

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HO-HO-KUS,

Petitioner,

-and-

Docket No. SN-2022-014

PBA LOCAL 353,

Respondent.

Appearances:

For the Petitioner, Wiss & Bouregy, P.C., attorneys  
(Timothy J. Wiss, of counsel and on the brief)

For the Respondent, Loccke, Correia, & Bukosky,  
attorneys (Michael A. Bukosky, of counsel and on the  
brief; Corey M. Sargeant, of counsel and on the brief)

SYNOPSIS

The Public Employment Relations Commission grants, in part, and denies, in part, the request of the Borough of Ho-Ho-Kus for a restraint of binding arbitration of a grievance filed by PBA Local 353 asserting that the Borough failed to comply with procedures set forth in its Promotional Ordinance governing the process for promotion to the position of police captain. The Commission finds that the PBA's challenges relating to the Borough's determination of promotional criteria, its weighting and application of criteria, and its determination of the best-qualified candidate are not legally arbitrable. The Commission finds that an arbitrator may determine whether any evidence establishes a change in the announced promotional criteria or procedures. The Commission further finds that alleged failures by the Borough to provide the grievant with requested documents underlying the promotional process are generally legally arbitrable, and the Borough may raise any specific confidentiality concerns to the arbitrator. Finally, the Commission finds that arbitration is not precluded under principles of res judicata and collateral estoppel, because the PBA was not a party to the grievant's separate appeal under the Promotional Ordinance, nor do the grievance and the appeal involve the same issues.

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. 2022-39

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For the Respondent, Loccke, Correia, & Bukosky,  
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DECISION

On November 30, 2021, the Borough of Ho-Ho-Kus (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 353 (PBA or Local 353). The grievance asserts that the Borough failed to comply with promotional procedures, Borough Ordinance 2021-56, Chapter 46, Section 46-9, Section III (the Promotional Ordinance).

The Borough filed briefs, exhibits and the certifications of its Chief of Police, Michael LaCroix, and its Business Administrator, William Jones. Local 353 filed a brief, exhibits,

and the certification of its President, Thomas Kirk. These facts appear.

Local 353 represents all Patrolmen and Sergeants of the Police Department of the Borough of Ho-Ho-Kus. The Borough and Local 353 are parties to a collective negotiations agreement (CNA) with a term from January 1, 2014 through December 31, 2017. The grievance procedure ends in binding arbitration, and permits the filing of grievances over "the interpretations, application, or violation of policies, agreements and administrative decisions affecting the terms and conditions of" employees covered under the CNA. The grievance procedure, at step two, permits individual unit members to present written grievances to the Chief. The CNA's "Management Rights" clause states, among other things, that the Borough retains the right, "subject to the provisions of law, to determine qualifications and conditions for continued employment, . . . and to promote and transfer Employees."

On July 20, 2021, the Borough enacted Ordinance No. 2021-56, amending Chapter 46-9 of the Borough's Code governing the process for promotion to the position of police captain, among others.<sup>1/</sup>

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<sup>1/</sup> The record includes a copy of the ordinance, in which sections of Chapter 46-9 of the Borough Code that were deleted by the ordinance are denoted by "~~striketroughs~~", while new sections added by the ordinance are "underlined". With respect to the promotional process for police captains and lieutenants, no portions of the existing Code were  
(continued...)

The ordinance specifies at section III(A) that no person shall be eligible for promotion to the rank of lieutenant or captain unless the candidate has served as a sergeant for the Ho-Ho-Kus Police Department for three years. As detailed in section III of the ordinance, the promotional procedure for those positions included two separately scored components, each having 100 points as a maximum score: (1) an "oral examination and assessment" by an "Interview Panel," worth sixty percent of a candidate's "total promotional score"; followed by (2) an interview and assessment by the "Appropriate Authority" after its receipt of the oral examination results, worth forty percent of the total promotional score.

The Borough's Promotional Ordinance, at section III(B) (1) (b), specifies that the Interview Panel would evaluate the following criteria during its oral examination and assessment of each candidate who applied for the open position(s):

commendations, employee reviews, disciplines  
and early intervention summaries, annual  
performance evaluations, merit, overall  
performance, demonstrated ability and  
accomplishments, efforts supporting  
department goals and objectives, in-service  
education and specialized schools,  
specialized job assignments,  
responsibilities, subsequent performance,

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1/ (...continued)  
deleted by the ordinance. The only new language that was added addressed the potential composition of an interview panel, allowing it to be comprised of "one or more of" certain officials, "or their designees."

attitude and demeanor, education, military experience, leadership ability, initiative, productivity, attitude toward peers, supervising officers recommendations, motivation and morale, previous job performance, loyalty to the department and community, experience and career development training.

