
1997-RECENT CASE LAW & POLICY DEVELOPMENTS

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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What follows is an overview of Commission case law since the April 1996 Annual Conference.

Workload, Assignments and Compensation

Changes in workload may trigger a negotiations obligation. The Commission therefore held that a school board had an obligation to negotiate concerning compensation for workload increases for supervisors assigned to supervise 75 minute lunchroom periods. *Belleville Bd. of Ed.*, P.E.R.C. No. 97-11, 22 *NJPER* 320 (¶27162 1996). Where supervision of a breakfast program was part of the administrators' regular workday and not extracurricular, a school board did not violate the Act by unilaterally implementing the uncompensated assignments. *Irvington Bd. of Ed.*, P.E.R.C. No. 96-74, 22 *NJPER* 194 (¶27102 1996).

Additional compensation for an alleged workday extension for elementary school teachers was mandatorily negotiable and could be resolved through binding arbitration. *Long Branch Bd. of Ed.*, P.E.R.C. No. 97-34, 22 *NJPER* 376 (¶27198 1996). Arbitration over an alleged agreement that child study team members would be paid additional compensation for additional workload after

two school psychologists left employment did not significantly interfere with any educational policy determinations. *Willingboro Bd. of Ed.*, P.E.R.C. No. 97-78, 23 *NJPER* 36 (¶28025 1996). However, a Complaint did not issue where a school board reduced kindergarten teachers' preparation periods to one, as permitted by the parties' contract, but refused to negotiate over compensation for an alleged increase in pupil contact time for those teachers. *North Caldwell Bd. of Ed.*, P.E.R.C. No. 97-37, 22 *NJPER* 379 (¶27200 1996). No allegation in the charge suggested that the Board did anything more than act in accordance with its contractual rights or that the alleged increase in pupil contact time was anything more than a necessary consequence of a contractually authorized reduction in preparation periods. *Id.*

A school board violated the Act when it unilaterally reduced a supervisor's work year by abolishing his 205-day position and replacing it with a 185-day position. *Lenape Valley Reg. Bd. of Ed.*, P.E.R.C. No. 97-25, 22 *NJPER* 360 (¶27189 1996).

Compensation for work performed in a different pay category is mandatorily negotiable. Thus, a grievance requesting that assistant principals allegedly performing the duties of vice principals be paid according to

the vice principals' salary guide was found legally arbitrable. *Irvington Bd. of Ed.*, P.E.R.C. No. 97-64, 23 *NJPER* 25 (¶28018 1996).

A contract provision calling for an increase in wage rates if a certain number of unit employees are moved from their pre-selected fixed shift work assignments was found not mandatorily negotiable. *Rutherford Bor.*, P.E.R.C. No. 97-7, 22 *NJPER* 280 (¶27151 1996), app. pending App. Div. Dkt. No. A-7700-95T1. The Commission found no showing that an increase in compensation for all employees was reasonably related to the removal from fixed work assignments experienced by a much more limited number of negotiations unit members. The Commission therefore viewed the provision as a penalty which significantly interfered with the employer's managerial right to reassign officers to meet operational needs. *Id.*

The Commission restrained arbitration of a grievance contesting an order establishing new procedures on overtime and staffing, and reassigning a detective to replace an absent patrol officer rather than call in another patrol officer on overtime. *Borough of Montvale*, P.E.R.C. No. 97-62, 23 *NJPER* 16 (¶28015 1996). There was no allegation that the detective was working out-of-title or that the work had been assigned to a non-unit employee. *Id.*

Arbitration over an alleged agreement not to assign officers on light duty to non-police

duties would not substantially limit governmental policymaking powers and is therefore legally arbitrable. *Township of Mt. Olive*, P.E.R.C. No. 97-45, 22 *NJPER* 398 (¶27216 1996).

Clauses addressing shift assignments by seniority and shift assignments of negotiations committee members were found not mandatorily negotiable because they did not preserve management's right to act unilaterally to accomplish its governmental policy goals. *Hudson Cty.*, P.E.R.C. No. 97-16, 22 *NJPER* 328 (¶27167 1996).

