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# RECENT CASE LAW & POLICY DEVELOPMENTS -- 1998

## PUBLIC EMPLOYMENT RELATIONS COMMISSION

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What follows is an overview of Commission case law since the March 1997 Annual Conference.

### Transfers and Assignments

Public employers have a prerogative to transfer or reassign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs. *See Local 195, IFPTE v. State*, 88 N.J. 393 (1982). The Commission will therefore generally restrain binding arbitration over transfer decisions. *Matawan-Aberdeen Reg. School Dist. Bd. of Ed.*, P.E.R.C. No. 97-131, 23 NJPER 337 (¶28153 1997)(board had prerogative to transfer cafeteria aide after reduction in force); *New Jersey Transit Corp.*, P.E.R.C. No. 97-127, 23 NJPER 304 (¶28139 1997)(police department could select officers with special skills and characteristics in starting up a new police unit); *South Brunswick Tp.*, P.E.R.C. No. 98-90, 24 NJPER 83 (¶29045 1997)(arbitrator cannot second-guess employer's determination of

most qualified candidate for ranger officer position); *City of Atlantic City*, P.E.R.C. No. 97-132, 23 NJPER 339 (¶28154 1997)(employer had prerogative to determine that deputy fire chief was most qualified to fill position of acting fire chief and not to rotate assignment); *Borough of North Plainfield*, P.E.R.C. No. 98-76, 24 NJPER 27 (¶29015 1997)(proposal to have EMS duties performed by firefighters who volunteer not mandatorily negotiable); *City of Newark*, P.E.R.C. No. 98-108, 24 NJPER \_\_ (¶\_\_ 1998)(restraining arbitration over decision not to assign active duty police officer performing armed security and other tasks at credit union).

In the education context, a contract article on non-instructional duties is not mandatorily negotiable to the extent it restricts a board's right to assign staff to perform lunchroom supervision duties and related clerical duties. *Paterson State-Operated School Dist.*, P.E.R.C. No. 98-29, 23 NJPER 514 (¶28250 1997). The article is mandatorily negotiable to the extent it relates to the

assignment of clerical duties that are not part of or incidental to the teachers' normal assignments. *Id.* A contract clause requiring that involuntary transfers or reassignments of custodians be based on length of service is not mandatorily negotiable. *West Windsor-Plainsboro Reg. Bd. of Ed.*, P.E.R.C. No. 97-133, 23 *NJPER* 436 (¶28199 1997). Requiring a meeting with an affected employee before a transfer is a mandatorily negotiable procedural issue. *Id.* Non-teaching duties that are either incidental to teaching or related to student safety, security and control are not mandatorily negotiable. *Byram Tp. Bd. of Ed.*, P.E.R.C. No. 76-27, 2 *NJPER* 143 (1976), *aff'd* 152 *N.J. Super.* 12 (App. Div. 1977). Maintaining an attendance register is incidental to the duty of providing instruction. *Englewood Bd. of Ed.*, P.E.R.C. No. 98-75, 24 *NJPER* 21 (¶29014 1997). A board did not show how transporting students was incidental to teaching or how a restriction on that duty interfered with its educational mission. *Id.*

Reassignments that result in a loss of benefits are not per se disciplinary. *City of Jersey City*, P.E.R.C. No. 98-38, 23 *NJPER* 549 (¶28274 1997).

A provision prohibiting, absent operational needs, the transfers of union

officials so they can administer the contract is an exception to the rule that transfers are not mandatorily negotiable. *Edison Tp.*, P.E.R.C. No. 98-16, 23 *NJPER* 492 (¶28237 1997); *See also Local 195, IFPTE v. State*, 88 *NJPER* 393, 419 (1982).

## **Workload and Compensation**

Changes in assignments can trigger a negotiations obligation or an obligation to arbitrate over a severable issue. *River Vale Bd. of Ed.*, P.E.R.C. No. 98-97, 24 *NJPER* 117 (¶29059 1998)(assignment to lunchroom supervision a prerogative; right to duty-free lunch period arbitrable); *Milltown Bd. of Ed.*, P.E.R.C. No. 98-89, 24 *NJPER* 81 (¶29044 1997)(assignment to central detention a prerogative; compensation arbitrable); *Newark State-Operated School Dist.*, P.E.R.C. No. 98-68, 24 *NJPER* 11 (¶29007 1997)(assignment of teaching duties to basic skills coordinators a prerogative; duty to negotiate compensation upon demand).

Although an arbitrator cannot second-guess a Department of Personnel ruling in a classification appeal, the question of whether an employer is contractually obligated to pay higher compensation to a grievant for

working in a provisional job title is legally arbitrable. *Morris Cty.*, P.E.R.C. No. 98-83, 24 *NJPER* 58 (¶29036 1997).

Arbitration demands for additional compensation based on claims that employees have performed the duties of higher-ranking positions involve mandatorily negotiable and legally arbitrable matters. *City of Newark*, P.E.R.C. No. 98-37, 23 *NJPER* 548 (¶28273 1997).

