
Recent Case Law & Policy Developments --1999

Public Employment Relations Commission

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What follows is an overview of Commission case law since the April 1998 Annual Conference.

Discrimination and Protected Rights
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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 transferred three teachers in retaliation for their Association activities. *Atlantic City Bd. of Ed.*, P.E.R.C. No. 98-119, 24 *NJPER* 209 (¶29099 1998). The Commission held that an employee organization illegally sent a union member a letter indicating that internal union charges were being brought against him because he had filed an unfair practice charge against the union. *PBA Local 152*, P.E.R.C. No. 99-18, 24 *NJPER* 450 (¶29208 1998).

The Commission found no illegal motivation in *Burlington Cty. Mosquito*

Extermination Commission, P.E.R.C. No. 99-75, 25 *NJPER* 126 (¶30056 1999)(adverse personnel actions based on legitimate operational concerns and proven misconduct); *Washington Tp.*, P.E.R.C. No. 99-6, 24 *NJPER* 412 (¶29190 1998)(layoff not discriminatorily motivated); *Monroe Tp. Fire Dist. No. 2*, P.E.R.C. No. 98-158, 24 *NJPER* 347 (¶29165 1998)(employer restructured department and created new position because it determined that the supervisor should formulate policies and advise employer on negotiations and grievances); *Camden Bd. of Ed.*, P.E.R.C. No. 98-144, 24 *NJPER* 294 (¶29140 1998)(charging party failed to meet burden of proving unfair practice charges against employer and union); *Neptune Tp. Bd. of Ed.*, P.E.R.C. No. 98-130, 24 *NJPER* 234 (¶29110 1998), app. pending App. Div. Dkt. No. A-004926-97T5 (final recommendations to eliminate teacher programmer positions came from independent consultant and superintendent, neither of whom was motivated by anti-union animus); *UMDNJ*, P.E.R.C. No. 98-127, 24 *NJPER* 227 (¶29107

1998)(no evidence of anti-union animus in connection with re-employment process); and *State of New Jersey (Dept. of Human Services)*, P.E.R.C. No. 98-126, 24 *NJPER* 225 (¶29106 1998)(union did not prove that employer was hostile towards employee for filing grievances).

Despite a finding of illegal motivation, the Commission found that adverse personnel actions would have taken place even absent the protected conduct in *Rahway Valley Sewerage Auth.*, P.E.R.C. No. 99-79, 25 *NJPER* 134 (¶30060 1999)(refusal to withdraw grievance reinforced layoff decision employer had already made); *West Orange Tp.*, P.E.R.C. No. 99-76, 25 *NJPER* 128 (¶30057 1999)(resignation was not planned by employer nor was it foreseeable consequence of any retaliatory conduct); and *West Deptford Tp. Bd. of Ed.*, P.E.R.C. No. 99-68, 25 *NJPER* 99 (¶30043 1999)(employer proved that it would not have renewed employee's contract based on his attendance record, even absent his protected activities).

The Commission found no protected activity in *Borough of Seaside Heights*, P.E.R.C. No. 99-67, 25 *NJPER* 96 (¶30042 1999), app. pending App. Div. Dkt. No. ____.

A union did not breach its duty of fair representation in *Passaic Cty. Community College Administrators' Ass'n, OPEIU Local 153*, P.E.R.C. No. 98-131, 24 *NJPER* 256 (¶29123 1998).

A grievance claiming that the employer reassigned an employee in retaliation for rights protected by the Act had to be addressed through unfair practice proceedings. *North Bergen Tp.*, P.E.R.C. No. 99-82, 25 *NJPER* ____ (¶_____ 1999); *North Bergen Tp.*, P.E.R.C. No. 99-31, 24 *NJPER* (¶29217 1998).

The Commission ordered an employer to stop threatening to discipline employees for posting union newsletters on union bulletin boards. *State of New Jersey*, P.E.R.C. No. 99-65, 25 *NJPER* 93 (¶30040 1999). The Commission, however, did not order the posting of a notice of the violation because the employer had acted based on a good faith interpretation of the contract and without anti-union animus. *Ibid.*

An employer eliminated paid holidays for part-time employees and modified bereavement leave after a union filed a representation petition. The Commission found that the tendency of these actions to interfere with the rights of employees to file a

representation petition and to vote in a fair election outweighed the employer's need to act during the representation proceedings. *Fairview Free Public Library*, P.E.R.C. No. 99-47, 25 *NJPER* 20 (¶30007 1998).

Unit Work and Subcontracting

An employer has generally been obligated to negotiate with the majority representative before shifting work historically performed by one group of employees within a negotiations unit to other employees outside the unit. *See, e.g., North Arlington Bd. of Ed.*, P.E.R.C. No. 98-10, 23 *NJPER* 469 (¶28210 1997); *see also City of Egg Harbor City*, P.E.R.C. No. 98-128, 24 *NJPER* (¶29108 1998)(City's desire to provide police coverage at reduced cost does not, as a matter of law, permit the City to abrogate an alleged contractual commitment to use full-time police within negotiations unit rather than part-time police outside unit).

