

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Respondent,

-and-

Docket No. DA-2020-003

PAUL FISCHER,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission dismisses Fischer's application for appointment of a special disciplinary arbitrator under P.L. 2009, c. 16 to review his termination from the Rutgers University Police Department. Pursuant to the recently published Appellate Division decision in In re DiGuglielmo, 2020 N.J. Super. LEXIS 219 (App. Div. 2020), the Commission finds that Fischer is ineligible for Special Disciplinary Arbitration under N.J.S.A. 40A:14-209 and -210 because that process is an alternative to de novo Superior Court review under N.J.S.A. 40A:14-150, which specifically applies only to non-Civil Service municipal police officers. As Rutgers is not a municipality, the Commission finds that Fischer was not statutorily eligible for Special Disciplinary Arbitration. The Commission also finds, based on DiGuglielmo's interpretation of N.J.S.A. 40A:14-209 and -210, that Fischer is ineligible for Special Disciplinary Arbitration because he was on paid administrative leave rather than an unpaid suspension pending his termination.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2021-13

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Appearances:

For the Petitioner, Javerbaum, Wurgaft, Hicks, Kahn,
Wikstrom & Sinnis, P.C., attorneys
(Herbert I. Waldman, of counsel)

For the Respondent, McElroy, Deutsch, Mulvaney &
Carpenter, LLP, attorneys
(James P. Lidon, of counsel)

DECISION

This case comes to us via the Director of Conciliation and Arbitration's (Director) transfer to the Commission in order to conduct further proceedings to determine whether to appoint an arbitrator from the Commission's Special Disciplinary Arbitration (SDA) panel to review a police officer's termination. Pursuant to N.J.A.C. 19:10-4.1, the Commission has designated itself to perform the Director's function under N.J.A.C. 19:12-6.5 to

determine whether to appoint a Special Disciplinary Arbitrator (Arbitrator) in this matter.^{1/}

PROCEDURAL HISTORY

On January 3, 2020, former Rutgers University Police Department (RUPD) Captain Paul Fischer (Fischer) filed a "Request for Appointment from the Special Disciplinary Arbitration Panel." On January 8, the Director notified Rutgers, the State University of New Jersey (Rutgers) of the filing. On January 29, Rutgers moved to dismiss the request, supported by a brief, exhibits, and the certification of RUPD Deputy Chief Michael J. Rein (Rein). On February 20, Fischer opposed Rutgers' motion to dismiss the request for SDA, supported by a brief, exhibits, and the certification of Fischer's counsel in support of the exhibits.

^{1/} The Director cited N.J.A.C. 19:10-3.1(a) and 19:10-4.1 as authority for the procedural transfer of this matter. N.J.A.C. 19:10-3.1(a) provides that: "Except as stated in (c) below, whenever the commission or a designated officer finds that unusual circumstances or good cause exists and that strict compliance with the terms of these rules will work an injustice or unfairness, the commission or such officer shall construe these rules liberally to prevent injustices and to effectuate the purposes of the act (N.J.S.A. 34:13A-1 et seq.)." N.J.A.C. 19:10-4.1 provides: "When in these rules an act is required or allowed to be done by a specific officer of the commission, it shall be understood that the specified officer acts as the designated officer of the commission and has all the powers necessary to permit the discharge of the duty or duties delegated. However, the commission at all times retains the authority to designate itself or some other officer of the commission to perform that function in a particular case or as circumstances may require."

The record before the Director closed on February 20. The Director transferred the case to the Commission on March 27.

On April 15, 2020, a Commission Deputy General Counsel (Designee) e-mailed the parties to schedule a conference call "to specifically identify any substantial and material factual disputes that may require additional evidence, and to determine if the parties can voluntarily submit any such evidence that they may have" in order to "attempt to resolve any remaining substantial and material factual disputes bearing on whether this matter may be appropriately appealed to a Special Disciplinary Arbitrator pursuant to N.J.S.A. 40A:14-210." On April 18, in response to an April 17 e-mail from Fischer's counsel, the Designee explained that the potential scope of the factual inquiry was stated in his April 15 e-mail and that it is not limited to the dispute about Fischer's suspension/pay status. On April 30, the Designee conducted a conference call among Fischer's counsel and Rutgers' counsel. The conference call included questioning by the Designee of both parties regarding factual issues in the case, as well as discussion concerning the submission of additional evidence.

