089497) from In re County of Essex, 2024 N.J. Super. Unpub. LEXIS 811 (Dkt. No. A-3809-22), in which the Appellate Division affirmed the Commission's decision, P.E.R.C. No. 2023-60, 50 NJPER 43 (¶15 2023), on County police and fire unions' consolidated unfair practice charges alleging the County violated the Act when it unilaterally changed health insurance carriers.

As noted in last month's Report, oral argument was heard in the matter of Union County College and Union County College Chapter of the American Association of University Professors (AAUP) (PERC Dkt. No. SN-2023-002, App. Div. Dkt. No. A-2993-22T4). The College appealed the status-quo result of a Commission tie vote.

## Commission Court Decisions

No new Commission court decisions have been issued since May 30.

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

Appellate Division holds OPRA/CLRA do not mandate disclosure of identity of attorney who rendered legal advice, as colleague or friend, to municipal prosecutor about ongoing prosecution

Ass'n for Governmental Resp., Ethics & Transparency v. Borough of Mantoloking, 2024 N.J. Super. LEXIS 41 (App. Div. Dkt. No. A-2395-22)

The Appellate Division of the Superior Court, in a published opinion that included a dissent, affirms a Law Division order that upheld the Borough of Mantoloking's denial of an Open Public Records Act (OPRA) request by the Association for Governmental Responsibility, Ethics, and Transparency (AGREAT). AGREAT sought an unredacted email exchange between a Borough prosecutor and an attorney-colleague who rendered advice about an ongoing prosecution via email to the prosecutor's personal account. The prosecutor disclosed the contents of the email in open court and provided a redacted copy to the defense without the sender's name and email address. In affirming, the Appellate Division held: (1) an email memorializing legal advice among colleagues is not a government record as defined by OPRA, thus the sender's name and address are not subject to disclosure; (2) the sending attorney's reasonable expectation of privacy favors non-disclosure; (3) even if the email were a government record, the sender's information would be shielded under OPRA as attorney work product; (4) the prosecutor did not waive the work-product protection by her in-court use of a redacted copy; and (5) the sending attorney's name and address is not a "public record" under the common law right of access (CLRA). The dissenting opinion argued that the public's interest in transparency during the prosecution of its citizens outweighs the sender's interest in privacy, where the prosecutor knowingly and voluntarily disclosed the substantive portion of the email.

Appellate Division upholds suspension of school psychologist's certificate following removal on tenure charges of conduct unbecoming

In re Holeman, 2024 N.J. Super. Unpub. LEXIS 890 (App. Div. Dkt. No. A-3859-21)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the New Jersey Acting Commissioner of Education (Commissioner) that upheld the New Jersey State Board of Examiners' (Board) decision to suspend Holeman's school psychologist certificate for six months. The Board's action followed Holeman's removal from his school psychologist position with the Freehold Regional High School District Board of Education, on tenure charges that alleged Holeman had used profanity and made sexual comments in front of students and staff and had publicly demeaned colleagues and supervisors. The tenure arbitrator's award was affirmed on appeal. In affirming the suspension of Holeman's certificate, the Appellate Division held: (1) there was no error in the Commissioner's application of the doctrine of collateral estoppel to preclude Holeman from relitigating the unbecoming conduct charges that were decided by the tenure arbitrator; and (2) there was sufficient credible evidence that Holeman engaged in conduct warranting the suspension of his certificate. The court also rejected Holeman's evidential and procedural claims about the proceedings before the Commissioner and Board.

Appellate Division upholds removal of sheriff's officer for conduct unbecoming following failed random drug test

In re Allen, 2024 N.J. Super. Unpub. LEXIS 906 (App. Div. Dkt. No. A-1820-22)

The Appellate Division of the Superior Court, in an unpublished opinion, affirms a final agency decision of the Civil Service Commission (CSC) upholding the decision of the Gloucester County Sheriff's Office to remove Allen as a sheriff's officer for conduct unbecoming following a failed random drug test in 2020. Allen contended his admitted off-duty use of marijuana during the months prior to the test was "self-medication" to deal with anxiety caused by the County's 2019 re-hiring of another officer who assaulted Allen in 2016. Following a hearing, an administrative law judge (ALJ) concluded Allen knowingly used marijuana in violation of State law, the Attorney General's Drug Testing Policy and the Sheriff's Office Rules of Conduct, and that termination was the appropriate penalty. The ALJ found Allen's testimony not credible, and rejected his effort to blame the Sheriff's Office for not protecting him from the officer who assaulted him, where: (1) they advised Allen in 2019 of the re-hiring of his assailant; (2) they took steps to limit contact between the two; and (3) Allen never lodged any written

complaints with his superiors about the stress and anxiety he allegedly felt, or availed himself of the psychological assistance provided by the Sheriff's Office. In affirming, the Appellate Division held the CSC's adoption of the ALJ's recommendation was supported by sufficient credible evidence in the record, and the sanction of removal was justified.