On March 27, 1998, the Commission held that Burlington County violated the Act by unilaterally transferring work historically performed by correction officers in the ID section to non-unit civilian employees. *Burlington Cty.*, P.E.R.C. No. 98-122, 24 *NJPER* 215 (¶29102 1998), recon. den.

P.E.R.C. No. 98-139, 24 *NJPER* 276 (¶29131 1998). The Commission ordered the employer to restore all ID section duties to unit employees pending negotiations over any transfer of those duties to County employees outside that negotiations unit. The County appealed.

On July 9, 1998, the Supreme Court issued *City of Jersey City v. Jersey City POBA*, 154 *N.J.* 555 (1998). Applying the negotiability balancing test detailed in *Local 195, IFPTE v. State*, 88 *N.J.* 393 (1982), the Court held that the City had a managerial prerogative to transfer police officers performing certain non-police duties into operational positions and to replace them with civilian employees.

As a result of a pre-argument conference, an Appellate Division judge granted the Commission jurisdiction to entertain Burlington County's motion to vacate P.E.R.C. No. 98-122 in light of *Jersey City*. Under the unusual circumstances of the case, the Commission granted the motion and, in light of the fact that the parties had resolved the underlying dispute, dismissed the Complaint as moot. P.E.R.C. No. 99-42, 25 *NJPER* 7 (¶30002 1998).

In *Borough of Bogota*, P.E.R.C. No. 99-77, 25 *NJPER* 129 (¶30058 1999), the Commission found that the case, like *Jersey City*, implicated the special position of police officers and a governing body's broad discretion to administer its police department and determine what assignments are most appropriate for police officers to perform. Although cost savings was one of the objectives for hiring civilian dispatchers, the Commission concluded that the Borough made a policy determination as to how to best manage department resources and assign police officers and the Borough's proposal to hire civilian dispatchers was, on balance, not mandatorily negotiable.

A decision to retain a private security firm to secure a city facility rather than have that service performed by negotiations unit members could not be contested through binding arbitration. *City of Summit*, P.E.R.C. No. 99-56, 25 *NJPER* 44 (¶30018 1998).

Duty to Negotiate

N.J.S.A. 34:13A-5.3 requires employers and unions to meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. The

statute also requires negotiations over proposed new rules or modifications of existing rules governing working conditions.

An municipality did not satisfy its duty to negotiate in good faith when it failed to submit a memorandum of agreement to the Borough Council for ratification and when a negotiations team member refused to support an agreement he had bound himself to support. *Borough of Tenafly*, P.E.R.C. No. 98-129, 24 *NJPER* 230 (¶29109 1998). The Borough was ordered to submit the memorandum to the Council for a vote. *Ibid.* The memorandum was ratified.

There may be a duty to accept a request to negotiate mid-contract as to subjects which were neither discussed in contract negotiations nor embodied in contract terms. *New Jersey Turnpike Auth.*, P.E.R.C. No. 99-49, 25 *NJPER* 29 (¶30011 1998). An employer breached such a duty when it refused a demand to negotiate over layoff and recall procedures at the time it announced a layoff. *Rahway Valley Sewerage Auth.*, P.E.R.C. No. 99-79, 25 *NJPER* 134 (¶30060 1999). The New Jersey Law Against Discrimination and the public policy against sexual harassment in the workplace do not preclude mid-contract negotiations over the timing of cross-

examinations and pre-arbitration confidentiality requirements in sexual harassment cases. *New Jersey Turnpike Auth.*, P.E.R.C. No. 99-49, 25 *NJPER* 29 (¶30011 1998).

Where a school board had a managerial prerogative to cancel the spring recess and reopen schools on those days, the Commission found that the board did not have a contractual right to refuse to negotiate over any impact issues. Negotiations over the specific issues raised by the Association would not have significantly encroached upon the Board's prerogative to change the calendar. *Piscataway Tp. Bd. of Ed.*, P.E.R.C. No. 99-39, 24 *NJPER* 520 (¶29242 1998); *see also Piscataway Tp. Bd. of Ed. v. Piscataway Tp. Ed. Ass'n*, 307 *N.J. Super.* 263 (App. Div. 1998).

An Association violated the Act when it refused to negotiate salary guides which reflected the negotiated percentage increases. *Essex Cty. Voc. School Bd. of Ed.*, P.E.R.C. No. 99-17, 24 *NJPER* 448 (¶29207 1998).

Where an employer allegedly changed the divisor used for computing biweekly compensation, a union's charge was dismissed because it involved a contractual dispute that had to be resolved through the negotiated

grievance procedure. The employer's charge against the union was also dismissed because the parties had not agreed on specific contract language and thus the union did not violate the Act by refusing to sign a final agreement. *Borough of Hopatcong*, P.E.R.C. No. 99-22, 24 *NJPER* 473 (¶29220 1998), recon.den. P.E.R.C. No. 99-50, 25 *NJPER* 34 (¶30012 1998); *see also Colts Neck Bd. of Ed.*, P.E.R.C. No. 98-157, 24 *NJPER* 347 (¶29164 1998)(dispute over pay for personnel hired to teach in before-school program involved good faith dispute over proper interpretation of negotiated agreement); *State of New Jersey (Human Services)*, P.E.R.C. No. 84-148, 10 *NJPER* 419 (¶15191 1984)(mere breach of contract not an unfair practice).