Workload and the length of the workday are, in general, mandatorily negotiable. A claim for compensation for an alleged workday extension is mandatorily negotiable. *Fairfield Tp. Bd. of Ed.*, P.E.R.C. No. 98-32, 23 *NJPER* 541 (¶28268 1997). Whether an alleged workday extension is de minimis is for an arbitrator to decide. The Commission cannot say that a dispute is too insignificant to be submitted to the legislatively-favored and voluntarily-negotiated forum of binding arbitration. *Id.*; see also *Irvington Bd. of Ed.*, P.E.R.C. No. 98-21, 23 *NJPER* 500 (¶28242 1997)(number of days worked by administrators was within range of days worked over past nine years; no evidence of request and refusal to negotiate over compensation); *Willingboro Bd. of Ed.*, P.E.R.C. No. 98-11, 23 *NJPER* 471 (¶28220

1997)(workload increase after a reduction in force not arbitrable; claim for compensation or negotiations over compensation for alleged increase in workload legally arbitrable).

The number of teaching periods assigned to individual teachers is a term and condition of employment that must be preserved during successor contract negotiations. *Berkeley Heights Bd. of Ed.*, P.E.R.C. No. 98-6, 23 *NJPER* 452 (¶28213 1997)(where regional school district dissolved, individual board could not unilaterally increase number of teaching periods). A school district has a prerogative to determine the structure of the school day and to establish block scheduling (double periods). *Jersey City State-Operated School District*, P.E.R.C. No. 97-151, 23 *NJPER* 396 (¶28182 1997). However, compensation for increased workload is severable, negotiable and legally arbitrable. *Id.* And teachers have a generally negotiable interest, expressed in terms of safety and workload, in not teaching more than four consecutive periods without a break or without additional compensation. *South Brunswick Tp. Bd. of Ed.*, P.E.R.C. No. 97-117, 23 *NJPER* 238 (¶28114 1997).

A school board had the right to permit teachers to hold parent-teacher conferences in

lieu of administrative or department meetings. *Teaneck Bd. of Ed.*, P.E.R.C. No. 97-114, 23 *NJPER* 232 (¶28111 1997). The association had the right to seek compensation for teachers who conduct such conferences. *Id.*

Where an association claimed that the use of a second textbook constituted an additional preparation in violation of the contract, the Commission restrained arbitration. *West Paterson Bd. of Ed.*, P.E.R.C. No. 98-31, 23 *NJPER* 540 (¶28267 1997). It held that negotiations over the amount or variety of supplemental materials to be used in a class and curriculum would trench too much upon educational policy determinations concerning the best textbooks or instructional materials to use. *Id.*

A school board had an obligation to negotiate before changing its practice of not requiring any administrator to report for work on days when the schools were closed for inclement weather. *Irvington Bd. of Ed.*, P.E.R.C. No. 97-148, 23 *NJPER* 392 (¶29179 1997). The Commission ordered the board to negotiate and compensate employees who reported to work, restore leave time to employees who were compelled to use leave, and post a notice.

An employer need not fill vacancies. *Paterson Police PBA No. 1 v. City of Paterson*, 87 *N.J.* 78 (1981). But where an employer has apparently decided to fill vacancies at least temporarily, Paterson does not bar arbitration of a claim that fire captains rather than firefighters should perform captain's work. *City of Newark*, P.E.R.C. No. 98-102, 24 *NJPER* 126 (¶29064 1998); *City of New Brunswick*, P.E.R.C. No. 97-141, 23 *NJPER* 349 (¶28162 1997)(temporary assignment of superior officer on overtime rather than non-unit employee at premium pay). Employees have a mandatorily negotiable interest in having vacancies in their title filled by employees holding the same title within the same negotiations unit rather than by lower-level employees in another negotiations unit. *Id.*; see also *Town of Kearny*, P.E.R.C. No. 98-22, 23 *NJPER* 501 (¶28243 1997), app. pending App. Div. Dkt. No. A-872-97T3. (Commission orders Town to restore practice of replacing an absent superior officer with officer of the same rank rather than filling the vacant position with lower-ranked officer in an acting capacity).

## Anti-union Discrimination

The New Jersey Employer-Employee Relations Act prohibits discrimination to encourage or discourage union activity protected by the Act, and interference with protected rights. The Commission found that an employer illegally denied a union president access to a jail facility; served him with a notice of termination at negotiations; and objected to his participation in negotiations because he had been fired. *Atlantic Cty. (Dept. of Corrections)*, P.E.R.C. No. 98-8, 23 *NJPER* 466 (¶28217 1997). Hostility toward an association and one of its representatives motivated a majority of board members not to promote the representative. *Willingboro Tp. Bd. of Ed.*, P.E.R.C. No. 98-113, 24 *NJPER* \_\_\_ (¶\_\_\_ 1998). The acting director of a library violated the Act when he transferred two library assistants to another library branch and increased proposed three-day suspensions against them to five days. *Camden Free Public Library*, P.E.R.C. No. 98-69, 24 *NJPER* 12 (¶29008 1997). The Commission found that these actions were taken in retaliation for the employees' having grieved the proposed suspensions and their representative's having

filed an unfair practice charge against the Library. *Id.*

The Commission found no illegal motivation in *Irvington Bd. of Ed.*, P.E.R.C. No. 98-94, 24 *NJPER* 113 (¶29056 1998)(transfer of school principal); *City of Millville*, P.E.R.C. No. 98-99, 24 *NJPER* 120 (¶29061 1998)(reorganization of police department and denial of promotion); *Rochelle Park Bd. of Ed.*, P.E.R.C. No. 98-87, 24 *NJPER* 76 (¶29042 1997)(teacher increment withholding); *Burlington Cty.*, P.E.R.C. No. 97-144, 23 *NJPER* 387 (¶28175 1997)(employer not aware of protected activity or hostile in any way); *Mendham Bor. Bd. of Ed.*, P.E.R.C. No. 97-126, 23 *NJPER* 300 (¶23138 1997)(tenure denial); *Bayonne Bd. of Ed.*, P.E.R.C. No. 97-129, 23 *NJPER* 336 (¶28150 1997)(assignment of association president to teach basic skills).