On May 11, 2020, the Designee e-mailed a letter to the parties requesting the submission of additional evidence from both Rutgers and Fischer. The letter provided:

This letter serves a follow-up to my e-mail of April 15, 2020 and our subsequent April 30 conference call in which I questioned you both in order to ascertain if there are any potentially material factual disputes in this matter that may require additional evidence. Based on the April 30 conference call with the parties and the evidence submitted thus far, I am requesting that **Rutgers** supplement the record with documentary evidence and/or certifications concerning the following issues.

1. Provide copies of the Internal Affairs reports #19-00005 and #19-00008/23, which the December 20, 2019 Final Notice of Disciplinary Action (FNDA) referenced.

2. Provide a copy of the Internal Affairs report #19-00006, which the April 26, 2019 suspension/administrative leave notice referenced.

3. Provide copies of any disciplinary notices issued to Captain Fischer related to his May 21, 2019 and June 24, 2019 suspensions without pay that were referenced in the December 20, 2019 FNDA.

4. Provide copies of any correspondence between the Rutgers University Police Department (RUPD) and the Middlesex County Prosecutor's Office (MCPO) concerning investigations, complaints, or discipline of Captain Fischer in 2019, including, but not limited to, any discussions or documents concerning: the opening of investigations, the referral or transfer of investigations, whether investigations would proceed as a criminal or administrative investigation, and the closing of investigations.

Based on the April 30 conference call with the parties and the evidence submitted thus far, I am requesting that **Fischer**

supplement the record with documentary evidence and/or certifications concerning the following issues:

1. Copies of the November 22, 2019 Preliminary Notice of Disciplinary Action (PNDA) and Pre-Disciplinary Conference Notification Letter referenced in Fischer's Exhibit E.

2. Copies of the June 18, 2019 and July 1, 2019 Complaint Notifications to Fischer that are referenced in Fischer's Exhibit E.

In order to provide both parties with sufficient time to obtain the requested information, and in light of the unprecedented challenges that the parties may have due to the COVID19 (coronavirus) pandemic in accessing certain files or in contacting people, **I am giving the parties 45 days from today to submit the requested information to me and your adversary electronically (in PDF form). Thus, the deadline for submissions pursuant to the requests in this letter is June 25, 2020.**

Failure to timely submit any additional evidence the parties may have concerning the information requests outlined in this letter may result in the record being closed and the Commission proceeding on this petition with whatever evidence has been submitted as of the deadline.

On May 13, 2020, Fischer's counsel submitted documents in response to the Designee's request. On June 25, Rutgers' counsel submitted documents in response to the Designee's request. On July 14, in response to emails of July 11 and 13 from Fischer's counsel, the Designee emailed a letter to the parties indicating that Rutgers' submissions were sufficiently responsive to his May

11 request. The Designee also informed the parties that no evidentiary hearing was anticipated in the matter. The Designee set a final briefing schedule so that "each party will have the opportunity to make one final submission of a written brief explaining their legal positions in light of the record, along with any additional certifications or exhibits they believe are relevant that have not already been produced." The Designee also stated that he anticipated the record would be closed upon receipt of the parties' final submissions and that no further briefs or submissions would be accepted unless leave is granted by the Commission. On July 15, in response to an email of same date from Fischer's counsel requesting that Rutgers submit its final submissions first, the Designee reiterated the July 14 final briefing and submissions schedule, noting that Fischer was the party seeking to make a final submission and that Rutgers would have an opportunity to respond. On July 22, the Commission received via courier Fischer's final submissions, dated July 19, including a brief, exhibits, and the certifications of Fischer, Fischer's counsel, and that of a different attorney of the same firm, Matthew Dorsi, Esq. On July 28, the Commission received Rutgers' final submission via email, including a brief, exhibit, and the supplemental certification of Deputy Chief Rein. The

record before the Commission was then closed as of July 28, 2020.^{2/}

SUMMARY OF FACTS

On January 28, 2019, the RUPD received an anonymous complaint alleging that several employees under Fischer's supervision engaged in improper recordkeeping for allegedly taking time off without deducting from their paid time off allotments. (case IA19-5). On January 30, Rein referred IA19-5 to the Middlesex County Prosecutor's Office (MCPO). On August 8, the MCPO referred IA19-5 back to the RUPD for it to complete an administrative investigation. On August 9, Rein notified Fischer of the IA19-5 complaint against him.