Promotions

Criteria for promotion to provisional positions are not mandatorily negotiable and a union may not challenge an employer's decision to promote based on its assessment of employee qualifications. *Mercer Cty.*, P.E.R.C. No. 99-32, 24 *NJPER* 471 (¶29218 1998). A restraint of arbitration was granted to the extent the grievance challenged the employer's substantive decision to hire to fill a senior mechanic position. *Colts Neck Tp.*,

P.E.R.C. No. 99-5, 24 *NJPER* 411 (¶29189 1998); *see also Borough of Paramus*, P.E.R.C. No. 99-89, 25 *NJPER* ____ (¶____ 1999)(denial of transfer to new position based on evaluation of qualifications).

Compensation

The Commission declined to restrain binding arbitration of a grievance seeking to have a police officer placed back on line-of-duty injury leave and to have his sick days and vacation days restored. *City of East Orange*, P.E.R.C. No. 99-34, 24 *NJPER* 511(¶29237 1998). Since the grievance did not seek tort-based damages and was limited to a claim for restored sick and vacation days, it was not preempted by Workers' Compensation laws. *Ibid.*

A claim that a grievance's compensation claim is *de minimis* is outside the limits of the Commission's scope of negotiations jurisdiction and is properly addressed to the arbitrator. *Cinnaminson Tp. Bd. of Ed.*, P.E.R.C. No. 99-10, 24 *NJPER* 419 (¶29294 1998). Thus, a grievance could seek compensation for changes in student contact, preparation and duty-free time resulting from the assignment of teachers to

supervise a pep rally during the school day. *Ibid.*

Whether a teacher, who was converted from a substitute teacher to a regular teacher, should have been paid retroactively as a regular teacher was a compensation question that could be resolved through binding arbitration. *Evesham Tp. Bd. of Ed.*, P.E.R.C. No. 98-143, 24 *NJPER* 293 (¶29139 1998).

Terminal Leave and Pensions

Paying employees for unused leave allowances is a mandatorily negotiable subject unless preempted. *See State of New Jersey (State Troopers)*, P.E.R.C. No. 92-3, 17 *NJPER* 374 (¶22175 1991), recon. den. P.E.R.C. No. 92-5, 17 *NJPER* 409 (¶22195 1991), *aff'd NJPER Supp.2d* 278 (¶225 App. Div. 1992), certif. den. 130 *N.J.* 596 (1992). A dispute over the hourly rate to be used to calculate the amount of a lump sum payment was found legally arbitrable. *Galloway Tp.*, P.E.R.C. No. 98-132, 24 *NJPER* (¶29124 1998); *see also Town of Harrison*, P.E.R.C. No. 99-54, 25 *NJPER* 40 (¶30016 1998)(dispute over calculation of terminal leave, not calculation of employee's pension, is legally arbitrable and not preempted by statutes or regulations that deal solely with

pension entitlements rather than terminal leave payments); *Galloway Tp.*, P.E.R.C. No. 98-133, 24 *NJPER* 261 (¶29125 1998)(longevity allowance in base pay after employer receives notice of intent to retire mandatorily negotiable; whether in base pay for pension purposes is issue for Division of Pensions).

A declining supplemental retirement incentive for employees with 25 to 34 years of service contravenes *Fair Lawn Ed. Ass'n v. Fair Lawn Bd. of Ed.*, 79 *N.J.* 574 (1979) and is not mandatorily negotiable. *Borough of Butler*, P.E.R.C. No. 99-83, 25 *NJPER* ____ (¶_____ 1999); *City of Elizabeth*, P.E.R.C. No. 99-69, 25 *NJPER* 103 (¶30044 1999).

Health Benefits

The Commission restrained arbitration over the decisions of the State Health Benefits Commission (SHBC) to equalize co-pays and delete the \$50 vision hardware benefit. *State of New Jersey (Office of Employee Relations)*, P.E.R.C. No. 99-40, 24 *NJPER* 522 (¶29243 1998). Any appeal from an action of the SHBC must be made to the SHBC or in court. *Ibid.*

A negotiations proposal was found not mandatorily negotiable to the extent it required

the payment of retiree dental premiums to retirees who do not meet the age and service requirements of *N.J.S.A.* 40A:10-23. *Township of Manalapan*, P.E.R.C. No. 98-136, 24 *NJPER* 269 (¶29128 1998).