## Contested Transfer Cases

In 1990, the Legislature amended the Act to prohibit transfers of education employees between work sites for disciplinary reasons. *N.J.S.A.* 34:13A-25. The Commission has interpreted the undefined phrase "work sites" to refer to disciplinary

transfers between buildings. *Mt. Arlington Bd. of Ed.*, P.E.R.C. No. 98-4, 23 *NJPER* 450 (¶28211 1997). In the first disciplinary transfer case it considered on the merits, the Commission found that the petitioner was transferred based on qualifications, not as an act of discipline. *Irvington Bd. of Ed.*, P.E.R.C. No. 98-94, 24 *NJPER* 113 (¶29056 1998).

### **Reprimands and Evaluations**

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 arbitral review of disciplinary reprimands. Applying *Holland*, the Commission found that a memorandum that alleges past misconduct, threatens future discipline, and is retained in a personnel file may be characterized as a written warning and may be used to justify future and stronger disciplinary actions. *Watchung Hills Reg. Bd. of Ed.*, P.E.R.C. No. 97-122, 23 *NJPER* 294 (¶28134 1997). Comments about absenteeism in a teacher's evaluation are predominantly evaluative and

cannot be contested in binding arbitration. *Marlboro Tp. Bd. of Ed.*, P.E.R.C. No. 97-121, 23 *NJPER* 293 (¶28133 1997). A memorandum addressing an incident during class, advising a teacher to insure proper student supervision, and offering assistance and suggestions was predominantly a "benign form of constructive criticism intended to enhance teaching performance" and was not disciplinary. *Somerdale Bd. of Ed.*, P.E.R.C. No. 98-40, 23 *NJPER* 562 (¶28280 1997); *see also Parsippany-Troy Hills Bd. of Ed.*, P.E.R.C. No. 98-106, 24 *NJPER* \_\_\_ (¶\_\_\_ 1998)(non-negotiable challenge to entire annual performance evaluation rather than limited and separate claim that contractual rebuttal clause was violated).

### **Evaluations**

In general, the criteria to be used in evaluating school district personnel are not mandatorily negotiable while evaluation procedures which are not expressly, specifically or comprehensively preempted by education statutes or regulations are mandatorily negotiable. *See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n*, 91 *N.J.* 38 (1982); *Ocean Tp. Bd. of Ed.*, P.E.R.C.

No. 85-123, 11 *NJPER* 378 (¶16137 1985), aff'd *NJPER Supp.2d* 164 (¶144 App. Div. 1986), certif. den. 105 *N.J.* 547 (1986). The Commission permitted arbitration contesting an alleged change in evaluation procedures whereby administrators could not, while being evaluated by an assessor, visit the class of any teacher who had not consented to be observed. *City of Newark State-Operated School Dist.*, P.E.R.C. No. 97-118, 23 *NJPER* 240 (¶28115 1997).

### **Fines, Suspensions, Terminations, and Nonrenewals**

Under a 1997 amendment to *N.J.S.A.* 34:13A-5.3, disciplinary review procedures may provide for binding arbitration of disputes involving the minor discipline of employees other than State troopers. The Appellate Division has clarified that minor discipline is defined as a suspension or fine of five days or less. *Monmouth Cty. and CWA*, 300 *N.J. Super.* 272 (App. Div. 1997). The Commission rejected the argument that the amendment applies only to employees covered by statutory tenure or civil service laws. *Rutgers, the State Univ.*, P.E.R.C. No. 98-2, 23 *NJPER* 448 (¶28209 1997).

Under *State v. State Troopers Fraternal Ass'n*, 134 *N.J.* 383 (1993), terminations of police officers may not be submitted to binding arbitration. *Cape May Cty. Prosecutor*, P.E.R.C. No. 98-56, 23 *NJPER* 629 (¶28305 1997); *New Jersey Institute of Technology*, P.E.R.C. No. 98-3, 23 *NJPER* 449 (¶28210 1997)(restrains arbitration over termination but not over five-day suspension of police officer). Terminations of employees who hold permanent appointments in classified titles under the Civil Service Act may not be submitted to binding arbitration. *Gloucester Tp. Municipal Utilities Auth.*, P.E.R.C. No. 97-135, 23 *NJPER* 341 (¶28156 1997). Nonrenewals of non-tenured teaching staff members may not be submitted to binding arbitration. *Atlantic City Bd. of Ed.*, P.E.R.C. No. 98-26, 23 *NJPER* 507 (¶28247 1997). A mid-contract termination of a non-tenured teacher allegedly for complaining to the principals and superintendent could be submitted to binding arbitration. *High Bridge Bd. of Ed.*, P.E.R.C. No. 97-140, 23 *NJPER* 348 (¶28161 1997). The arbitrator could not order reinstatement or back pay beyond the contract year. *Id.*

Contractual tenure and other forms of job security for custodians are mandatorily negotiable. *Wright v. East Orange Bd. of Ed.*, 99 N.J. 112 (1985). Applying *Wright*, the Commission has declined to restrain arbitration of grievances involving terminations and non-renewals of custodians and other support staff employees. *Bergenfield Bd. of Ed.*, P.E.R.C. No. 98-39, 23 *NJPER* 561 (¶28279 1997)(custodian non-renewal; Commission does not have jurisdiction to consider question of whether or not custodian had achieved contractual tenure); *Hamilton Tp. Bd. of Ed.*, P.E.R.C. No. 98-9, 23 *NJPER* 467 (¶28218 1997)(failure to move custodian into vacant position required rejection of employer's layoff rational). The Commission specifically declines to restrain arbitration in cases involving terminations based on allegedly poor job performance. *Long Branch Bd. of Ed.*, P.E.R.C. No. 98-100, 24 *NJPER* 123 (¶29062 1998).