Appellate Division upholds termination of three municipal police officers for their involvement in unlawful warrantless search

In re Vazquez, 2024 N.J. Super. Unpub. LEXIS 939 (App. Div. Dkt. No. A-4177-19)

In re Vasquez, 2024 N.J. Super. Unpub. LEXIS 946 (App. Div. Dkt. No. A-3428-20)

The Appellate Division of the Superior Court issues unpublished opinions on appeals from related disciplinary actions against City of Hackensack police officers.

In Vazquez, the court affirms a final decision of the Civil Service Commission (CSC) upholding the dismissal of appellant Justin de la Bruyere after he and several other officers were found to have violated administrative and department rules and regulations by conducting an unlawful warrantless search of an apartment in Hackensack, and after de la Bruyere approved the filing of a misleading and inaccurate report of the incident. In affirming, the Appellate Division, among other things, held: (1) the administrative law judge's (ALJ's) finding that appellant's testimony was not credible was entitled to deference; (2) appellant failed to establish that his misconduct resulted from inadequate training or a good-faith mistake; (3) the CSC's determination substantiating the charges was not arbitrary, capricious, or unreasonable; and (4) the CSC did not abuse its discretion in imposing termination as appellant's penalty.

In Vasquez, the court reverses a final agency decision of the Civil Service Commission (CSC) adopting the ALJ's recommendation to reverse the disciplinary removals of officers Mark Gutierrez and Rocco Duardo in connection with the same warrantless search. Although both officers had previously received disciplinary suspensions for that conduct, their subsequent discharge was based upon their designation as "Brady officers" by the Bergen County Prosecutor's Office (BCPO) which, due to the warrantless search incident, was compelled to dismiss several Superior Court cases involving the officers under Brady v. Maryland, and Giglio v. United States, that required a prosecutor to disclose all evidence to the defense that could be used to impeach the

credibility of the prosecution's witnesses. The CSC ordered the officers reinstated because they were denied due process when they could not challenge the Brady designations in the disciplinary proceeding, and because they had already been disciplined for the warrantless search. In reversing, the Appellate Division held: (1) because the officers had an avenue available to them to challenge the Brady designation, through the courts, the CSC erred in concluding the officers were deprived of their due process rights; (2) the CSC erred by relying on double jeopardy to bar the officers' dismissal, because that applies to criminal and quasi-criminal actions, not to civil actions such as the disciplinary charges; and (3) where the BCPO had already dismissed multiple pending Superior Court cases and directed the municipal prosecutor to refrain from prosecuting any matters in which the officers were involved, there were sufficient grounds to support the City's decision to terminate the officers.

Appellate Division reinstates tenure arbitrator's award dismissing tenure charges, rejects school board's procedural challenges to arbitrator's scheduling and discovery rulings

Roselle Borough Bd. of Educ. v. Batts, 2024 N.J. Super. Unpub. LEXIS 1094 (App. Div. Dkt. No. A-1323-22)

The Appellate Division of the Superior Court, in an unpublished opinion, reverses a Chancery Division decision and reinstates a tenure arbitrator's award that dismissed tenure charges brought by the Roselle Borough Board of Education against Batts, a tenured elementary school teacher employed by the Board. The Board charged Batts with incapacity, excessive absenteeism, and other just cause requiring her dismissal. Following a three-day virtual hearing, the arbitrator concluded the Board failed to meet its burden of proof. The award dismissed the tenure charges, reinstated Batts, and restored her full salary and benefits retroactively. In vacating it, the Chancery Division found the award was procured by undue means, as the arbitrator made a clear mistake of law by violating strict discovery timelines required by the tenure arbitration law, and improperly denied the Board's pre-hearing motion to suppress additional discovery submitted by Batts. In reversing the Chancery Division and reinstating the award, the Appellate Division held, among other things: (1) the arbitrator obtained approval from the Commissioner of Education to extend time to conduct the arbitration hearing on at least one occasion; (2) the Commissioner was silent when the Board sought the pre-hearing removal of the arbitrator over the discovery scheduling issue;

(3) by declining to take any corrective action it deemed proper (including removal) concerning the scheduling and discovery rulings, the Commissioner effectively extended the relevant statutory timelines and permitted fulsome discovery; and (4) the arbitrator's rulings did not result in any substantive or procedural prejudice to the Board.