The ordinance is silent as to whether or to what extent Interview Panel members could or should assign separate point values, if any, to each of the above-quoted criteria when conducting an oral examination. The Promotional Ordinance also provides, at section III(B) (1) (d), "[d]ue consideration shall be given to the eligible candidate for promotion based upon length of service and merit of service and preference shall be given according to seniority pursuant to N.J.S.A. 40A:14-129."

The Promotional Ordinance further specifies at section IV(D) :

The announcement [of a promotional process] shall include the eligibility requirements for the position, and shall include a description of the promotional process and should indicate to the candidates the format, length and duration of any examinations, together with a description of any other portions of the promotional process, and the date by which they must submit a request to participate in the promotional process.

Section V of the ordinance requires that upon the completion of the promotional process, the Chief of Police must submit an eligibility list (of two years' duration) to the Appropriate Authority for a final determination after the expiration of the

time for filing an appeal, with the appeal process further detailed in section VII of the ordinance as follows:

Within ten (10) days of the notification to each candidate of his/her ranking, a candidate may file a written appeal directed to the Chief of Police. Said written appeal must contain the reason(s) or justification for the appeal. As part of any appeal, any candidate may review his or her evaluation or any other internal document pertaining to the candidate that was utilized in the promotional process.

The Chief of Police will assess the request for appeal and make a determination as to how the request will be addressed, on a case by case basis. Scores on the written examination shall be final and not subject to appeal. If the Chief determines the appeal should move forward, any appeals of the oral examinations or other section of this procedure shall be decided by the Governing Body, within 10 days from the filing of the appeal. The Governing Body shall make a written decision on the appeal together with a brief statement of the reasons therefore. All decisions by the Governing Body on the appeal shall be final.

In August of 2021, LaCroix wrote to all members of the PBA announcing that the Governing Body was moving forward with a promotional opportunity for the position of police captain. LaCroix's notice fully incorporated the language of the Promotional Ordinance with respect to its eligibility requirements, the selection process and the evaluation criteria. The grievant was an eligible candidate who applied but was not selected for promotion. Jones certifies that the grievant

participated in the promotional process without raising any objections to the process itself.

After the process ended, the grievant wrote to LaCroix on September 30, 2021, requesting "a copy of the scored elements for the selection process . . . [and] to review any evaluations or internal documents that were used in the selection process related to the applicants." The grievant also asked "to view the point distribution for all the candidates, and me" specifically with respect to each criterion listed in section III(B)(1)(b) of the Promotional Ordinance. The grievant also requested "the scores for all candidates during each part of the process and their complete breakdown of points," as well as "the questions asked to each candidate during their interviews . . . [and] all contemporaneous notes taken, by all personnel present, during each interview phase."

On October 6, 2021, the grievant wrote to LaCroix, again requesting the information detailed in his September 30<sup>th</sup> letter, and further stating that he was filing a formal appeal under the Borough's Promotional Ordinance. That same day, LaCroix wrote to the grievant, stating, in pertinent part:

Please be advised that your scores are attached to this correspondence. Other than the aggregate total score for each candidate, the Borough does not release the scores of other candidates, which are not the subject of your appeal.

With respect to your request for documents, the Borough's Ordinance lists the criteria which was used by the Interview Panel. . . . Your personnel file is available for inspection at a mutually agreeable time and date. Please contact me within five (5) days so that we may set up a time for you to review the same.

LaCroix certifies that he also met with the grievant "thereafter" and explained the evaluation process to him in further detail. LaCroix explained that while the grievant was a valued officer in the Department, the successful candidate simply scored better during the promotional process. More specifically, when asked by the grievant how the scores were reached, LaCroix explained that each of the criteria assessed by the Borough was not provided a separate point total (i.e. a candidate was not scored specifically for each category). Rather, each factor was considered as part of the overall evaluation. The Borough utilized an oral examination process, followed by an interview, and asked each candidate a series of the same questions, including questions which each touched on and considered the promotional evaluation criteria, and enabled each scoring member an opportunity to evaluate the candidates and to provide a score for each candidate.

LaCroix certifies that he further explained where the grievant fell short in the scoring when compared to the successful candidate: the successful candidate had a series of higher ranked performance evaluations, demonstrated superior



knowledge of Attorney General directives, provided clear and concise answers to the questions asked, and expressed a strong motivation to foster a more diverse, citizen-focused department. He further explained that seniority and military service were considered and accounted for, but were one component as part of the overall score.