*N.J.S.A.* 18A:17-2 establishes the statutory framework governing tenure for school secretaries. Under that framework, secretaries do not achieve tenure until they have worked three consecutive calendar years or such shorter period as may be fixed by the board, or have worked three consecutive

academic years and begun employment in the next academic year. A tenured secretary has a right to continued employment, absent a reduction in force, during good behavior and efficiency. Absent some claim of job security, a decision not to reemploy a secretary could not be characterized as disciplinary and subject to binding arbitration under *N.J.S.A.* 34:13A-29. *Ridgefield Bd. of Ed.*, P.E.R.C. No. 98-55, 23 *NJPER* 624 (¶28303 1997). That statute requires that grievance procedures in schools be deemed to require binding arbitration as the terminal step with respect to disputes concerning the imposition of reprimands and discipline.

*N.J.S.A.* 40A:14-147 establishes certain procedural rights for police officers facing departmental charges. Those rights include a pre-disciplinary hearing before an employer-designated hearing officer. *N.J.S.A.* 34:13A-5.3 authorizes negotiations over disciplinary review procedures and permits an agreement to have an arbitrator review suspensions of five days or less. The question of who, under *N.J.S.A.* 40A:14-147, determines whether discipline will be imposed is different from the question of who, under *N.J.S.A.* 34:13A-5.3, reviews whether a disciplinary action, once imposed, was

warranted. The Commission therefore restrained arbitration over an employer's designation of the departmental hearing officer. *Borough of Sayreville*, P.E.R.C. No. 98-58, 23 *NJPER* 631 (¶28307 1997).

*N.J.S.A.* 2C:51-2(g) requires a court, not the Commission, to determine whether invocation of the forfeiture statute is appropriate. *UMDNJ*, P.E.R.C. No. 97-111, 23 *NJPER* 227 (¶28108 1997).

### **Increment Withholdings**

Withholding an increment is generally a form of discipline, but not all increment withholdings can go to binding arbitration. 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 the evaluation of teaching performance cannot be reviewed by an arbitrator and can only be reviewed by the Commissioner of Education. *New Providence*

*Bd. of Ed.*, P.E.R.C. No. 98-91, 24 *NJPER* 108 (¶29053 1998)(allegations of ineffective instruction and classroom management of students); *Upper Saddle River Bd. of Ed.*, P.E.R.C. No. 98-81, 24 *NJPER* 54 (¶29034 1997), app. pending App. Div. Dkt. No. A-003101-97T5 (question of whether teacher's classroom management technique fell within the parameters of *N.J.S.A.* 18A:6-1 and was therefore not corporal punishment); *Dennis Tp. Bd. of Ed.*, P.E.R.C. No. 98-73, 24 *NJPER* 17 (¶29012 1997)(curriculum, instruction, and classroom discipline); *North Caldwell Bd. of Ed.*, P.E.R.C. No. 98-80, 24 *NJPER* 52 (¶29033 1997)(appropriateness of teacher's interactions with students during class); *Wood-Ridge Bd. of Ed.*, P.E.R.C. No. 98-41, 23 *NJPER* 564 (¶28281 1997)(preparing lessons, instructing students, maintaining classroom discipline); *West Essex Reg. Bd. of Ed.*, P.E.R.C. No. 98-42, 23 *NJPER* 565 (¶28282 1997)(evaluation of assistant principal's performance as educational leader and manager); *Vernon Tp. Bd. of Ed.*, P.E.R.C. No. 98-44, 23 *NJPER* 569 (¶28284 1997)(librarian's teaching methodology and lessons and the organization and cleanliness of library); *Millville Bd. of Ed.*, P.E.R.C. No. 98-48, 23 *NJPER* 601 (¶28295 1997)(lesson

plans, instructing students, and maintaining classroom discipline); *Washington Bor. Bd. of Ed.*, P.E.R.C. No. 98-49, 23 *NJPER* 603 (¶28296 1997)(allegations that teacher used loud tone of voice and inappropriate language with young children in class); *Dennis Tp. Bd. of Ed.*, P.E.R.C. No. 98-50, 23 *NJPER* 605 (¶28297 1997)(classroom management of students); *Morris School Dist. Bd. of Ed.*, P.E.R.C. No. 97-110, 23 *NJPER* 225 (¶28107 1997)(alleged inability to meet goals of professional improvement plan for two years).

Withholdings not based predominately on the evaluation of teaching performance may be reviewed by an arbitrator. *Willingboro Bd. of Ed.*, P.E.R.C. No. 98-51, 23 *NJPER* 607 (¶28298 1997)(allegations of alleged misconduct and insubordination while teachers acting as administrators and proctors); *Atlantic City Bd. of Ed.*, P.E.R.C. No. 98-43, 23 *NJPER* 567 (¶28283 1997)(tardiness).