Work Schedules

Work schedules of police officers are, in general, mandatorily negotiable. *Maplewood Tp.*, P.E.R.C. No. 97-80, 23 *NJPER* 106 (¶28054 1998). However, there are exceptions to the rule when the facts prove a particularized need to preserve or change a work schedule to effectuate a governmental policy. *Ibid.* The Commission denied a request for a restraint of binding arbitration of a grievance contesting a change for police from steady to rotating shifts. *City of Egg Harbor City*, P.E.R.C. No. 98-125, 24 *NJPER* 223 (¶29105 1998). If the employer agreed to maintain steady shifts, abiding by such an agreement during the life of the contract would not substantially limit governmental policymaking powers. *Ibid. Contrast Woodbridge Tp.*, P.E.R.C. No. 99-91, 25 *NJPER* ____ (¶_____ 1999)(prerogative to determine that concerns about crime, misconduct, and citizen complaints warrant

command presence and enhanced supervision at night and weekends).

A municipality did not commit an unfair practice when it transferred a patrol officer from the afternoon shift to the day shift and prohibited him from working overtime assignments pending an internal investigation. *Franklin Tp.*, P.E.R.C. No. 99-78, 25 *NJPER* 133 (¶30059 1999). The Township did not unilaterally end the practice of allocating overtime seniority, but deviated from it in this one instance because of a perceived need to more closely supervise and control the assignments of one patrol officer. *Ibid.*

The Commission denied a restraint of binding arbitration contesting a special order changing schedules and overtime assignments on New Year's Eve. *New Jersey Transit Corp.*, P.E.R.C. No. 99-33, 24 *NJPER* 509 (¶29236 1998), recon. den. P.E.R.C. No. 99-51, 25 *NJPER* 35 (¶30013 1998). Since the grievance was proceeding to arbitration over the PBA's compensation claims, the Commission declined to speculate about what contractual rulings the arbitrator would make and what remedies he might order concerning the police employer's right to make scheduling changes. *Ibid.*

A school board violated the Act when it changed the dismissal time of eighth grade teachers, but not when it assigned the Association president a duty period instead of a free period to conduct union business. *Roselle Bd. of Ed.*, P.E.R.C. No. 98-145, 24 *NJPER* 307 (¶29147 1998). The Commission declined to convert the Board's willingness to permit Association business during an unassigned period into an obligation to negotiate before assigning duties during that period once the president's services were needed. *Ibid.*

The Commission dismissed an unfair practice charge where a State university unilaterally determined that support staff employees would be required to work on four official paid holidays when classes were being held. *State of New Jersey (Rowan Univ.)*, P.E.R.C. No. 99-26, 24 *NJPER* 483 (¶29224 1998) app. pending App. Div. Dkt. No. A-1500-98T5. The State had a prerogative to require support staff employees to work involuntarily (at holiday pay rates) on previously scheduled holidays if necessary to meet its staffing levels for support services. *Ibid.*

Assignments

The criteria in a directive for the assignment of firefighters as acting officers were found to be a permissive, but not mandatory, subject for negotiations. *City of Bayonne*, P.E.R.C. No. 98-149, 24 *NJPER* 317 (¶29151 1998). A restraint of grievance arbitration was denied, but a restraint of interest arbitration was granted. *Ibid.*

The Commission restrained arbitration of a grievance challenging a decision not to fill a vacant long-term acting deputy fire chief position with a qualified captain. *Montclair Tp.*, P.E.R.C. No. 98-151, 24 *NJPER* 322 (¶29153 1998). An employer that has decided to fill an acting position may commit itself to do so according to a list it has generated pursuant to the promotional criteria it alone has established and announced. However, the employer must retain the right not to fill the vacancy. *Ibid.*

Although allocation of overtime is generally negotiable, a municipality had a right to deviate from a negotiated allocation system to provide the police officer supervision it deemed appropriate. *Borough of Wallington*, P.E.R.C. No. 98-162, 24 *NJPER* 355 (¶1998).

If an employer agreed that officers could choose shifts by seniority before assignments are made and the employer did not identify any governmental policy reason to deviate from the terms of that agreement, enforcement of the agreement would not substantially limit governmental policymaking powers. *Mercer Cty. Sheriff*, P.E.R.C. No. 99-46, 25 *NJPER* 19 (¶30006 1998).

The Commission restrained arbitration over a challenge to a requirement that an administrator stay in the building until all students have left or are otherwise participating in supervised activities. *Newark State-Operated School Dist.*, P.E.R.C. No. 98-148, 24 *NJPER* 315 (¶29150 1998). The Commission declined to restrain arbitration of grievance alleging that a municipality did not make an overtime assignment in accordance with a seniority list. *Jefferson Tp.*, P.E.R.C. No. 98-161, 24 *NJPER* 354 (¶29168 1998). The union raised a factual dispute concerning the nature of the overtime assignment and whether other more senior employees could have performed the work. The Commission permitted the arbitrator to consider the factual dispute initially, as well as the parties' contractual claims and disputes. The Commission retained jurisdiction to reassess

the employer's prerogative defense in the event the arbitrator found a contractual violation. *Ibid.*

A school board generally has a prerogative to make assignments. *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, 78 N.J. 144, 154 (1978); *Middle Tp. Bd. of Ed.*, P.E.R.C. No. 99-3, 24 NJPER 409 (¶29187 1998)(no basis for considering reassignment to have been disciplinary).