Competing contractual contentions over whether an employer could assign painting duties to certain employees even though such work was allegedly outside of their job descriptions could be resolved through binding arbitration. *Somerset Raritan Valley Sewerage Auth.*, P.E.R.C. No. 97-49, 22 *NJPER* 403 (¶27220 1996). Absent any interference with the employer's right to have qualified employees perform overtime, a union could legally seek to arbitrate a claim that the parties' overtime allocation system required it to allocate an overtime opportunity to one employee rather than another. *Township of Wayne*, P.E.R.C. No. 97-74, 23 *NJPER* 42 (¶28029 1996), app. pending App. Div. Dkt. No. A-; *see also North Bergen Tp. Bd. of Ed.*, P.E.R.C. No. 97-46, 22 *NJPER* 399 (¶27217 1996)(allocation of weekend overtime assignment from custodian/boilerman assigned to school to

another employee assigned to different building).

A collective negotiations agreement could legally protect employees in the title of firefighter from having to perform ambulance/EMS duties outside the job duties of that title. *Township of Maplewood*, P.E.R.C. No. 97-80, 23 *NJPER* __ (¶__ 1997). At the same time, the employer had a managerial prerogative to have its fire department assume ambulance/EMS responsibilities; create a firefighter/EMT job title; and staff the new position by hiring or promoting employees into it. *Id.*

The Commission refused to restrain arbitration over a grievance claiming that a college breached an alleged agreement that unit members be considered for summer overload assignments and that the college review requests for such assignments on a case-by-case basis. *Camden Cty. College*, P.E.R.C. No. 97-22, 22 *NJPER* 357 (¶27186 1996). The Commission restrained arbitration to the extent the grievance asserted that the College was required to appoint a technician to teach a specific course. *Id.*

Transfers of Unit Work

Absent a managerial prerogative to shift the duties of supervisory operations to non-unit employees, a grievance claiming that supervisory operators, not chief operators, were entitled to perform certain duties on the weekday day shifts could be arbitrated. *City*

of Jersey City, P.E.R.C. No. 97-4, 22 *NJPER* 275 (¶27148 1996). The unilateral transfer of duties traditionally performed by police officers to non-unit employees violated the Act. *City of Jersey City*, P.E.R.C. No. 96-89, 22 *NJPER* 251 (¶27131 1996), partial stay granted P.E.R.C. No. 97-17, 22 *NJPER* 329 (¶27168 1996), app. pending App. Div. Dkt. No. A-6290-95T2, stay granted pending appeal.

Staffing Levels

Public employers are not required to negotiate about overall staffing levels or how many police officers will be assigned to be on duty at a particular time or deployed on a particular duty. *City of Sea Isle*, P.E.R.C. No. 96-83, 22 *NJPER* 240 (¶27125 1996).

The scheduling of vacations and other time off is mandatorily negotiable so long as an agreed-upon system does not prevent an employer from fulfilling its staffing requirements. *Rutherford Bor.*, P.E.R.C. No. 97-12, 22 *NJPER* 322 (¶27163 1996); recon. den. P.E.R.C. No. 97-95, 23 *NJPER* __ (¶__ 1997). The additional labor cost of overtime payments does not make a vacation scheduling dispute non-negotiable. *Id.*

Work Schedules

The Commission reaffirmed that work schedules of police officers and firefighters are generally mandatorily negotiable and

found that a 24/72 hour schedule for firefighters was mandatorily negotiable and could be submitted to interest arbitration. *Township of Maplewood*. Both parties could present their concerns to each other and develop a full record enabling an interest arbitrator to evaluate their concerns in light of the public interest and all the other statutory criteria in the Police and Fire Public Interest Arbitration Reform Act. *Id.*

Arbitration over a change in work schedules for a deputy police chief and a captain was restrained where the city had a prerogative to decide that it needed to have high-ranking officers on duty during the summer months when the city's weekend population soars and when the on-duty presence of high ranking officers may be needed to respond to emergencies. *City of North Wildwood*, P.E.R.C. No. 97-83, 23 *NJPER* ___(¶___ 1997). Arbitration was permitted over an alleged breach of an agreement over work hours and compensation. *Id.*

A policy requiring notice, before the first half of a shift swap occurs, of the date the exchange will be completed could be legally arbitrated. *Borough of North Plainfield*, P.E.R.C. No. 97-77, 23 *NJPER* 38 (¶28026 1996).

A rotation of police officers from road patrol to foot patrol and vice versa every three months instead of every four months was found permissively negotiable. *New Jersey*

Transit Corp., P.E.R.C. No. 96-78, 22 *NJPER* 199 (¶27106 1996).