The Legislature did not mean to go beyond addressing the forum for reviewing initial increment withholdings, to repeal the part of *N.J.S.A.* 18A:29-14 prohibiting the mandatory restoration of adjustment increments, or to overrule the prior case law holding mandatory restoration clauses non-negotiable. *Cherry Hill Bd. of Ed.*,

P.E.R.C. No. 97-139, 23 *NJPER* 346 (¶28160 1997).

The Commission does not have jurisdiction to decide whether the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 *et seq.*, bars arbitration of a grievance contesting a withholding not based predominately on the evaluation of teaching performance. *Mansfield Tp. Bd. of Ed.*, P.E.R.C. No. 98-33, 23 *NJPER* 544 (¶28269 1997).

Although advance notice and other procedural aspects of increment withholdings are generally negotiable, a contract may not interfere with the board's ability to continue to evaluate a teacher's performance until the end of the school year to determine whether an increment should be withheld. *West Windsor-Plainsboro Reg. Bd. of Ed.*, P.E.R.C. No. 97-128, 23 *NJPER* 305 (¶28140 1997).

## **Work Hours and Schedules**

Public employers have a prerogative to determine the hours and days during which a service will be operated and the staffing levels at any given time during those hours. But within that framework, work schedules of individual employees are, as a rule,

mandatorily negotiable. *Local 195, IFPTE v. State*, 88 N.J. 393 (1982). A particular work schedule proposal is not mandatorily negotiable if the record demonstrates that it would significantly interfere with a governmental policy determination. Applying that case law, the Commission found that a provision concerning work schedules for officers in the corrections division of a county jail was mandatorily negotiable; a provision concerning work schedules in the transportation division was mandatorily negotiable except to the extent it would prohibit the employer from scheduling employees after 6:00 p.m.; and a provision concerning scheduling of weekends off in the corrections division was mandatorily negotiable. *Cumberland Cty.*, P.E.R.C. No. 97-116, 23 *NJPER* 236 (¶28113 1997).

A school board had a managerial prerogative to provide remedial instruction before and after the school day to fulfill its educational policy goal of not removing students during the regular school day for basic skills instruction. The Commission therefore restrained arbitration to the extent the association sought to challenge the board's decisions to require one teacher to work 48 minutes before the contractual workday and

another teacher to work 48 minutes after the contractual workday. *Wood-Ridge Bd. of Ed.*, P.E.R.C. No. 98-45, 23 *NJPER* 570 (¶28285 1997).

A school board has a prerogative to determine the days and hours custodial services are needed and the number of custodians on duty at any given time. *Bloomfield Bd. of Ed.*, P.E.R.C. No. 98-84, 24 *NJPER* 60 (¶29037 1997). A desire to reduce labor costs by changing the custodial workday to encompass early morning and evening hours does not involve educational policy. *Id.*

A grievance contesting a five day "layoff" of custodial employees was mandatorily negotiable and legally arbitrable. *Woodbury Bd. of Ed.*, P.E.R.C. No. 98-112, 24 *NJPER* \_\_ (¶\_\_ 1998). No positions were abolished and the work force was not reduced. *Id.*

As a rule, a clause permitting shift exchanges subject to an employer's prior approval is mandatorily negotiable. However, an employer can deny shift exchanges if an officer's special skills are required on a particular shift. *City of Jersey City*, P.E.R.C. No. 98-96, 24 *NJPER* 116 (¶29058 1997).

## 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). A seniority provision cannot require an employer to keep an employee in a promotional position permanently unless the employer can show that the employee is unqualified. *Somerset Raritan Valley Sewerage Auth.*, P.E.R.C. No. 97-120, 23 NJPER 291 (¶28132 1997). The Commission restrained arbitration over the portion of a grievance challenging the employer's substantive right to set promotional qualifications, including a requirement that applicants have supervising skills and experience. *Matawan-Aberdeen Reg. Bd. of Ed.*, P.E.R.C. No. 97-113, 23 NJPER 230 (¶28110 1997). However, it declined to restrain arbitration over the procedural claim that the Board changed the posted qualifications. *Id.* Similarly, the Commission restrained arbitration where the grievance challenged a determination of what constituted relevant professional experience. *Sussex Cty.*

*Community College*, P.E.R.C. No. 98-61, 23 NJPER 633 (¶28309 1997). The Commission declined to restrain arbitration to the extent, if any, the grievance alleged that the employer did not properly notify employees that the categories of teaching and work experience would not be considered as relevant professional experience. *Id.*; *see also Englewood Bd. of Ed.*, P.E.R.C. No. 98-75, 24 NJPER 21 (¶29014 1997)(included among negotiable procedures are guarantees that employees who meet all the promotional criteria will be considered for promotion).

Generally it is not mandatorily negotiable to restrict promotional opportunities to current employees. *North Bergen Bd. of Ed. v. North Bergen Teachers Fed.*, 141 N.J. Super. 97 (App. Div. 1976); *New Jersey Hwy. Auth.*, P.E.R.C. No. 98-92, 24 NJPER 110 (¶29054 1998)(employer has prerogative to interview candidates outside negotiations unit and to decide which applicants are qualified). N.J.S.A. 40A:14-29 narrows an employer's prerogative in this area. It requires that in most municipalities, promotions to fire superior positions shall be made from the membership of the department. A contract may incorporate that mandate.