N.J.S.A. 34:13A-23 provides that all aspects of assignment to, retention in, dismissal from, and any terms and conditions of employment concerning extracurricular activities, except for the establishment of qualifications, shall be deemed mandatorily negotiable. Accordingly, disputes over non-renewals of coaches are legally arbitrable. *South Amboy Bd. of Ed.*, P.E.R.C. No. 99-30, 24 NJPER 469 (¶29216 1998); *Jackson Tp. Bd. of Ed.*, P.E.R.C. No. 99-62, 25 NJPER 87 (¶30037 1999), app. pending App. Div. Dkt. No. A-_____.

The Commission restrained arbitration of the portion of a grievance challenging the substantive decision not to make a grievant a light equipment operator. *Colts Neck Tp.*, P.E.R.C. No. 99-57, 25 NJPER 45 (¶30019 1999). Whether certain procedural claims

could properly be placed before an arbitrator turned on issues of contractual arbitrability outside the Commission's jurisdiction. *Ibid.*

Staffing Levels

An employer has a managerial prerogative to set staffing levels, including the number of firefighters needed to perform firefighting duties and the number of captains needed to perform supervisory duties. *Town of West New York*, P.E.R.C. No. 99-14, 24 NJPER 430 (¶29198 1998). Arbitration of a grievance seeking to enforce a ratio of one fire captain to 3.5 firefighters was restrained. *Ibid.*; see also *Borough of Franklin*, P.E.R.C. No. 98-138, 24 NJPER 273 (¶29130 1998)(two patrol officers on shift not mandatorily negotiable; proposal that officers working alone be compensated at double time mandatorily negotiable); *Hamilton Tp. Bd. of Ed.*, P.E.R.C. No. 99-88, 25 NJPER ____ (¶_____ 1999)(prerogative to eliminate cafeteria operator positions).

Health and Safety

Clauses seeking to protect the health and safety of employees are mandatorily negotiable and may be enforced through binding arbitration. *State of New Jersey (Dept. of Corrections)*, P.E.R.C. No. 99-66, 25 *NJPER* 94 (¶30041 1999)(declining to restrain arbitration of grievance seeking declaration that workplace unsafe and unhealthful); *State of New Jersey (Dept. of Corrections)*, P.E.R.C. No. 99-35, 24 *NJPER* 512 (¶29238 1998)(safety concerns arising from staffing level clause legally arbitrable, but arbitrator cannot order increase in staffing levels); *City of Perth Amboy*, P.E.R.C. No. 98-146, 24 *NJPER* 311 (¶29148 1998)(permitting arbitration of alleged violation of health and safety clause during two fire calls); *but see City of Newark*, P.E.R.C. No. 98-154, 24 *NJPER* 341 (¶29161 1998)(restraining arbitration of grievance contesting order that all police officers be sprayed in face with pepper mace as part of training; policy for controlling riots and dangerous altercations without resort to deadly force is important matter of governmental policymaking).

In 1982, the Legislature enacted the discipline amendment to *N.J.S.A. 34:13-5.3* which generally permits binding arbitration of disciplinary disputes. Under that mandate, however, any agreed-upon disciplinary review procedures cannot replace or be inconsistent with any alternate statutory appeal procedure or provide for binding arbitration of disciplinary disputes involving employees protected by tenure or civil service laws. *See Borough of Carteret*, P.E.R.C. No. 99-15, 24 *NJPER* 405 (¶29185 1998)(restraining arbitration of major disciplinary dispute in Civil Service jurisdiction); *City of Hackensack*, P.E.R.C. No. 98-121, 24 *NJPER* 214 (¶29101 1998)(restraining arbitration of 15-day suspension in Civil Service jurisdiction).

In 1993, the Supreme Court decided *State Troopers Fraternal Ass'n v. State*, 134 *N.J.* 393 (1993) and held that the discipline amendment did not apply to State troopers or any other police officers. In 1996, the Legislature amended section 5.3 to permit binding arbitration of minor disciplinary determination for all employees except State troopers. Minor discipline is defined as fines or suspensions of five days or less. *Monmouth*

Discipline

Cty. v. CWA, 300 *N.J. Super.* 272 (App. Div. 1997).

The Commission granted a restraint of arbitration of a grievance seeking back pay and retroactive benefits for a State trooper who was restored to good standing after disciplinary charges were dismissed. *State of New Jersey (Div. of State Police)*, P.E.R.C. No. 99-38, 24 *NJPER* 518 (¶29241 1998), recon. den. P.E.R.C. No. 99-61, 25 *NJPER* 86 (¶30036 1999). Under *State Troopers* and the 1996 statutory amendments, the dispute was outside the scope of negotiations. *Ibid.*

In *Borough of New Milford*, P.E.R.C. No. 99-43, 25 *NJPER* 8 (¶30002 1998), the Commission restrained arbitration of a grievance contesting the reassignment of a police detective to the patrol division. Reassignments of police officers are not legally arbitrable regardless of whether they were disciplinary in nature. *Ibid.*