On January 29, 2019, the RUPD received an anonymous complaint alleging that Fischer attempted to humiliate colleagues in front of their fellow officers through name-calling and mocking, and behaves inappropriately in his interactions with females. (case IA19-8). On January 30, Rein referred IA19-8 to the MCPO. On April 15, the RUPD received an anonymous complaint alleging that Fischer has made racist comments and stereotypical jokes, has had inappropriate relationships with subordinates, and has physically and verbally assaulted people while attending

^{2/} On July 29, 2020, Fischer attempted to make additional, unsolicited submissions without being granted or requesting leave of the Commission as was required per the Designee's final briefing schedule letter. Those submissions were therefore not accepted and are not part of the record.

events such as Christmas parties. (case IA19-23). On April 19, Rein referred IA19-23 to the MCPO. On May 17, the MCPO referred IA19-23 back to the RUPD for it to complete an administrative investigation. On June 4, the MCPO referred IA19-8 back to the RUPD for it to complete an administrative investigation. Rein consolidated IA19-8 and IA19-23. On June 18, Rein notified Fischer of the IA19-8/23 complaint against him. On July 22, Rein issued an "Administrative Advisement Form" regarding IA19-8/23 that notified Fischer that he is being questioned as part of an investigation concerning "conduct unbecoming."

On April 26, 2019, in a separate matter (IA19-6), Fischer was issued an "Immediate Suspension Notice" and "placed on administrative leave with pay pending the outcome" of IA19-6. On June 24, Rein issued Fischer a "Final Notice of Disciplinary Action" (FNDA) in IA19-6, sustaining three violations of the Department's "Uniform Standards of Conduct." The FNDA imposed a suspension without pay for four eight-hour shifts, which Fischer served from June 25 through June 28. On July 1, 2019, Rein issued an internal memorandum to Fischer's personnel file stating that "Fischer would remain on a paid suspension (administrative leave)" until the IA19-5 and IA19-8/23 investigations were completed.

On November 22, 2019, Rein issued Fischer a Preliminary Notice of Disciplinary Action regarding IA19-5 and IA19-8/23

which sustained several violations and recommended termination. On December 5, 2019, a pre-disciplinary conference was held. On December 20, 2019, Rein issued Fischer a FNDA for IA19-5 and IA19-8/23. The IA19-5 investigation resulted in two violations of the Department's Uniform Standards of Conduct being sustained.^{3/} The IA19-8/23 investigation resulted in three violations of the Uniform Standards of Conduct being sustained.^{4/}

The FNDA imposed a disciplinary sanction of immediate termination for Fischer.

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- 3/ The violations sustained in IA19-5 were Section 1:6-5(d) "Employee shall not conduct themselves in a manner as to impair the operation or efficiency of the agency, brings the agency into disrepute, or reflects discredit on the employee as a member of the agency" and Section 1:6-5(n) "Employees shall not commit any act nor fail to perform an act that constitutes a neglect of duty."
- 4/ The violations sustained in IA19-8/23 were Section 1:6-6(b) "Employees shall display respect for their supervisors, subordinates, and associates. All employees are to display good ethical character in on and off duty contexts and shall conduct their professional and private lives in a manner to avoid bringing this agency disrepute" and Section 1:6-6(d) "Employees shall address their subordinates, associates, supervisors, and members of the general public courteously and shall not use abusive, insulting, or provoking language" and Section 1:6-6(f) "Employees shall not slander or speak detrimentally about the department or another employee, nor unjustly criticize, ridicule, express hatred or contempt toward or otherwise defame the department, its policies, directives, orders, practices, or procedures, or other employees when to do so might disrupt operations or adversely affect morale or create disharmony in the department, government, or other agency."