*Edison Tp.*, P.E.R.C. No. 98-14, 23 *NJPER* 487 (¶28235 1997).

Arbitration was restrained where a grievance alleged a violation of a practice of promoting the most senior candidate. *Greenwich Tp.*, P.E.R.C. No. 98-20, 23 *NJPER* 499 (¶28241 1997). An employer may leave a position vacant after its former holder has retired, resigned or been promoted. *Paterson Police PBA No. 1 v. Paterson*, 87 *N.J.* 78 (1981); *Monclair Tp.*, P.E.R.C. No. 98-36, 23 *NJPER* 546 (¶28272 1997)(employer had not yet determined whether to fill vacancy).

### **Unit Work**

A public employer must negotiate over shifting work traditionally done by a group of employees within a negotiations unit to another group of its employees outside its unit. *See, e.g., City of Jersey City*, P.E.R.C. No. 96-89, 22 *NJPER* 251 (¶27131 1996), *aff'd* 23 *NJPER* 325 (¶28148 App. Div. 1997), certif. granted S.Ct. Dkt. No. 44,268; Regular police may seek contractual protection against having their opportunities to earn overtime compensation reduced through the use of special police officers to fill in for absent

officers. *City of Egg Harbor City*, P.E.R.C. No. 98-95, 24 *NJPER* 114 (¶29057 1998). In an unfair practice case, the Commission ordered a school board to immediately discontinue the use of non-unit substitute custodians who were performing work previously assigned during the school year to unit custodians as overtime work. *North Arlington Bd. of Ed.*, P.E.R.C. No. 98-10, 23 *NJPER* 469 (¶28210 1997). A loss of overtime opportunities was not negotiable where the employer decided to curtail emergency medical services on holidays and rely on volunteer services instead. *Monroe Tp.*, P.E.R.C. No. 97-149, 23 *NJPER* 394 (¶28179 1997).

In a case involving the decision to staff a Home Energy Assistance Program with personnel contracted through Kelly Temporary Services, Inc., there was no duty to negotiate. *Burlington Cty. Bd. of Social Services*, P.E.R.C. No. 98-62, 24 *NJPER* 2 (¶29001 1997). The case was primarily about contracting to hire extra temporary personnel for seasonal work rather than eroding a negotiations unit. The Commission noted the minor effect of the decision on the in-house staff and the lack of a contractual right of temporary personnel to reemployment each

heating season or any expectation of reemployment.

### **Benefits for Sickness and Disability**

A dispute over whether a police officer's injury is a new or separate injury entitling him to another year of paid leave under the parties' contract can be decided by an arbitrator consistent with *N.J.S.A. 40A:14-137. Woodbridge Tp.*, P.E.R.C. No. 98-101, 24 *NJPER* 124 (¶29062 1998).

A claim for paid disability leave and restored sick leave days was not preempted by workers' compensation laws and could be arbitrated. *Burlington Cty.*, P.E.R.C. No. 98-86, 24 *NJPER* 74 (¶29041 1997), app. pending App. Div. Dkt. No. A-003176-97T5.

*N.J.S.A. 40A:14-154*, which authorizes an employer to provide limited supplemental compensation to police officers disabled while performing their duties, does not preempt negotiations over a proposal to have an employer purchase a group disability insurance policy for its employees. *Old Bridge Tp.*, P.E.R.C. No. 98-53, 23 *NJPER* 622 (¶28301 1997).

An employer may not unilaterally redefine "full-time employment" for purposes

of determining employee eligibility for coverage under the State Health Benefits Plan. *Frankford Tp. Bd. of Ed.*, P.E.R.C. No. 98-60, 23 *NJPER* 625 (¶28304 1997).

*N.J.S.A. 18A:30-6* requires that extended sick leave determinations be based on a school board's consideration of individual circumstances, not on an application of a negotiated rule. Accordingly, the Commission restrained arbitration over a grievance contesting a failure to recredit an employee with sick leave for absences covered by a workers' compensation claim and by denying the employee extended sick leave benefits. *Moonachie Bd. of Ed.*, P.E.R.C. No. 97-134, 23 *NJPER* 340 (¶28155 1997).

Workers' compensation statutes preempted aspects of a claim that an employer changed the established list of physicians, imposed pre-certification requirements, and increased travel to receive treatment. *City of Perth Amboy*, P.E.R.C. No. 97-138, 23 *NJPER* 345 (¶28159 1997), app. and cross-app. pending App. Div. Dkt. No. A-006159-96T1.

## Overtime

Part of a State employee's grievance concerning overtime for travelling on a Sunday was preempted by regulation. State of New Jersey (OER), P.E.R.C. No. 98-66, 24 *NJPER* 7 (¶29005 1997). Part of the grievance relating to overtime compensation for attending training on a holiday was legally arbitrable. *Id.*

A claim by a State employee for overtime compensation for travel time to and from field locations beyond his normal commuting time to and from regional headquarters was not preempted and was therefore legally arbitrable. *State of New Jersey (Dept. of Transportation)*, P.E.R.C. No. 98-52, 23 *NJPER* 608 (¶28299 1997).