Where a Superior Court Judge had already entered an order rejecting arguments that disciplinary charges should be dismissed given statutory deadlines for filing and hearing disciplinary charges, the Commission restrained arbitration over those procedural issues. *City of Newark*, P.E.R.C. No. 99-24, 24 *NJPER* 477 (¶29222 1998). A claim that a

hearing on the disciplinary charges should have been postponed could be submitted to the Merit System Board together with an already pending appeal of the termination. *Ibid.* A procedural claim that formed the basis of a challenge to the termination of a police officer had to be presented through the statutory appeal mechanism instead of binding arbitration. *City of Newark*, P.E.R.C. No. 99-48, 25 *NJPER* 23 (¶30008 1998); *Contrast Woodbridge Tp.*, P.E.R.C. No. 99-58, 25 *NJPER* 47 (¶30020 1998)(grievance asserting that contractual procedures were violated during investigation of incidents prompting discipline and not challenging suspensions of officers who chose not to exercise right to contest major discipline before Merit System Board could be resolved through binding arbitration).

Mid-term discharges involving non-tenured custodial and maintenance employees are legally arbitrable. *Bloomfield Bd. of Ed.*, P.E.R.C. No. 99-53, 25 *NJPER* 38(¶30014 1998); *see also Absecon Bd. of Ed.*, P.E.R.C. No. 98-134, 24 *NJPER* 265 (¶29126 1998)(permitting arbitration of grievance contesting custodian's suspension and termination); *Borough of Kenilworth*, P.E.R.C. No. 98-135, 24 *NJPER* 267 (¶29127

1998)(permitting arbitration of grievance contesting laborer's termination). Absent some claim of job security, a school board's decision not to renew the contract of a non-tenured (but tenure eligible) secretarial employee could not be reviewed in binding arbitration. *Hopewell Valley Reg. Bd. of Ed.*, P.E.R.C. No. 99-87, 25 *NJPER* ____ (¶____ 1999).

The Commission found legally arbitrable a minor disciplinary dispute over the docking of holiday pay lost because of the grievant's alleged failure to provide doctors' notes for absences the days before and after a holiday. *Mercer Cty.*, P.E.R.C. No. 99-21, 24 *NJPER* 472 (¶29219 1998).

A non-police employer may legally agree that, after a set period of time, reprimands or letters of suspension will not be considered in imposing discipline for a current alleged infraction. *See Rutgers, the State Univ.*, P.E.R.C. No. 91-74, 17 *NJPER* 156 (¶22064 1991). A contract provision requiring that disciplinary materials be removed from a police officer's personnel file after two years was found not mandatorily negotiable. *Montgomery Tp.*, P.E.R.C. No. 99-19, 24 *NJPER* 452 (¶29209 1998).

N.J.S.A. 34:13A-29 mandates binding arbitration as the terminal step of grievance procedures concerning reprimands and discipline as defined by *N.J.S.A.* 34:13A-22 for school board employees. The Commission held that it is not inherently illegal for parties to agree to exclude non-renewals of non-tenured bus drivers from an arbitration clause. *Hanover Tp. Bd. of Ed.*, P.E.R.C. No. 99-7, 24 *NJPER* 413 (¶29191 1998), app. pending App. Div. Dkt. No. A-000306-98T2. However, it also held that such a clause is preempted by *N.J.S.A.* 34:13A-29 if contractual tenure or job security has been extended to bus drivers. Such contractual questions must be resolved in another forum. *Ibid.*

The Commission restrained binding arbitration of a grievance challenging as discipline the privatization of bus transportation services and the creation of a new position that included some of the former dispatcher's duties. *Cherry Hill Tp. Bd. of Ed.*, P.E.R.C. No. 98-155, 24 *NJPER* 344 (¶29162 1998).

A grievance claiming that comments concerning absenteeism placed in certain teachers' personnel files were unjust reprimands could be reviewed through binding

arbitration. *North Hunterdon-Voorhees Reg. H.S. Dist. Bd. of Ed.*, P.E.R.C. No. 98-147, 24 *NJPER* 313 (¶29149 1998).

Arbitration of a grievance contesting the inclusion of comments about a teacher's third period class in an observation report about a first period class would not significantly interfere with educational policy, in general, or the right and duty to evaluate in particular. *East Brunswick Bd. of Ed.*, P.E.R.C. No. 98-150, 24 *NJPER* 319 (¶29152 1998), app. pending App. Div. Dkt. No. A-006560-97T1.