ARGUMENTS

Rutgers asserts that Fischer is ineligible for SDA under N.J.S.A. 40A:14-209(a). It argues that N.J.S.A. 40A:14-209(a)(1), which makes officer suspensions without pay pending terminations ineligible for SDA if the complaint or charges (1) "relat[e] to the subject matter of a pending criminal investigation, inquiry, complaint, or charge whether pre-indictment or post indictment," or (2) "allege conduct that also would constitute a violation of the criminal laws of this State or any other jurisdiction," is applicable to Fischer. Rutgers contends that the disciplinary charges against Fischer relate to criminal Internal Affairs investigations of him, specifically IA19-5, IA19-6, IA19-7, and IA19-8/23. Rutgers further contends that the conduct alleged in complaints IA19-5, IA19-6, and IA19-7 would constitute a crime under New Jersey law. Although not citing a specific criminal statute alleged to have been violated in those complaints, Rutgers asserts that IA19-5 concerns allegations of officers under Fischer's supervision "stealing time" and engaging in "fraud," and that IA19-6 and IA19-7 "sound in physical violence or an assault" concerning Fischer's alleged physical conduct with colleagues.

Rutgers next argues that Fischer is ineligible for SDA under N.J.S.A. 40A:14-209(a) because he was not suspended without pay. It contends that in Isaacson v. Pub. Emp't Rels. Comm'n, No. A-

2991-14T4, 2017 N.J. Super. Unpub. LEXIS 466, (App. Div. Feb. 27, 2017), certif. den., 230 N.J. 530 (2017), the court found that SDA to appeal terminations is unavailable under both N.J.S.A. 40A:14-209 and N.J.S.A. 40A:14-210 if the officer was not also suspended without pay.

Finally, Rutgers asserts that Fischer is ineligible for SDA because Rutgers is not a "law enforcement agency" subject to Title 40A in general, or to N.J.S.A. 40A:14-150, -209, or -210 specifically. It argues that SDA under N.J.S.A. 40A:14-209 and -210 requires application of the "just cause" standard of N.J.S.A. 40A:14-147 for police officer suspension and removal, and that if the Legislature intended for that standard to be applicable to Title 18A campus police officers, it should have amended N.J.S.A. 40A:14-147 to specifically cover them.

Fischer asserts that none of the conduct alleged in the complaints underlying his discipline and termination involved a violation of criminal law. Fischer notes that the FNDA in this matter found he had violated three sections of the RUPD's Uniform Standards of Conduct, accusing him of displaying disrespect for subordinates, using abusive or insulting language, and speaking detrimentally about another employee. He asserts that the evidence from those investigations shows no criminal conduct was at issue. Fischer contends that while the allegation that he supervised officers who stole time could relate to "official

misconduct," a referral to the MCPO for a criminal investigation does not automatically make SDA unavailable. He argues that the referral resulted in an administrative investigation being conducted after the preliminary evidence did not indicate an overall intent to commit criminal actions.

Fischer next argues that he was not suspended with pay, but was placed on administrative leave prior to being terminated. Fischer asserts that the language in Isaacson v. PERC relied on by Rutgers for its contention that SDA is not available to appeal terminations which did not also involve a suspension without pay is dicta in an unpublished decision. Fischer contends that the Isaacson court misinterpreted N.J.S.A. 40A:14-209(a) concerning suspensions without pay pending terminations as affecting an officer's right to appeal a termination through SDA under N.J.S.A. 40A:14-210. Fischer asserts the Isaacson court's interpretation would also not make sense in light of N.J.S.A. 40A:14-209(c), which provides that officers receiving full pay pending a final determination of their SDA appeal shall be paid no salary for any period of delay or postponement of the SDA hearing that they caused.

