

**To: New Jersey Law Revision Commission**  
**From: Nicholas Tharney**  
**Re: Definition of Misconduct Pursuant to the Unemployment Compensation Act - N.J.S. 43:21-5(b) – (*In re N.J.A.C. 12:17-2.1*)**  
**Date: July 9, 2018**

## MEMORANDUM

### Executive Summary

In May of 2017, the Appellate Division of the Superior Court decided a case concerning the levels of misconduct that would affect an individual’s ability to receive unemployment benefits. Though the case, *In re N.J.A.C. 12:17-2.1*,<sup>1</sup> was originally brought in response to an administrative regulation that attempted to rectify the ambiguity in the corresponding statute that defines levels of misconduct, the Court relied on the legislative intent and history, in addition to previous decisions, in order to distinguish the types of misconduct under N.J.S. 43:21-5(b).

### Background

In *In re N.J.A.C. 12:17-2.1*, the Court noted that the regulation attempted to “[define], for the first time in codified form, the concept of ‘simple misconduct’ by an employee that can limit his or her eligibility for unemployment benefits under the Unemployment Compensation Act ... [N.J.S. 43:21-1 to -56].”<sup>2</sup> In doing so, the Court recognized the need to distinguish “... ‘simple misconduct’ from the more stringent intermediate concept of ‘severe misconduct’ as defined by the Legislature in a 2010 amendment to N.J.S.A. 43:21-5(b), or the most extreme category of ‘gross misconduct’ defined in the statute.”<sup>3</sup> The portion of the administrative regulation that attempted to clarify the wording put in place by the Legislature was “set aside as arbitrary and capricious...”<sup>4</sup>

In the earlier case of *Silver v. Board of Review*, the Court stated, [f]rom its inception in 1936 until 2010, New Jersey’s Unemployment Compensation Law has provided for disqualification for benefits for employees discharged for “misconduct” or “gross misconduct” connected with the work...The statute defines “gross misconduct” as “an act punishable as a crime of the first, second, third or fourth degree,” but it does not define the term “misconduct.” ... Appropriately, the sanctions for gross misconduct are greater than for simple misconduct.<sup>5</sup>

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<sup>1</sup> *In re N.J.A.C. 12:17-2.1*, 450 N.J. Super. 152 (App. Div. 2017).

<sup>2</sup> *Id.* at 155.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 155-156.

<sup>5</sup> *Silver v. Bd. of Review, Dep’t of Labor*, 430 N.J. Super. 44, 48 (App. Div. 2013).

Both the *Silver* and the *N.J.A.C. 12:17-2.1* Courts pointed out that the 2010 “amendatory provision does not define severe misconduct, but contains a non-exclusive list of examples.”<sup>6</sup> Specifically, the statute states:

Examples of severe misconduct include, but are not necessarily limited to, the following: repeated violations of an employer's rule or policy, repeated lateness or absences after a written warning by an employer, falsification of records, physical assault or threats that do not constitute gross misconduct as defined in this section, misuse of benefits, misuse of sick time, abuse of leave, theft of company property, excessive use of intoxicants or drugs on work premises, theft of time, or where the behavior is malicious and deliberate but is not considered gross misconduct as defined in this section.<sup>7</sup>

In contrast, gross misconduct is defined as “the commission of an act punishable as a crime of the first, second, third or fourth degree under the ‘New Jersey Code of Criminal Justice,’ N.J.S. 2C:1-1 et seq.”<sup>8</sup> This more explicit definition allows one to readily determine whether an alleged act constituted gross misconduct under the statute, as opposed to simple misconduct or severe misconduct. However, it is not as clear where the line is drawn between simple misconduct and severe misconduct.

The *N.J.A.C. 12:17-2.1* Court reviewed the history of some of the case law in this area in which the courts have attempted to fill in the gap left by the absence, in the statute, of an express definition of “simple misconduct.”<sup>9</sup> The Court also pointed out that the *Silver* Court had “reasoned...that it is ‘fundamental’ that the term ‘misconduct’ should have ‘the same meaning throughout *N.J.S.A. 43:21–5(b)* and its implementing regulation.”<sup>10</sup> The *Silver* Court had noted that

“it is obvious that the Governor and Legislature intended to create severe misconduct as a gap-filler between simple misconduct and gross misconduct.”...(emphasis added). We added that “[i]t would make no sense to allow for conduct with a lower level of culpability (such as mere inadvertence or negligence) to qualify as severe misconduct and carry with it a harsher sanction than simple misconduct.”...“Such a result would be absurd and clearly contrary to

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<sup>6</sup> *Silver* at 49; *N.J.A.C. 12:17-2.1* at 156.

<sup>7</sup> N.J.S. 43:21–5 subsection (b).

<sup>8</sup> *Id.*

<sup>9</sup> *N.J.A.C. 12:17-2.1* at 157.

<sup>10</sup> *N.J.A.C. 12:17-2.1* at 161.

the legislative intent, as expressly set forth in the Governor's Conditional Veto Message, S1813, L. 2010, c. 37.”<sup>11</sup>

The regulation held to be invalid was the subject of proposed changes in 2017, but has not been modified to this time.

### **Conclusion**

Staff seeks authorization to conduct additional research and outreach in the matter in order to determine whether modifications to the statute could potentially be of assistance in clarifying this area of the law.

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<sup>11</sup> *Id.* at 162.