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. *Morris School Dist. Bd. of Ed.*, P.E.R.C. No. 99-85, 25 *NJPER* ____ (¶____ 19)(concerns about professional characteristics and class management); *Morris School Dist. Bd. of Ed.*, P.E.R.C. No. 99-84, 25 *NJPER* ____ (¶____ 19)(concerns about professional characteristics, class management and teaching procedures); *Kinnelon Bd. of Ed.*, P.E.R.C. No. 99-64, 25 *NJPER* 90 (¶30039 1999)(inappropriate comments in classroom, inappropriate classroom discussions, and failure to follow administrators' related recommendations); *Bergenfield Bd. of Ed.*, P.E.R.C. No. 99-63, 25 *NJPER* 89 (¶30038 1999)(although element of withholding involves misuse of school property, on balance, the reasons relate predominately to evaluation of teaching performance); *Maurice River Tp. Bd. of Ed.*, P.E.R.C. No. 99-52, 25 *NJPER* 35 (¶30014 1998)(lesson design and delivery, classroom management, student telecasts, regular course-related communications with parents, and student access to library); *Franklin Bor. Bd. of Ed.*, P.E.R.C. No. 99-2, 24 *NJPER* 407 (¶29186 1998)(evaluation of nurse's performance of nursing duties under the education laws);

Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 98-153, 24 *NJPER* 339 (¶29160 1998)(evaluation of performance as school psychologist and child study team member).

Withholdings not based predominately on the evaluation of teaching performance may be reviewed by an arbitrator. *Demarest Bd. of Ed.*, P.E.R.C. No. 99-36, 24 *NJPER* 514 (¶29239 1998), app. pending App. Div. Dkt. No. A-2001-98T5 (allegedly inappropriate interaction with parent and alleged misinforming of students about why their class had been moved); *Red Bank Reg. H.S. Dist. Bd. of Ed.*, P.E.R.C. No. 99-23, 24 *NJPER* 474 (¶29221 1998)(most reasons for withholding did not involve evaluation of teaching performance).

Under the 1990 education amendments to the Act, all increment withholdings not involving teaching staff members are disciplinary and must be submitted to binding arbitration. *Randolph Tp. Bd. of Ed.*, P.E.R.C. No. 99-45, 25 *NJPER* 14 (¶30005 1998), app. pending App. Div. Dkt. No. ____; *see also Lakeland Reg. H.S. Dist. Bd. of Ed.*, P.E.R.C. No. 99-92, 25 *NJPER* ____ (¶_____ 1999).

Payment of Automatic Increments

Neptune Tp. Bd. of Ed. v. Neptune Tp. Ed. Ass'n, 144 *N.J.* 16 (1996), held that education law prohibits a school board from paying automatic salary increments to teaching staff members under the salary schedule of an expired three year contract. Applying labor relations principles in the aftermath of the Supreme Court's decision, the Commission held that a school board cannot be compelled, after a three year contract expires, to pay automatic increments to non-professional employees in a mixed unit with teaching staff members. *East Hanover Bd. of Ed.*, P.E.R.C. No. 99-71, 25 *NJPER* (¶30052 1999). Also applying *Neptune*, the Commission found that a school board was not required to pay higher compensation for longevity or educational attainment under the salary schedule in an expired three-year agreement. *Middletown Tp. Bd. of Ed.*, P.E.R.C. No. 99-72, 25 *NJPER* 122 (¶30053 1999); *Green Tp. Bd. of Ed.*, P.E.R.C. No. 99-73, 25 *NJPER* 124 (¶30054 1999).

Representation

The Act excludes managerial executives from its definition of "public employee." In *New Jersey Turnpike Auth. and*

AFSCME Council 73, 150 N.J. 331 (1997), the Supreme Court examined this exclusion and partially modified but otherwise approved standards set forth in *Borough of Montvale*, P.E.R.C. No. 81-52, 6 *NJPER* 507 (¶11259 1981). The line between managerial executives and lower-level employees (including supervisors and professional employees) has to be located case-by-case. The Commission's analysis will focus on the interplay of multiple factors such as the employee's responsibilities, position in the hierarchy, breadth of authority, and extent of discretion. Its goal will be to determine whether the employee has the authority of a managerial executive to formulate or direct the effectuation of management policies and practices. *Ocean Cty. Utilities Auth.*, P.E.R.C. No. 98-120, 24 *NJPER* (¶29100 1998)(regulatory compliance officer exercises Authority-wide decisional powers and is managerial executive); *State of New Jersey*, P.E.R.C. No. 99-60, 25 *NJPER* 55 (¶30022 1998)(chief investigators and assistant chief investigators in regional offices of the Office of the Public Defender not managerial executives); *State of New Jersey*, P.E.R.C. No. 99-59, 25 *NJPER* 48 (¶30021 1998)(section chiefs in Department of Environmental

Protection do not formulate management policies and practices or direct their effectuation).