Finally, Fischer argues against Rutgers' assertion that it is not a "law enforcement agency" under the applicable SDA statutes. Fischer asserts that N.J.S.A. 40A:14-210 authorizes SDA for RUPD officers challenging termination. Fischer contends

that RUPD's Annual Report describes RUPD as a "law enforcement agency" and states that its officers "possess full enforcement authority of federal and state laws as well as local ordinances" and can "investigate criminal activity and arrest anyone involved in illegal acts, both on and off properties owned and/or controlled by Rutgers throughout the State of New Jersey."

ANALYSIS

On March 5, 2009, the Legislature approved P.L. 2009, c. 16 which, among other things, created a "special disciplinary arbitration" (SDA) process by which certain non-Civil Service law enforcement officers and paid firefighters may appeal their terminations for noncriminal complaints or charges and begin to again receive their base salary if a final determination on their appeal is not rendered within 180 days of being suspended without pay. Codified as N.J.S.A. 40A:14-209 and -210, the SDA sections of the new law provide, in pertinent part:

§ 40A:14-209. Suspension, termination not subject to Title 11A, payment status

a. When a law enforcement officer or firefighter employed by a law enforcement agency or department that is not subject to the provisions of Title 11A of the New Jersey Statutes is suspended from performing his official duties without pay for a complaint or charges, other than (1) a complaint or charges relating to the subject matter of a pending criminal investigation, inquiry, complaint, or charge whether pre-indictment or post indictment, or (2) when the complaint or charges allege conduct that also would

constitute a violation of the criminal laws of this State or any other jurisdiction, and the law enforcement agency or department employing the officer or firefighter seeks to terminate that officer's or firefighter's employment for the conduct that was the basis for the officer's or firefighter's suspension without pay, the officer, as an alternative to the judicial review authorized under N.J.S.40A:14-150, and the firefighter, as an alternative to the judicial review authorized under N.J.S.40A:14-22, may submit an appeal of his suspension and termination to the Public Employment Relations Commission for arbitration conducted in accordance with the provisions of section 11 of P.L.2009, c.16 (C.40A:14-210). A final determination on the officer's or firefighter's suspension and termination shall be rendered by an arbitrator within 180 calendar days from the date the officer or firefighter is suspended without pay.

If a final determination is not rendered within those 180 days, as hereinafter calculated, the officer or firefighter shall, commencing on the 181st calendar day, begin again to receive the base salary he was being paid at the time of his suspension and shall continue to do so until the final determination on the officer's or firefighter's termination is rendered.

§ 40A:14-210. Appeal to arbitration, final determination, payment status

a. In lieu of serving a written notice to the Superior Court under the provisions of N.J.S.40A:14-150 or N.J.S.40A:14-22, as appropriate, seeking review of the termination of his employment for a complaint or charges, other than a complaint or charges relating to a criminal offense, as prescribed in subsection a. of section 10 of P.L.2009, c.16 (C.40A:14-209), an officer or firefighter may submit his appeal to arbitration as hereinafter provided.

b. Within 20 days of receiving notice of termination, the officer or firefighter shall submit his appeal for arbitration to the Public Employment Relations Commission. The appeal shall be filed in a manner and form prescribed by the commission.

The legislation also included a definitions section at N.J.S.A.

40A:14-200, which provides:

§ 40A:14-200. Definitions relative to suspension, termination of certain law enforcement officers, firefighters

As used in this act:

"Law enforcement agency" or "agency" means any public agency, other than the Department of Law and Public Safety, but not including the Juvenile Justice Commission, any police force, department, or division within the State, or any county or municipality thereof, which is empowered by statute to act for the detection, investigation, arrest, conviction, detention, or rehabilitation of persons violating the criminal laws of this State.

"Law enforcement officer" or "officer" means any person who is employed as a permanent full-time member of any State, county, or municipal law enforcement agency, department, or division of those governments who is statutorily empowered to act for the detection, investigation, arrest, conviction, detention, or rehabilitation of persons violating the criminal laws of this State and statutorily required to successfully complete a training course approved by, or certified as being substantially equivalent to such an approved course, by the Police Training Commission pursuant to P.L.1961, c.56 (C.52:17B-66 et seq.).

"Paid firefighter" or "firefighter" means any full-time paid firefighter employed by a public fire department.