Promotions

Public employers have a prerogative to make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs. *See, e.g., Local 195, IFPTE v. State*, 88 *N.J.* 393 (1982); *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, 78 *N.J.* 144 (1978); *Essex Cty.*, P.E.R.C. No. 90-74, 16 *NJPER* 143 (¶21057 1990). A claim that employees have a right to be told why they are not promoted is procedural and mandatorily negotiable. *Montclair Tp.*, P.E.R.C. No. 96-75, 22 *NJPER* 196 (¶27103 1996); *see also NJIT*, P.E.R.C. No. 97-65, 23 *NJPER* 26 (¶28019 1996)(statement of reasons for accepting or rejecting candidates). Claims of race discrimination in promotions must be pursued in the appropriate administrative agency or court. *Id.*, *see also Teaneck Tp. Bd. of Ed. v. Teaneck Teachers Ass'n*, 94 *N.J.* 9 (1983).

Arbitration was restrained to the extent grievances asserted that an employer was restricted in its search for candidates to fill vacancies to individuals who already have certain qualifications and to the extent the grievances asserted that the employer had to prove that the outside candidates hired were superior to current employees. *NJIT*. Arbitration was permitted to the extent the grievances asserted that the employer did not

adequately consider current employees before considering outside applicants or follow posting procedures. *Id.* An employer can legally agree to post announcements of interim as well as permanent vacancies. *State-Operated School Dist. of the City of Newark*, P.E.R.C. No. 97-87, 23 *NJPER* __ (¶ __ 1997).

Decisions to change promotional criteria and the weight given to various criteria are not mandatorily negotiable. *State of New Jersey, Dept. of Law & Public Safety v. State Troopers NCO Association*, 179 *N.J. Super.* 80 (App. Div. 1981). Where a union failed to request negotiations over severable economic consequences of a decision to change an evaluation program, the employer did not refuse to negotiate in good faith. *Township of Cherry Hill*, P.E.R.C. No. 97-33, 22 *NJPER* 375 (¶27197 1996).

An employer can agree to permit a qualified senior employee to serve a trial period in a promotional position before it considers an outside applicant for the position. *North Bergen Tp. Bd. of Ed.*, P.E.R.C. No. 96-87, 22 *NJPER* 245 (¶27129 1996).

The rotation of summer school assignments among equally qualified applicants is mandatorily negotiable and legally arbitrable. *Springfield Bd. of Ed.*, P.E.R.C. No. 97-10, 22 *NJPER* 319 (¶27161 1996).

If there are no preemptive statutes or regulations, parties may negotiate provisions

relating seniority to determinations of which satisfactory employees will be laid off, recalled, bumped or re-employed. *State v. State Supervisory Employees Ass'n*, 78 *N.J.* 54, 84 (1978). Where the employees did not have the requisite qualifications, the Commission restrained arbitration over claims that the employees were entitled to bump into certain positions. *UMDNJ*, P.E.R.C. No. 97-89, 23 *NJPER* __ (¶__ 1997); *South Brunswick Tp.*, P.E.R.C. No. 97-29, 22 *NJPER* 368 (¶27193 1996). The Commission declined to restrain arbitration over a bumping claim to a position for which the employee was qualified. *South Brunswick*. The Commission found mandatorily negotiable the use of evaluative ratings for purposes of determining the order of layoffs among competent employees. *South Orange-Maplewood Bd. of Ed.*, P.E.R.C. No. 97-54, 22 *NJPER* 411 (¶27225 1996).

Civil Service "rule of three" regulations preempt arbitration over a grievance contesting the promotion of two employees ranked first and second on an eligibility list. *Township of Riverside*, P.E.R.C. No. 97-56, 23 *NJPER* 9 (¶28009 1996), app. pending App. Div. Dkt No. A-002473-96T2.

Discipline and Evaluations

Effective January 9, 1997, *P.L.* 1996, *c.* 115 amended *N.J.S.A.* 34:13A-5.3 to provide specifically for binding arbitration of minor discipline for all public employees except

State police. In *City of East Orange*, P.E.R.C. No. 97-85, 23 *NJPER* ___ (¶___ 1997), the Commission held that a minor disciplinary dispute that was pending before the effective date of the new amendment was legally arbitrable. See *CWA v. PERC*, 193 *N.J. Super.* 658 (App. Div. 1984).