On October 15, 2021, the grievant notified LaCroix that he was "formally beginning the grievance process" in regard to his promotional appeal. The grievant acknowledged reviewing his personnel file and receiving the "scores of the candidates and the scores that each member of the interview process awarded to each candidate," but stated that he did "not believe the [selection] criteria have been applied to the process," and further that he had not received all the information requested in his September 30<sup>th</sup> letter to LaCroix, including "the complete breakdown of the scores and where the points were awarded to each candidate in accordance with the Borough Ordinance and the 25 criteria that is set within." The grievant's letter concluded:

Therefore, I file this formal grievance due to the failure to comply with Borough Ordinance 2021-56, Chapter 46, section 46-9 Section III (Promotion to the rank of Lieutenant/Captain), subsection (B) (1) (b), the application of the criteria to the evaluations; and Borough Ordinance 2021-56, Chapter 46, section 46-9, section III, subsection VII, the Appeal of Process.

LaCroix responded with an undated letter, denying his appeal and stating that the Borough adhered to its criteria during the promotional process, and had provided the grievant with access to documents utilized by the Interview Panel, along with the scores of each candidate. On October 26, the grievant wrote to the Mayor, requesting to move the grievance to step three of the grievance procedure, and asserting that Chief LaCroix had failed to timely respond at step two, as required by Article XII of the CNA.

On October 26, 2021, Jones wrote to the grievant stating, among other things, that the Mayor and Council had scheduled a special meeting, via Zoom, for October 28 regarding his "secondary appeal of the promotions process under the Borough's Promotional Ordinance". Jones directed the grievant to indicate in writing, by "no later than 10/27/21 at 1 pm," if he wished a public meeting. Jones also stated that the matter was "not being heard pursuant to Step Three of any grievance process" in the CNA, and further that the Borough "does not recognize any right to file such a grievance related to this matter." On October 27 the grievant wrote in reply, thanking Jones and further stating, among other things:

Please note I am prosecuting my right to the challenge of the promotional process. The appeal process and the grievance process are both being advanced simultaneously. My letters have been very explicit and guided on the matter of each of the processes.

This letter is to advise you that I wish to have a public meeting with the Mayor and Council to discuss all these matters and present any information or argument that I wish to present.

Counsel will be representing me during this public hearing.

I only received word that you placed a letter in my mailbox at 6:28pm on 10/26/21 and did not receive your letter until 7am on 10/27/2021. As I am sure you can understand, I had to wait to hear from counsel before responding back to you. That is why I was unable to respond within the 6-hour time period that you slotted.

Jones certifies that neither the grievant nor his attorney showed up at the October 28, 2021, special meeting, despite the grievant's letter the previous day. On October 29 Jones wrote to the grievant, stating:

As you are aware, you have filed an appeal with the Governing Body related to the promotional process. This matter was heard by the Governing Body at a Special Meeting held on October 28, 2021 pursuant to the notice provided to you and pursuant to the Borough's promotional Ordinance. We are aware that the Administrator has advised you the hearing was conducted for such purpose, and concur that the hearing was not being held pursuant to any grievance process.

Please be advised, based on the information presented, your appeal was denied. We wish you the best of luck in the future.

Kirk certifies that the filed grievance seeks to determine whether there was a:

1. Failure to properly notice changes in the promotional procedure;

2. Failure to properly identify criteria to be utilized within the promotional process;
3. Failure to properly assess numerical scores to the criteria;
4. Failure to properly add and calculate the scoring related to criteria;
5. Changing the practices as to the weight given to each type of criteria;
6. Failure to properly designate and inform the officers of a criteria which will be utilized and how it will be weighted;
7. Failure to properly provide copies of materials underlying the promotional process including resume scores, calculations, etc., so that members can accurately assess the fairness of the promotional process;
8. Failure to provide documents to the Union concerning the promotional process; and/or
9. Failure to provide any of the documents necessary for a fair review of this matter and the PBA therefore reserves its right to address other procedural issues which reveal themselves as this matter proceeds.