A public employer has a right to deviate from a negotiated overtime allocation system when necessary to protect the public interest. *City of Elizabeth*, P.E.R.C. No. 97-115, 23 *NJPER* 234 (¶28112 1997)(overtime detail called for officers with specialized experience). *Id.*

## Other Compensation Issues

In the context of a disciplinary dispute covered by *N.J.S.A.* 34:13A-5.3, a claim for compensation for time spent responding to a subpoena to testify at a disciplinary hearing is legally arbitrable. *Borough of Rutherford*, P.E.R.C. No. 98-103, 24 *NJPER* 128 (¶29065 1998).

The Commission dismissed an unfair practice charge alleging that the employer, during successor contract negotiations, unilaterally changed terms and conditions of employment by refusing to pay an automatic salary adjustment. *Bergen Cty.*, P.E.R.C. No. 97-124, 23 *NJPER* 297 (¶28136 1997). The Commission found that the case involved adjustments to overall salary levels -- adjustments that are conceptually different from increments. The Commission declined to consider a salary increase unrelated to attainment of an additional year of service as part of the status quo. *Id.*

*N.J.S.A.* 34:13A-5.3 states that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." Thus, existing employment conditions cannot be changed without negotiations. *Barnegat Tp. Bd. of Ed.*, P.E.R.C. No. 91-18, 16

*NJPER* 484 (¶21210 1990), *aff'd NJPER Supp.2d* 268 (¶221 App. Div. 1992). A charging party need not prove an established past practice creating a contractual term. It is sufficient to show that the employment condition existed and was changed. Thus, an employer violated the Act by unilaterally changing a practice of placing new police officers with police academy training and at least one year's municipal police department experience at step three of the salary guide. *Middletown Tp.*, P.E.R.C. No. 98-77, 24 *NJPER* 28 (¶29016 1997), *app. pending App. Div. Dkt. No. A-2351-97T5*.

Employers and majority representatives may legally agree that new employees will not be paid more than incumbent employees performing the same duties. *Somerset Cty.*, P.E.R.C. No. 98-24, 23 *NJPER* 505 (¶28245 1997).

An employer violated the Act by unilaterally requiring police applicants to agree to repay certain training costs if they leave employment within two years of completing police academy training. *New Jersey Transit*, P.E.R.C. No. 97-125, 23 *NJPER* 298 (¶28137 1997), *app. pending App. Div. Dkt. No. A-005710-96T5*. The Commission found the disputed requirement to be a term and

condition of employment which intimately and directly concerns the duration of employment of police trainees. *Id.*

An employer may not unilaterally change the pay period from weekly to biweekly. *Borough of Fairview*, P.E.R.C. No. 97-152, 23 *NJPER* 398 (¶28183 1997).

### Miscellaneous

Given safety concerns, a dispute over whether certain police officers must turn in their portable, two-way radios was found to be at least permissively negotiable and therefore arbitrable. *City of Newark*, P.E.R.C. No. 97-153, 23 *NJPER* 400 (¶28184 1997).

Special circumstances justified a prohibition against employees wearing t-shirts stating "Don't Privatize, Manage Wise" within the inner perimeter of correctional facilities. *State of New Jersey (Dept. of Corrections)*, P.E.R.C. No. 97-145, 23 *NJPER* 388 (¶28176 1997).

Appeals involving the demotional/layoff rights of permanent Civil Service employees must be filed with the New Jersey Department of Personnel. *City of Rahway*, P.E.R.C. No. 97-147, 23 *NJPER* 391 (¶28178 1997).

In *Local 195, IFPTE v. State*, 88 N.J. 393 (1982), the Court held that subcontracting decisions are not mandatorily negotiable. The Court added, however, that an employer cannot subcontract in bad faith for the sole purpose of laying off public workers or substituting private workers for public workers. *Id.* at 411. Such a claim cannot, however, be pursued through binding arbitration. *Borough of Belmar*, P.E.R.C. No. 97-150, 23 *NJPER* 395 (¶28181 1997); *N.J. Sports & Exposition Auth.*, P.E.R.C. No. 90-63, 16 *NJPER* 48 (¶21023 1989).

An agreement to reduce accumulated sick leave and personal leave day banks must be entered into knowingly. *Morris Sch. Dist. Bd. of Ed.*, P.E.R.C. No. 97-142, 23 *NJPER* 437 (¶28200 1997), app. pending App. Div. Dkt. No. A-006013-96T2. Delayed implementation of sick leave and personal day caps cannot unlawfully induce employees to retire. *Id.*; see *Fair Lawn Ed. Ass'n v. Fair Lawn Bd. of Ed.*, 79 N.J. 574 (1979).

Arbitration over aspects of grievances contesting a recalculation of sick leave time after a workweek reduction were preempted by N.J.A.C. 4A:6-1.5(f). *State of New Jersey (DEP)*, P.E.R.C. No. 98-114, 24 *NJPER* \_\_ (¶\_\_ 1998). Since no comparable regulation

specifies a formula for recalculating administrative and vacation time balances in the event of workweek reductions, arbitration over that aspect of the grievances was not restrained. *Id.*

A school board has a right to set a student discipline policy normally providing that only the vice-principal or principal can summon the police to a school, but a majority representative may seek to negotiate over a narrow exception where a teacher's safety is threatened and immediate action is required. *Perth Amboy Bd. of Ed.*, P.E.R.C. No. 98-59, 23 *NJPER* 632 (¶28308 1997).

A school board member has a right to raise concerns about instructional issues and to criticize teachers generally. *Washington Tp. Bd. of Ed.*, P.E.R.C. No. 98-72, 24 *NJPER* 16 (¶29011 1997).