A grievance asserted that the employer violated the parties' collective negotiations agreement when it reassigned a detective to a patrol position. Management has a prerogative to transfer or reassign a police officer from one duty position to another to meet its governmental policy goal of assigning the officer best qualified for a particular duty. *State v. State Troopers Fraternal Ass'n*, 134 *N.J.* 393 (1993), held that the discipline amendment to *N.J.S.A.* 34:13A-5.3 does not apply to troopers or any other police officers. Accordingly, the Commission found that regardless of whether or not the reassignment was disciplinary, arbitration over the merits must be restrained. *Stafford Tp.*, P.E.R.C. No. 96-82, 22 *NJPER* 239 (¶27124 1996).

Whether or not a school board agreed to provide contractual tenure to teachers' aides and whether, if so, it had just cause to dismiss a particular aide is legally arbitrable. *Atlantic Cty. Special Services Bd. of Ed.*, P.E.R.C. No. 97-51, 22 *NJPER* 407 (¶27222 1996); *Mercer Cty. Special Services Bd. of Ed.*, P.E.R.C. No. 97-52, 22 *NJPER* 409 (¶27223 1996). No alternate statutory appeal procedure exists for contesting discharges of custodians without

statutory tenure rights. Therefore the Commission declined to restrain binding arbitration of a grievance contesting a termination for allegedly poor job performance. *Elizabeth Bd. of Ed.*, P.E.R.C. No. 97-50, 22 *NJPER* 405 (¶27221 1996).

A grievance alleged that a school board violated a collective negotiations agreement when, allegedly without just cause, it suspended a non-tenured teacher with pay for the rest of the 1994-95 school term and canceled his reappointment offer or contract for the 1995-96 school term. *Somerset Cty. Voc. and Tech. Schools Bd. of Ed.*, P.E.R.C. No. 97-53, 22 *NJPER* 410 (¶27224 1996). Arbitration was restrained to the extent the grievance sought reinstatement or payment of wages or benefits beyond the 1995-1996 school year. The request for a restraint was otherwise denied. *Id.*

In *Holland Tp. Bd. of Ed.*, P.E.R.C. No. 87-43, 12 *NJPER* 824 (¶17316 1986), aff'd *NJPER Supp.2d* 183 (¶161 App. Div. 1987), the Commission distinguished between a school board's prerogative to evaluate its employees and the employee's right to seek arbitrable review of disciplinary reprimands. Applying *Holland*, the Commission found that comments on an evaluation form recorded the job performance observations of a teacher's supervisor and were not punitive. *Manalapan-Englishtown Bd. of Ed.*, P.E.R.C. No. 97-15, 22 *NJPER* 326 (¶27166 1996). A memorandum did not suggest that a secretary

was being disciplined and instead was predominately constructive criticism intended to assist in improving performance. *Deptford Bd. of Ed.*, P.E.R.C. No. 97-24, 22 *NJPER* 359 (¶27188 1996); *see also West Windsor-Plainsboro Reg. Bd. of Ed.*, P.E.R.C. No. 97-99, 23 *NJPER* _____ (¶_____ 1997)(evaluative memorandum did not impose discipline or suggest that any disciplinary action would be taken); *Greater Egg Harbor Reg. Bd. of Ed.*, P.E.R.C. No. 97-100, 23 *NJPER* _ (¶__ 1997)(comments in teacher's year-end evaluation were not disciplinary).

Increment Withholdings

Since the 1990 amendments to the PERC Act, *N.J.S.A.* 34:13A-22 *et seq.*, the Commission has been empowered to determine the proper forum for reviewing increment withholding disputes involving teaching staff members. *Scotch-Plains Fanwood Bd. of Ed.*, P.E.R.C. No. 91-67, 17 *NJPER* 144 (¶22057 1991), sets out the analysis the Commission uses to balance the competing factors. Withholdings based predominately on an evaluation of teaching performance cannot be reviewed by an arbitrator and can only be reviewed by the Commissioner of Education. *Rockaway Tp. Bd. of Ed.*, P.E.R.C. No. 97-88, 23 *NJPER* _ (¶_____ 1997)(impact of illness on teaching performance and teaching performance in general); *Red Bank Reg. H.S. Bd. of Ed.*,