On November 10, Local 353 filed a request for submission of a panel of arbitrators. On November 12, counsel for Local 353 submitted to the Mayor and Council a "clarification" of the grievance. Among other things, the clarification stated that the PBA "takes no position as to the ultimate selection of the eligibles selected," but alleged that the promotions process was

"potentially arbitrary in scoring" and "appears to have improperly allocated graded criteria and materials inconsistent with recognized practice." The PBA further alleged that the appeal process under the Promotional Ordinance "was unfairly and improperly administered because the materials requested were never provided nor was there adequate opportunity for a public hearing to be held" as there was "neither adequate notice nor adequate and meaningful opportunity to be heard and the failure to provide the requested documents and materials rendered any potential opportunity to be heard arbitrary and capricious." The PBA further alleged that the Borough, a non-civil service municipality, arbitrarily and capriciously failed to provide a statement of reasons as to why an eligible candidate was not selected, as required by N.J.S.A. 40A:14-129. This petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a

mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). Thus, if we conclude that Local 353's grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the

grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The Borough does not argue that any statute or regulation is preemptive. It argues that arbitration must be restrained because the decision to establish promotional criteria and the ultimate evaluations of candidates is not mandatorily negotiable. The Borough retains the exclusive right to determine which candidate is better qualified, as well as to determine which candidates, if any, are equally qualified. The Borough further argues that principles of issue preclusion, collateral estoppel and res judicata preclude the PBA from re-litigating the issue of the grievant's promotion through the grievance procedure.

Local 353 argues that while the decision to promote is within the power of the employer, the procedures used for promotions are negotiable. The grievance at issue is based upon whether promotional procedures were followed, specifically with respect to the nine items set forth in Kirk's certification. Local 353 also asserts that the grievant's participation in the promotional process does not equate to his "acquiescence" to that process.

Local 353 further argues that it is not precluded from grieving this matter, because the grievant's appeal to the Governing Body was made on an individual basis claiming a

violation of the Promotional Ordinance, while the PBA through the grievance procedure is asserting a contractual violation. The issues and causes of action are not the same. The PBA was not a party to the grievant's appeal under the Borough's ordinance, nor was that appeal decided by a court or administrative agency. And, although that appeal allegedly resulted in a final decision, no final decision from the Governing Body was provided.

The Borough replies that its ordinance and LaCroix's August 2021 notice fully apprised the PBA of the criteria used in the promotional process, and no "change" from that process occurred here. The Borough did not change practices as to the weight given to each type of criteria, as no "practice" existed prior to the Borough's passage of the Promotional Ordinance in July of 2021 and the promotional opportunity announcement and process that took place in August of 2021. The Borough argues that the allegation that it failed to provide copies of materials underlying the promotional process is factually without merit, as the PBA does not dispute that the grievant was given an opportunity to examine his scores, the scores of the successful candidate, and all written materials utilized. No specific "documents" were requested by the PBA, and no such request was provided. The PBA should not be permitted to amend its grievance as it sees fit. The Borough also reiterates its arguments as to preclusion, res judicata and collateral estoppel.



It is well-settled that a public employer has a prerogative to determine promotional criteria and make promotional decisions, but must negotiate over promotional procedures. See State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90 (1978). The opportunity to apply for a promotion is a term and condition of employment, and candidates should be made aware of the basis upon which they will be evaluated so that they are equipped to understand how promotional decisions are made. State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80, 89-91 (App. Div. 1981). A dispute concerning whether an employer followed a specific practice relating to the application of its promotional criteria or provided notice of same is legally arbitrable. Ridgefield Park. See also, State of N.J. (Dept. of Corrections), P.E.R.C. No. 2018-50, 44 NJPER 461 (¶128 2018) (allowing arbitration of dispute over whether employer provided notice of promotional criterion, or had practice of using that criterion in promotional process). We also permit arbitration of alleged procedural violations, including inadequate notice issues first raised in a brief or certification, that were not mentioned in the grievance and request for arbitration. See, e.g., Red Bank Boro, P.E.R.C. No. 2021-44, 47 NJPER 470 (¶111 2021); Edison Tp. Bd. of Ed., P.E.R.C. No. 2015-74, 41 NJPER 495 (¶153 2015); Neptune Tp. Bd. of Ed., P.E.R.C. No. 93-36, 19 NJPER 2 (¶24001 1992).

Moreover, the Commission determines scope of negotiations petitions not only based on the grievance documents, but rather, based on the totality of the certified facts and arguments raised by the parties. We have often acknowledged that a dispute becomes more sharply focused as the grievance proceeds and professional assistance is received at higher levels of the grievance process. See, North Hunterdon Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 86-55, 11 NJPER 707, n.3 (§16245 1985); City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (§19212 1988); Union Cty. Reg. H.S. Dist. No. 1 Bd. of Ed., P.E.R.C. No. 81-16, 6 NJPER 388 (§11200 1980). Therefore, we will use the identification of issues in Kirk's certification to provide the framework for our analysis.