"Public fire department" or "department" means any department of a municipality, county, fire district or the State or any agency thereof having employees engaged in firefighting provided that such firefighting employees are included in a negotiating unit exclusively comprised of firefighting employees.

Pursuant to N.J.S.A. 40A:14-211, the Commission promulgated regulations, N.J.A.C. 19:12-6.1 et seq., to administer N.J.S.A. 40A:14-209 and -210. The Commission's regulations require the Director of Conciliation and Arbitration to process a law enforcement officer's or firefighter's timely appeal of their termination to SDA. N.J.A.C. 19:12-6.1(a). The Director's role is limited to reviewing the parties' submissions to determine eligibility for SDA, including whether the claims against the officer or firefighter relate to a criminal offense. See Twp. of Hardyston v. Isaacson, 2014 N.J. Super. Unpub. LEXIS 1663 (App. Div. 2014), certif. den., 220 N.J. 98 (2014); Isaacson v. Public Empl. Rels. Comm'n, 2017 N.J. Super. Unpub. LEXIS 466 (2017), certif. den., 230 N.J. 530 (2017). If the officer or firefighter is deemed eligible for SDA, the Director appoints an arbitrator. N.J.A.C. 19:12-6.5. Once the Director makes the eligibility determination and appoints an arbitrator, jurisdiction over the matter resides with the appointed arbitrator, who has authority

over the conduct of the proceedings. See N.J.A.C. 19:12-6.6. Arbitrators must render a decision within 90 days of appointment. N.J.S.A. 40A:14-210.

In NJIT and FOP Lodge No. 93, P.E.R.C. No. 2010-48, 35 NJPER 474 (¶158 2009), the Commission restrained contractual binding grievance arbitration of a police officer's termination. See State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993). However, the Commission found that the non-Civil Service police officer could apply for SDA to appeal his termination. In doing so, the Commission considered NJIT's argument that the SDA provisions of P.L. 2009, c. 16 are inapplicable to university police officers because they are created and governed by N.J.S.A. 18A:6-4.2. The Commission held that the SDA process enacted in P.L. 2009, c. 16 applies to all eligible non-Civil Service police officers. We reasoned:

There is nothing in the statute or legislative history of N.J.S.A. 40A:14-200 et seq. to suggest that it was not intended to cover all non-Civil Service police officers. As originally introduced, Assembly Bill 3481 covered all law enforcement departments except the Department of Law and Public Safety. A committee amendment to that bill also excluded law enforcement officers employed by the Juvenile Justice Commission. Assembly Law and Public Safety Committee Statement to A3481, with committee amendments, December 8, 2008. A floor amendment reversed the committee's action to clearly affirm that Juvenile Justice Commission law enforcement officers are to be afforded the benefits of the bill. Thus, in

the end, no police officers other than some in the Department of Law and Public Safety are excluded.

[35 NJPER at 476].

Although the Commission found the NJIT officer eligible for SDA as a non-Civil Service police officer, in a follow-up decision it dismissed the officer's SDA application as untimely. NJIT, P.E.R.C. No. 2011-16, 36 NJPER 322 (¶125 2010). The Appellate Division affirmed the Commission's dismissal based on the officer's untimely SDA application, so it dismissed as moot NJIT's cross-appeal arguing that university police were not subject to SDA under N.J.S.A. 40A:14-210. In re N.J. Inst. of Tech., 2012 N.J. Super. Unpub. LEXIS 888 (App. Div. 2012).

Since NJIT and FOP Lodge No. 93, P.E.R.C. No. 2010-48, the Commission's Director of Conciliation and Arbitration has regularly processed applications for SDA from non-Civil Service police officers and firefighters, including university employees. The Commission, through its Director, has determined that eligibility for SDA pursuant to N.J.S.A. 40A:14-210 requires: 1) a permanent, full-time law enforcement police officer or firefighter in a non-Civil Service jurisdiction; 2) who has been terminated for non-criminal conduct; and 3) a timely application for SDA within 20 days of the employee's receipt of a notice of termination.