P.E.R.C. No. 97-72, 23 *NJPER* 45 (¶28031 1996)(concerns about content of final examination, teaching of controversial material and alleged statements during class that parents had lied to their children, and allegedly unsatisfactory supervision of students during a lecture); *Hillside Bd. of Ed.*, P.E.R.C. No. 97-39, 22 *NJPER* 389 (¶27210 1996)(ineffective instruction and poor classroom management); *Manchester Tp. Bd. of Ed.*, P.E.R.C. No. 97-38, 22 *NJPER* 387 (¶27209 1996)(incident involving classroom instruction); *Essex Cty. Voc. Schools Bd. of Ed.*, P.E.R.C. No. 97-31, 22 *NJPER* 371 (¶27195 1996)(failure to submit adequate lesson plans and curriculum maps). Withholdings not based predominantly on an evaluation of teaching performance may be reviewed by an arbitrator. *Jersey City State-Operated School District*, P.E.R.C. No. 97-98, 23 *NJPER* _ (¶__ 1997)(compliance with applicable policies and regulations concerning outside employment); *Edison Tp. Bd. of Ed.*, P.E.R.C. No. 97-40, 22 *NJPER* 390 (¶27211 1996), app. pending App. Div. Dkt. No. A002093-96T1(excessive absenteeism); *North Arlington Bd. of Ed.*, P.E.R.C. No. 97-28, 22 *NJPER* 366 (¶27192 1996)(poor judgment and unprofessional, unbecoming and improper conduct in dealing with a child who was not teacher's student).

Longevity payments are construed by the Commissioner of Education to constitute employment increments. *See, e.g., Rosania v.*

Middlesex Bd. of Ed., C.D. 18+-88 (210-87) (1/22/88). Therefore the withholding of a longevity payment based on an evaluation of teaching performance could not be reviewed by an arbitrator. *South Harrison Tp. Bd. of Ed.*, P.E.R.C. No. 96-84, 22 *NJPER* 242 (¶27126 1996). Finding no precedent construing a failure to advance a teacher to the master's degree on the salary guide as an increment withholding under *N.J.S.A.* 18A:29-14, the Commission declined to restrain arbitration of a grievance contesting that action. *Id.*

A school board retains the power to withhold increments for problems arising at any time during the school year. *Milltown Bd. of Ed.*, P.E.R.C. No. 97-66, 23 *NJPER* 28 (¶28020 1996).

N.J.A.C. 4A:6-5.3 provides an alternate statutory appeal procedure to review increment withholdings of State employees receiving a Performance Assessment Review rating of four or five. *State of New Jersey (OER)*, P.E.R.C. No. 97-41, 22 *NJPER* 392 (¶27212 1996).

Union Benefits

Union leave, paid or unpaid, is mandatorily negotiable. *West Caldwell Tp.*, P.E.R.C. No. 97-55, 22 *NJPER* 414 (¶27226 1996); *City of Jersey City*, P.E.R.C. No. 97-6, 22 *NJPER* 279 (¶27150 1996); *Bergen Cty. Prosecutor*, P.E.R.C. No. 96-81, 22 *NJPER* 237 (¶27123 1996). Proposals to grant office

space to a majority representative are mandatorily negotiable, so long as they would not require a capital improvement involving a major budgetary expense. *Bergen Cty. Prosecutor*.

Health Benefits

Health insurance proposals are mandatorily negotiable unless preempted. A refusal to supply health benefits information during successor contract negotiations violates the obligation to negotiate in good faith. *Lakewood Bd. of Ed.*, P.E.R.C. No. 97-44, 22 *NJPER* 397 (¶27215 1996). Where a contract provision on retiree health benefits did not facially violate the uniformity requirements of *N.J.S.A.* 40A:10-23, the Commission found the provision mandatorily negotiable. *Essex Cty. Sheriff*, P.E.R.C. No. 97-26, 22 *NJPER* 362 (¶27190 1996). The employer's concerns turned on the application of the provisions and their relationship to parts of the system that were not before the Commission and over which the Commission has no jurisdiction. Further relief could be sought in the Superior Court. *Id.*

An employer proposal to eliminate HMO coverage for all employees and retiree health benefits for employees hired after a certain date was controlled by statute and could not be submitted to interest arbitration. *Township of Verona*, P.E.R.C. No. 97-71, 23 *NJPER* 48 (¶28032 1996). Payment of health benefit premiums for employees on unpaid