Guided by the above legal principles, we find item numbers "3) proper assessment of numerical scores to promotional criteria; (4) incorrect adding and calculating of scores related to criteria; and (5) a change in practices as to the weight given to each criteria" to be not legally arbitrable. The Borough's determination of promotional criteria, its weighting and application of the criteria, and its determination of the best-qualified candidate are not legally arbitrable.

However, we find that item numbers "(1) notice of changes in the promotional procedure; (2) identification of promotional criteria; and (6) a failure to inform officers of criteria to be

utilized and how it will be weighted" are legally arbitrable as an arbitrator may determine whether any evidence establishes a change in the announced promotional criteria or procedures.

Items "7) Failure to properly provide copies of materials underlying the promotional process including resume scores, calculations, etc., so that members can accurately assess the fairness of the promotional process; 8) Failure to provide documents to the Union concerning the promotional process; and 9) Failure to provide any of the documents necessary for a fair review of this matter and the PBA therefore reserves its right to address other procedural issues which reveal themselves as this matter proceeds" concern the disclosure of documents to Local 353 relating to the promotional process. In In re Univ. of Medicine and Dentistry of New Jersey, 144 N.J. 511, 530-531 (1996), the New Jersey Supreme Court noted the following regarding union requests for information:

[A]n employer must supply information if [there is] a probability that the information is potentially relevant and that it will be of use to the union in carrying out its statutory duties. Thus, unions are entitled to a broad range of potentially useful information. PERC requires every public employer to provide its employees' union with the information that the union needs to evaluate the merits of an employee's complaint about employer conduct unless such information is clearly irrelevant or confidential.

However, "[a] majority representative does not have an absolute right to obtain all requested information; rather, the duty to disclosure turns upon the circumstances of the particular case." State of New Jersey (Office of Employee Relations), P.E.R.C. No. 88-27, 13 NJPER 752 (¶ 18284 1987) (citations omitted). We find Items 7, 8 and 9 to be generally legally arbitrable. The Borough may raise any specific confidentiality concerns to the arbitrator.

Finally, we find that arbitration is not precluded under principles of res judicata and collateral estoppel. Res judicata is applicable when the same parties have fairly litigated the same cause of action to a final judgment on the merits. See, Hudson Cty, P.E.R.C. No. 2019-24, 45 NJPER 219 (¶58 2018); Newark Bd. of Ed., P.E.R.C. No. 84-156, 10 NJPER 445 (¶15199 1984), aff'd, NJPER Supp.2d 151 (¶134 App. Div. 1985). Collateral estoppel is applicable when an issue of ultimate fact has been fairly and fully litigated in a prior action between, generally, the same two parties, regardless of whether the causes of action were identical, and bars relitigation of that particular question of fact. Id. The Borough denied the grievant's appeal under the Promotional Ordinance. The PBA was not a party to that appeal, and it is not clear whether the Borough's denial was either "fairly and fully litigated" or was based on the merits. The grievant did not attend the hearing. The Borough's decision

stated only, "based on the information presented, your appeal was denied." Therefore, we do not have a decision from the Borough explaining the basis of its denial. Nor do the grievance and the appeal involve the same issues. The former alleges a contractual violation, while the latter alleges a violation of the ordinance.

ORDER

The request of the Borough of Ho-Ho-Kus for a restraint of binding arbitration is denied with regard to following assertions raised by Local 353 in Kirk's certification:

- 1) Failure to properly notice changes in the promotional procedure;
- 2) Failure to properly identify criteria to be utilized within the promotional process;
- 6) Failure to properly designate and inform the officers of a criteria which will be utilized and how it will be weighted;
- 7) Failure to properly provide copies of materials underlying the promotional process including resume scores, calculations, etc., so that members can accurately assess the fairness of the promotional process;
- 8) Failure to provide documents to the Union concerning the promotional process; and/or
- 9) Failure to provide any of the documents necessary for a fair review of this matter and the PBA therefore reserves its right to address other procedural issues which reveal themselves as this matter proceeds.

The request for a restraint of binding arbitration is granted with regard to the following assertions raised by Local 353 in Kirk's certification:

- 3) Failure to properly assess numerical scores to the criteria;
- 4) Failure to properly add and calculate the scoring related to criteria;
- 5) Changing the practices as to the weight given to each type of criteria;

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Papero and Voos voted in favor of this decision. Commissioner Jones did not vote either yes or no to the draft as presented. Commissioner Ford was not present.

ISSUED: March 31, 2022

Trenton, New Jersey