A grievance asserting that an employer improperly accepted a custodian's oral resignation was legally arbitrable. *Washington Bor. Bd. of Ed.*, P.E.R.C. No. 98-110, 24 *NJPER* \_\_ (¶\_\_ 1998).

N.J.S.A. 40A:14-155 mandates that an employer provide legal representation to police officers in certain instances. But it is well-established that this statute does not prohibit an employer from agreeing to provide

coverage beyond the instances required by that statute. *City of Newark*, P.E.R.C. No. 98-82, 24 *NJPER* 56 (¶29035 1997), app. pending App. Div. Dkt. No.\_\_\_\_\_.

Disputes over compliance with protections afforded by the Open Public Meetings Act may be arbitrated. *Union Cty. Reg. H.S. Dist. No. 1 Bd. of Ed.*, P.E.R.C. No. 98-98, 24 *NJPER* 119 (¶29060 1998). Extracurricular appointments and retentions are mandatorily negotiable and procedural claims related to non-renewals are also mandatorily negotiable. *Id.*

Hard bargaining does not necessarily constitute bad faith bargaining. *Kenilworth Bd. of Ed.*, P.E.R.C. No. 98-93, 24 *NJPER* 112 (¶29055 1998).

A union did not breach its duty of fair representation where it declined in good faith to process a unit member's grievances but did not inform him that he could file grievances on his own. *Carteret Ed. Ass'n*, P.E.R.C. No. 97-146, 23 *NJPER* 390 (¶28177 1997). The Commission has declined to recognize a duty to inform absent some other action by the union that misleads employees or impedes that right.

An employer has a prerogative to decide which employees will be trained, how

they will be trained, and how long they will be trained. *See, e.g., Borough of Dunellen*, P.E.R.C. No. 95-113, 21 *NJPER* 249 (¶26159 1995). However, an employer may agree to reimburse employees for tuition payments for work-related courses. *Wayne Tp.*, P.E.R.C. No. 98-85, 24 *NJPER* 71 (¶29040 1997).

Language requiring consultation with a teacher before a grade change is mandatorily negotiable because it does not restrict a board's right to change grades nor does it bind the board in regard to its managerial prerogative to establish student grading policy. *Middletown Tp. Bd. of Ed.*, P.E.R.C. No. 98-74, 24 *NJPER* 19 (¶29013 1997).

Parties may agree to exchange information and material relevant to a grievance that they have agreed cannot be submitted to binding arbitration. *Rutgers, the State Univ.*, P.E.R.C. No. 98-109, 24 *NJPER* \_ (¶\_\_ 1998).

Clauses which state that non-negotiable subjects will become a part of the contract in the event of a change in the case law or a statute are not mandatorily negotiable. *Englewood Bd. of Ed.*, P.E.R.C. No. 98-75, 24 *NJPER* 21 (¶29014 1997). Clauses which allow the reopening of negotiations in the event of increases in

salaries or other benefits negotiated by other units are not illegal parity clauses and are mandatorily negotiable. *City of Perth Amboy*, P.E.R.C. No. 98-67, 24 *NJPER* 8 (¶29006 1997).

### **Commission Procedures**

Where one party alleges a violation of the statutory duty to negotiate and the other party raises a contractual defense, a Complaint will normally issue. *East Brunswick Tp.*, P.E.R.C. No. 97-112, 23 *NJPER* 229 (¶28109 1997); *North Caldwell Bd. of Ed.*, P.E.R.C. No. 97-37, 22 *NJPER* 379 (¶27200 1996); *see also Passaic Cty. Bd. of Ed.*, P.E.R.C. No. 89-98, 15 *NJPER* 257 (¶20106 1989). Nevertheless, deferral of the underlying contractual interpretation question to binding arbitration is the preferred mechanism for resolving such questions. *See Brookdale Comm. College*, P.E.R.C. 83-131, 9 *NJPER* 266 (¶14122 1983). Even if a case cannot be deferred, a pre-hearing summary judgment motion based on a contractual defense may be filed and supported by affidavits and exhibits. This procedure guarantees the parties an opportunity to present their legal arguments

and permits summary judgment if no material facts are in dispute.

Where there is no successor contract proposal, demand to arbitrate a grievance, or any special circumstances warranting the Commission's scope of negotiations jurisdiction, the Commission will not entertain a scope petition seeking a determination that portions of an agreement are not mandatorily negotiable. *Lower Tp.*, P.E.R.C. No. 98-57, 23 *NJPER* 630 (¶28306 1997); *Rumson-Fair Haven Reg. H.S. Bd. of Ed.*, P.E.R.C. No. 98-25, 23 *NJPER* 506 (¶28246 1997).

Where grievances can legally be submitted to advisory arbitration, whether the parties have agreed to do so is an issue of contractual arbitrability outside the Commission's jurisdiction. *Rutgers, the State Univ.*, P.E.R.C. No. 98-23, 23 *NJPER* 504 (¶28244 1997).

Absent a showing that the charging party was prevented from filing a timely charge, no violation can be found based on any unfair practice occurring more than six months before the filing of the charge. *Borough of Sayreville*, P.E.R.C. No. 98-18, 23 *NJPER* 497 (¶28239 1997); *NJIT*, P.E.R.C. No. 97-123, 23 *NJPER* 296 (¶28134 1997).