The Commission found, on balance, that the reasons for severing sheriff's officers and sheriff's superior officers from multi-employer units did not outweigh the reasons for maintaining the units. *Ocean Cty. Sheriff*, P.E.R.C. No. 99-70, 25 *NJPER* ____ (¶_____ 1999). There was a strong community of interest between sheriff's officers and corrections officers and that fact, added to a long history of multi-employer negotiations, the willingness of the employers (the County and the Sheriff) and the current majority representatives to continue the present unit structure, and the proliferation of negotiations units that could occur should severance be granted, led the Commission to hold that the current units remain the appropriate ones. *Ibid.*

Procedural Rulings

The Commission denied the request of Rutgers, the State University to have a permanent referee restrained from ruling on an objection made by Rutgers Council of AAUP Chapters during the processing of a grievance alleging procedural flaws in the

non-reappointment of a non-tenured faculty member. *Rutgers, the State Univ.*, P.E.R.C. No. 99-44, 25 *NJPER* 10 (¶30004 1999). The AAUP sought to have the faculty member's dean disqualified from representing the employer before a grievance committee made up of tenured faculty members. Rutgers asserted that disqualifying the dean violated its right to select its representatives for adjusting grievances. The Commission treated the scope petition as if it were an unfair practice charge, but deferred the dispute to the pending proceeding before the referee. The Commission retained jurisdiction to entertain an application for further consideration if the referee reaches a result which the employer believes is repugnant to the Act. *Ibid.*

Where an unfair practice charge had been deferred to arbitration and the employer subsequently filed a scope petition seeking to restrain that arbitration, the Commission consolidated the petition with the charge and referred the consolidated case to the Director of Unfair Practices for further processing. *Pemberton Tp.*, P.E.R.C. No. 99-90, 25 *NJPER* ____ (¶_____ 1999).

The Commission denied requests for reconsideration of interim relief decisions issued by Commission designees. *City of*

Newark, P.E.R.C. No. 99-27, 24 *NJPER* 485 (¶29225 1998)(charge raised breach of contract claim and did not appear to state cause of action); *City of Newark*, P.E.R.C. No. 99-37, 24 *NJPER* 517 (¶29240 1998)(designee restrained City from implementing certain modifications to General Order on disciplinary hearings); *Dover Tp.*, P.E.R.C. No. 98-164, 24 *NJPER* 358 (¶29171 1998)(designee denied interim relief; given contractual defenses to unfair practice charge, Commission found no extraordinary circumstances warranting reconsideration).

Absent special circumstances, where parties enter into a successor contract and do not preserve an issue for a scope of negotiations determination, the Commission will not entertain a scope of negotiations petition seeking a declaration on the negotiability of a contract provision. *Bergen Community College*, P.E.R.C. No. 99-12, 24 *NJPER* 428 (¶29196 1998).

The Commission granted a request to withdraw an unfair practice charge over an employer's objection. *Borough of Fair Lawn*, P.E.R.C. No. 98-160, 24 *NJPER* 352 (¶29167 1998), app. pending App. Div. Dkt. No. A-007064-97T50. A dismissal with prejudice after the issuance of a Hearing Examiner's

report is a final adjudication on the merits and the union is prevented from filing another charge alleging that the same actions violated the Act. *Ibid.*

The Commission dismissed a petition for contested transfer determination as untimely since it was filed more than 90 days from the date of the notice of the transfer. *Orange Ed. Ass'n*, P.E.R.C. No. 98-142, 24 *NJPER* 292 (¶29138 1998).

N.J.A.C. 19:14-3.1 provides that if a respondent in an unfair practice proceeding does not file an answer, “all allegations in the complaint ... shall be deemed to be admitted to be true and shall be so found by the Commission, unless good cause to the contrary is shown.” The Commission found no grounds to disturb a Hearing Examiner’s application of the rule and ordered an employer to commence negotiations and post a notice of its violations. *Borough of Fort Lee*, P.E.R.C. No. 98-118, 24 *NJPER* 208 (¶29096 1998).

Miscellaneous

The requirement that a school board conduct a pre-evaluation conference was found mandatorily negotiable, except to the extent the discussion restricts the Board’s right

to establish or choose which criteria will be applied during the subsequent evaluation. *Rumson-Fair Haven Reg. H.S. Bd. of Ed.*, P.E.R.C. No. 99-55, 25 *NJPER* 41 (¶30017 1998). The Commission found that the maximum number of evaluations is mandatorily negotiable, but its holding does not preclude informal observations and discussion. *Ibid.*

A contractual clause requiring the employer to pay higher cost-of-living raises if it agrees to negotiate higher raises for employees in any other negotiations unit is an illegal parity clause that cannot be enforced through binding arbitration. *Lower Tp.*, P.E.R.C. No. 99-4, 24 *NJPER* 410 (¶29188 1998).

Where a grievance sought to have non-unit employees laid off and, as a result, to increase the number of supervisors vis-a-vis non-supervisors, the Commission restrained binding arbitration. *State of New Jersey (Dept. of Military and Veterans Affairs)*, P.E.R.C. No. 98-159, 24 *NJPER* 351 (¶29166 1998).

A sick leave donation program for school employees was found not mandatorily negotiable. *Newark State-Operated School Dist.*, P.E.R.C. No. 99-25, 24 *NJPER* 479 (¶29223 1998). The proposal did not preserve

the employer's right under *N.J.S.A.* 18A:30-6 to grant extended sick leave on a case-by-case basis. *Ibid*; *but see* Assembly Bill 874, pre-filed for introduction in the 1998 legislative session.

The development and the substance of teacher lesson plans are not mandatorily negotiable. *Wayne Tp. Bd. of Ed.*, P.E.R.C. No. 99-29, 24 *NJPER* 468 (¶29215 1998).