non-medical leaves of absence is not preempted by statute and is mandatorily negotiable. *Hopewell Valley Reg. Bd. of Ed.*, P.E.R.C. No. 97-91, 23 *NJPER* __ (¶__ 1997). Where there was no successor contract proposal or demand to arbitrate a grievance, nor special circumstances warranting the Commission's scope of negotiations jurisdiction, the Commission dismissed a scope petition seeking a declaration that a provision requiring employee co-pays conflicts with statutes and regulations governing the New Jersey State Health Benefits Plan ("SHBP"). *Hamilton Tp. Bd. of Ed.*, P.E.R.C. No. 97-69, 23 *NJPER* 50 (¶28034 1996). Where aspects of the rights, duties, and obligations in or associated with the SHBP are integrally involved, a contract proposal cannot be considered by an interest arbitrator. *Township of Montclair*, P.E.R.C. No. 97-82, 23 *NJPER* __ (¶__ 1997); *N.J.S.A.* 34:13A-18. A grievance alleging a violation of a contractual obligation to form a joint committee and discuss alternative insurance plans could be submitted to binding arbitration. *Hamilton Tp. Bd. of Ed.*, P.E.R.C. No. 97-104, 23 *NJPER* __ (¶__ 1997).

Other Compensation Issues

Increasing a police sergeant's salary during the last year of employment to the highest rate of pay under the negotiated salary schedule was found mandatorily negotiable. *Township of Voorhees*, P.E.R.C. No. 96-77, 22 *NJPER*

198 (¶27105 1996). Any pension eligibility issues could be presented to the State Division of Pensions. *Id.*

Lump sum payments in lieu of overtime are preempted by the Fair Labor Standards Act, 29 *U.S.C.* §201 *et seq.*, and therefore not mandatorily negotiable. *Salem Cty. Prosecutor*, P.E.R.C. No. 97-14, 22 *NJPER* 325 (¶27165 1996).

The federal Equal Access Act, 20 *U.S.C.* §4071 *et seq.*, does not prohibit payment of a stipend to a teacher performing the limited role of faculty monitor to a student Bible Club. *East Brunswick Bd. of Ed.*, P.E.R.C. No. 97-42, 22 *NJPER* 393 (¶27213 1996).

The filing of a petition before the Commissioner of Education does not foreclose arbitration of a related grievance claiming an improper reduction in salary. *Old Tappan Bd. of Ed.*, P.E.R.C. No. 97-76, 23 *NJPER* 40 (¶28027 1996).

Grievances asserted that unsafe working conditions violated the parties' collective negotiations agreement and that employees who were made ill were contractually entitled to have their medical expenses paid and their sick leave days recredited. Arbitration over these workplace safety disputes was not preempted by workers' compensation and tort claims laws. *Burlington Cty.*, P.E.R.C. No. 97-84, 23 *NJPER* __ (¶__ 1997).

The Commission declined to restrain binding arbitration of a grievance seeking additional compensation on behalf of unit

members who were required to remain at work when other employees were dismissed early without loss of pay. *Marlboro Tp.*, P.E.R.C. No. 97-102, 23 *NJPER* __ (¶__ 1997).

N.J.S.A. 40A:9-7 does not remove the parties' discretion to negotiate over paid leave for non-work injuries for non-police. *Stafford Tp.*, P.E.R.C. No. 97-103, 23 *NJPER* __ (¶__ 1997).

The Commission granted a request for a restraint of binding arbitration of grievances asserting that the employer violated the parties' collective negotiations agreement when three state troopers holding the rank of Trooper II were not advanced to the rank of Trooper I at the same time as the other members of their recruit class. *State of New Jersey (Division of State Police)*, P.E.R.C. No. 97-105, 23 *NJPER* __ (¶__ 1997) The union was no longer seeking to have the three troopers advanced in grade, but instead was asserting that they were entitled to be compensated at the Trooper I pay rate retroactive to the date of the advancement of other members of their recruit class. The Commission found that there was no alleged right to increased compensation independent of a promotion. *Id.*

In a consolidated unfair practice and scope of negotiations proceeding, the Commission denied the employer's request for a restraint of binding arbitration of a grievance seeking automatic pay upgrades from the title of teacher 2 to the title of teacher 1 for teachers

who have performed satisfactorily for three years. *State of New Jersey (Dept. of Human Services)*, P.E.R.C. No. 97-106, 23 *NJPER* __ (¶__ 1997). Stressing that the job duties of the two titles are the same, the Commission held that movement from teacher 2 to teacher 1 presents a mandatorily negotiable issue which is not preempted by any Civil Service statute or regulation. *Id.*

A grievance contested an alleged failure to pay a librarian and set her work hours in accordance with the collective negotiations agreement. Arbitration was restrained only to the extent an award would limit the employer's right to determine the hours that the library would be open and staffed with a qualified librarian. *Moonachie Bd. of Ed.*, P.E.R.C. No. 97-13, 22 *NJPER* 324 (¶27164 1996).