The Appellate Division has issued multiple unpublished decisions reviewing the Commission's determinations of eligibility for SDA that did not review or question the Commission's application of SDA to all non-Civil Service police officers and firefighters who are otherwise eligible. See, e.g., In re Rutgers, 2017 N.J. Super. Unpub. LEXIS 917 (App. Div. 2017); In re N.J. Inst. of Tech., 2017 N.J. Super. Unpub. LEXIS 1907 (App. Div. 2017); In re Essex Cnty. College & Wilson, 2016 N.J. Super. Unpub. LEXIS 1435 (App. Div. 2016).

Recently, while this case was pending, the Appellate Division issued a published decision that squarely considered the applicability of SDA under N.J.S.A. 40A:14-209 and -210 to the different types of law enforcement officers set forth in N.J.S.A. 40A:14-200. In re DiGuglielmo, 2020 N.J. Super. LEXIS 219 (App. Div. 2020). That case involved a NJIT police officer who was terminated after administrative charges for violating seven Department Rules and Regulations. The officer had been suspended with pay during the internal affairs investigation that culminated in the termination. The Commission's Director of Conciliation and Arbitration issued a written decision finding the officer eligible for SDA because NJIT is a "law enforcement agency" and the officer is a "law enforcement officer" per N.J.S.A. 40A:14-200 and the officer met the other statutory requirements for SDA under N.J.S.A. 40A:14-210.

The Appellate Division agreed with the Commission's statutory interpretation that NJIT is a "law enforcement agency" and that its police officers are "law enforcement officers" as defined by N.J.S.A. 40A:14-200. DiGuglielmo at *3-4, *26-27. However, the Court held that the NJIT officer was ineligible for SDA because N.J.S.A. 40A:14-209 and -210 both cross-reference N.J.S.A. 40A:14-150 and state that they are "an alternative to" or "in lieu of" de novo Superior Court review under N.J.S.A. 40A:14-150, which predates P.L. 2009, c. 16 and is explicitly only applicable to municipal non-Civil Service police officers. Id. at *4, *27-29. Thus, the Court held that N.J.S.A. 40A:14-150 makes SDA available only for police officers who were employed by a non-Civil Service municipal law enforcement agency. Ibid. The Court held that the broader definitions of law enforcement agency and law enforcement officer under N.J.S.A. 40A:14-200 remain applicable to N.J.S.A. 40A:14-201 through -208, which were also enacted as part of P.L. 2009, c. 16 but concern Civil Service and OAL review of police officer terminations and suspensions in Civil Service jurisdictions. Id. at *29-30.

The Appellate Division also held that even if the NJIT officer could be found eligible for SDA despite being a non-municipal officer, N.J.S.A. 40A:14-209 and -210 do not allow SDA for a termination accompanied by a suspension with pay, but only make SDA available for non-Civil Service municipal police

officers whose terminations were preceded by an unpaid suspension. DiGuglielmo at *31.

Applying DiGuglielmo to this matter, we find that Fischer is not statutorily eligible for SDA under N.J.S.A. 40A:14-209 and - 210 because Rutgers is not a municipality and Fischer therefore was not a non-Civil Service municipal police officer as required by N.J.S.A. 40A:14-150. Furthermore, DiGuglielmo also directs that Fischer is statutorily ineligible for SDA because he challenged only his termination, rather than a termination and an unpaid suspension pending that termination. Here, Fischer had been on paid administrative leave during the Internal Affairs investigations that culminated in administrative charges and his termination. Given these two bases for statutory ineligibility for SDA as per the recent published Appellate Division in DiGuglielmo, we need not reach the eligibility issue of whether the charges leading to Fischer's termination allege criminal conduct or relate to a criminal offense.

Accordingly, based on the Appellate Division decision in DiGuglielmo, the Commission declines to appoint a special disciplinary arbitrator for Fischer and dismisses his application for Special Disciplinary Arbitration.

ORDER

The application for appointment of a special disciplinary arbitrator is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford and Papero voted in favor of this decision. Commissioner Voos recused herself. Commissioner Jones abstained from consideration.

ISSUED: November 12, 2020

Trenton, New Jersey