Maintaining the Status Quo

The Commission denied reconsideration of an interim relief order requiring an employer to restore the status quo after it unilaterally terminated certain medical insurance coverage and/or charged employees for the coverage and changed the payday from Thursday to Friday. *Township of Cherry Hill*, P.E.R.C. No. 97-36, 22 *NJPER* 378 (¶27199 1996); *see also Borough of Fairview*, P.E.R.C. No. 97-96, 23 *NJPER* __ (¶__ 1997)(denying reconsideration of order restoring weekly paychecks); *Township of Fairfield*, P.E.R.C. No. 97-60, 23 *NJPER* 13 (¶28013

1996)(summary judgment for union after employer announced change from biweekly to weekly pay periods). The Commission also denied reconsideration of a decision denying a request for interim relief where the union had not shown that the employer had an obligation to pay salary advances after the expiration of the parties' contract. *Bergen Cty.*, P.E.R.C. No. 96-79, 22 *NJPER* 236 (¶27121 1996).

Commission Procedures

A determination by the Director of Unfair Practices to issue a Complaint may not be appealed before hearing except by seeking special permission to appeal to the full Commission. *N.J.A.C.* 19:14-2.3. A Hearing Examiner may not entertain a pre-hearing motion to dismiss on timeliness grounds. *East Brunswick Bd. of Ed.*, P.E.R.C. No. 97-75, 23 *NJPER* 41 (¶28028 1996).

The Commission denied a majority representative's motion to reopen a decision declining to restrain binding arbitration. *Franklin Lakes Bd. of Ed.*, P.E.R.C. No. 97-2, 22 *NJPER* 274 (¶27146 1996). The arbitrator found for the employer and no scope of negotiations issue survived. Any arguments that the representative might have about the validity of the award must be raised in the Superior Court. *Id.*

Whether a grievance or demand for arbitration was properly processed to arbitration is a contractual arbitrability

question to be decided by the arbitrator rather than the Commission in a scope of negotiations proceeding. *Woodbridge Tp.*, P.E.R.C. No. 97-101, 23 *NJPER* ___ (¶___ 1997).

Deferral to Arbitration

An employer unilaterally recouped alleged overpayments of overtime compensation from the paychecks of unit employees. *Borough of Dunellen*, P.E.R.C. No. 97-30, 22 *NJPER* 370 (¶27194 1996). The Commission found that a Hearing Examiner properly deferred the dispute to binding arbitration. The proper contractual amount of overtime compensation was at the heart of the litigation. *Id.*

The Commission deferred to arbitration unfair practice allegations concerning automatic pay upgrades for teachers; every other weekend off for certain employees; and forced use of vacation for certain employees. *State of New Jersey (Dept. of Human Services)*, P.E.R.C. No. 97-106, 23 *NJPER* _ (¶___ 1997).

Anti-union Discrimination

The New Jersey Employer-Employee Relations Act prohibits discrimination to encourage or discourage activity protected by the Act, and interference with protected rights. The Commission found that a sheriff threatened and intimidated cadets and sheriff's officers because of their union affiliation and

assigned undesirable work details and vehicles because of that affiliation. *Somerset Cty. Sheriff*, P.E.R.C. No. 97-5, 22 *NJPER* 277 (¶27149 1996). Giving a building representative unfavorable performance evaluations in retaliation for her Association activities also violated the Act. *Maple Shade Ed. Ass'n*, P.E.R.C. No. 97-67, 23 *NJPER* 30 (¶28021 1996).

The Commission found no illegal motivation in *New Jersey Hwy. Auth.*, P.E.R.C. No. 97-108, 23 *NJPER* ___ (¶___ 1997)(ordering unit members to distribute court orders to members of another local not intended to interfere with or coerce union in negotiations; also, employer had legitimate business justification for have supervisors deliver court orders to subordinates along with daily work assignments); *Gloucester Cty. College*, P.E.R.C. No. 97-73, 23 *NJPER* 44 (¶28030 1996)(decision not to renew contract and removal from adjunct teaching list not motivated by organizing efforts); *Newark Housing Auth.*, P.E.R.C. No. 97-43, 22 *NJPER* 395 (¶27214 1996)(termination and failure to find another position not motivated by organizing activities); and *East Brunswick Bd. of Ed.*, P.E.R.C. No. 97-35, _ *NJPER* _ (¶_ 1996)(transfers of teachers not motivated by their actions as Association representatives or on behalf of co-workers). In two termination cases consolidated with appeals to the Merit System Board, the Commission adopted the recommendations of the Administrative Law

Judges that protected activity did not motivate the firings. *City of Gloucester City*, P.E.R.C. No. 97-27, 22 *NJPER* 364 (¶27191 1996)(absenteeism motivated discharge); *State of New Jersey (Dept. of Human Services)*, P.E.R.C. No. 96-85, 22 *NJPER* 243 (¶27127 1996)(threat to supervisor motivated discharge). In *Warren Cty.*, P.E.R.C. No. 96-86, 22 *NJPER* 244 (¶27128 1996), the Commission dismissed an unfair practice charge because even though hostility to the filing of a grievance motivated the termination, the employer proved that it would have terminated the employee for insubordination even absent her protected activity. The Commission was not convinced that the employer had proved by a preponderance of the evidence that it would have fired the employee for a second reason absent her protected conduct. *Id.*

The Commission found that it had no jurisdiction to enforce the labor relations rights of employees of a bi-state agency. *Delaware River Port Auth.*, P.E.R.C. No. 97-18, 22 *NJPER* 352 (¶27182 1996).

An employer interfered with protected rights when it delayed consideration of a tentative contract with the majority representative to assist another union in filing a representation petition seeking to represent sanitation employees. *City of Newark*, P.E.R.C. No. 97-61, 23 *NJPER* 14 (¶28014 1996).

Representation

The Commission denied review of the Director of Representation's decision directing an election among adjunct faculty employed at seven State colleges and one State university. *State of New Jersey*, P.E.R.C. No. 97-81, 23 *NJPER* 115 (¶28055 1997). The Commission also denied a request for review of the Director of Representation's dismissal of a representation petition seeking to represent a unit of EMTs. *Township of East Windsor*, P.E.R.C. No. 97-68, 23 *NJPER* 51 (¶28035 1996). The Director had determined that the existing unit of civilian employees is the most appropriate unit for the EMTs. *Id.*

Miscellaneous

In assessing discovery/subpoena issues, the Commission evaluated the employer's ability to defend against unfair practice charges in light of any potential interference with the charging party union's internal affairs. *Rutgers, the State Univ.*, P.E.R.C. No. 96-88, 22 *NJPER* 247 (¶27130 1996). This need to balance the parties' interests recognizes that there is an inherent relationship between the parties' arguments on relevancy and privilege. *Id.*

The Commission restrained arbitration over a grievance alleging that a school board violated its conflict of interest policy when it appointed its interim superintendent of schools. *Middletown Tp. Bd. of Ed.*, P.E.R.C.

No. 97-70, 23 *NJPER* 49 (¶28033 1996). An arbitrator cannot interfere with a school board's right to appoint its interim superintendent. *Id.*

Generally, provisions guaranteeing academic freedom in the classroom involve educational policy and are not mandatorily negotiable. *South Orange-Maplewood Bd. of Ed.*, P.E.R.C. No. 97-54, 22 *NJPER* 411 (¶27225 1996); *see also Old Bridge Tp. Bd. of Ed.*, P.E.R.C. No. 95-15, 20 *NJPER* 334, 339 (¶25175 1994). A clause that protects employees against political or religious discrimination and is not tied to curriculum content, teaching functions, or other forms of educational policy is mandatorily negotiable. *Id.* Clauses incorporating statutory and constitutional anti-discrimination protections are mandatorily negotiable, although a particular dispute under such a clause might not be legally arbitrable if the contested personnel action is not mandatorily negotiable. *Id.*, *see also Teaneck Tp. Bd. of Ed. v. Teaneck Teachers' Ass'n*, 94 *N.J.* 9 (1983).

The Commission found mandatorily negotiable a proposal that any modifications of rules and regulations be supplied to all unit members at least ten days before compliance is expected. *West Caldwell Tp.*, P.E.R.C. No. 97-55, 22 *NJPER* 414 (¶27226 1996). The proposal protects the majority representative's right to seek negotiations over proposed changes in terms and conditions of employment and protects the employees'

interest in knowing what the employer's rules are and behaving accordingly. If, however, such a proposal is adopted and a rule modification is necessary to respond to an emergency and the union seeks to arbitrate an alleged failure to provide advance notice, the employer may seek a restraint of arbitration.

Id.