
Recent Case Law & Policy Developments -- 2000

Public Employment Relations Commission

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What follows is an overview of Commission case law since the April 1999 Annual Conference.

Discrimination and Protected Rights

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 number of discrimination cases reaching the Commission dropped this year. The Commission found no illegal motivation in *Village of Ridgewood*, P.E.R.C. No. 99-114, 25 *NJPER* 341 (¶30147 1999)(anti-union animus did not account for disparity in disciplinary sanctions received by shop steward and other employee) and *Township of Teaneck*, P.E.R.C. No. 2000-45, 26 *NJPER* 48 (¶31018 1999)(no retaliation for protected activity in layoff decision). The Commission found no protected activity in *State of New Jersey (Dept. of Treasury)*, P.E.R.C. No. 2000-52, 26 *NJPER* 97 (¶31025 2000).

Assignments, Duties, and Shift Selection

A public employer generally has a prerogative to make assignments within a shift. *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, 78 *N.J.* 144, 154 (1978). The Commission therefore restrained arbitration over a decision to transfer State troopers. *State of New Jersey (Div. of State Police)*, P.E.R.C. No. 2000-60, 26 *NJPER* 97 (¶31039 2000).

An employer may unilaterally assign duties incidental to an employee's job description and regular duties. In *City of Rahway*, P.E.R.C. No. 99-99, 25 *NJPER* 249 (¶30105 1999), where the firefighters' job description and normal duties did not encompass hydrant flushing, the City did not show that having public works employees rather than firefighters flush hydrants would substantially limit governmental policymaking. Accordingly, the grievance was at least permissively negotiable and legally arbitrable.

A school board has a managerial prerogative to assign teachers to supervise students before and after school to ensure student safety, security and control. *Bergenfield Bd. of Ed.*, P.E.R.C. No. 99-100, 25 *NJPER* 286 (¶30120 1999). Release time, workload and methods of selecting staff to perform the duties were found legally arbitrable. *Ibid.*

Public employers and majority representatives may agree that seniority can be a factor in assignments to shifts where all qualifications are equal and managerial prerogatives are not otherwise compromised. *Somerset Cty. Sheriff*, P.E.R.C. No. 2000-20, 25 *NJPER* 419 (¶30182 1999), recon. den. P.E.R.C. No. 2000-38, 26 *NJPER* 16 (¶31003 1999), app. pending App. Div. Dkt. No. A-1635-99T5. In that case contesting the employer's decision to deviate from the bidding system to require female correction officers to work certain shifts, the Commission restrained arbitration only to the extent the grievances, if sustained, would compromise the Sheriff's statutory duty to have at least one female correction officer on every shift.

Similarly, an employer had a prerogative to transfer a nurse instructor from

the night shift to the day shift to increase day shift instruction. *Essex Cty.*, P.E.R.C. No. 2000-19, 25 *NJPER* 416 (¶30181 1999). See also *Township of Scotch Plains*, P.E.R.C. No. 99-113, 25 *NJPER* 339 (¶30146 1999)(given contractual clause protecting employer's operational needs and given factual dispute, Commission declined to restrain arbitration over denial of shift selection); *City of Plainfield*, P.E.R.C. No. 2000-74, 26 *NJPER* ____ (¶_____ 2000)(work schedule not mandatorily negotiable to extent it provides that officers will be placed on shifts through bidding based solely on seniority); *City of Elizabeth*, P.E.R.C. No. 2000-16, 25 *NJPER* 410 (¶30178 1999); *City of Elizabeth*, P.E.R.C. No. 2000-15, 25 *NJPER* 407 (¶30177 1999)(employer had prerogative to establish new task force on new shift and assign employees; grievance could contest elimination of regular shift for patrol division).

Some cases involve shift bidding clauses that determine both an assignment and a shift. In *Camden Cty. Sheriff*, P.E.R.C. No. 2000-25, 25 *NJPER* 431 (¶30190 1999), recon. den. P.E.R.C. No. 2000-72, 26 *NJPER* ____ (¶_____ 2000), app. pending App. Div. Dkt. No. A-1509-99T3, bidding for shifts and

assignments was found not mandatorily negotiable to the extent it pertained to assignments requiring special qualifications.

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. *West Milford Tp.*, P.E.R.C. No. 2000-63, 26 *NJPER* 104 (¶31042 2000); see also *North Hudson Reg. Fire and Rescue*, P.E.R.C. No. 2000-78, 26 *NJPER* ____ (¶____ 2000)(firefighter/captain ratio not mandatorily negotiable). And a clause that prevents an employer from replacing absent officers with officers of equal rank may be permissively, but is not mandatorily negotiable. *Ibid.*

Civilianization

A police employer that acted primarily for operational reasons had no obligation to negotiate before transferring two superior officers and filling their posts with civilian employees. *City of Jersey City*, P.E.R.C. No. 2000-10, 25 *NJPER* 376 (¶30164 1999).

Work preservation clauses remain mandatorily negotiable in the abstract, but for

police officers, the clause must specify that it is subject to employer's right to civilianize for demonstrated governmental policy reasons. *City of Passaic*, P.E.R.C. No. 2000-8, 25 *NJPER* 373 (¶30162 1999).

Work Schedules

Consistent with Supreme Court cases and the Legislature's decrees, the Commission and the Appellate Division have generally held that work schedules of police officers and firefighters are mandatorily negotiable. See cases cited in *Maplewood Tp.*, P.E.R.C. No. 97-80, 23 *NJPER* 106, 113 (¶28054 1997). However, the Commission and the Appellate Division have also found exceptions to the rule of negotiability when the facts prove a particularized need to preserve or change a work schedule to protect a governmental policy determination.

In *Township of Clinton*, P.E.R.C. No. 2000-3, 25 *NJPER* 365 (¶30157 1999), recon. granted P.E.R.C. No. 2000-37, 26 *NJPER* 15 (¶31002 1999), app. pending App. Div. Dkt. No. A-002208-99T2, the work schedule proposal was not facially invalid. Therefore, the parties could develop a full record enabling an interest arbitrator to evaluate their

concerns in light of the public interest and all the statutory criteria the interest arbitrator must apply in crafting an arbitration award.

One week's notice of work schedule changes was found mandatorily negotiable. *Township of Montclair*, P.E.R.C. No. 2000-22, 25 *NJPER* 425 (¶30187 1999).

Proposals to maintain the current work schedule and to guarantee contractual time off consistent with staffing levels were also found mandatorily negotiable. *Township of Long Hill*, P.E.R.C. No. 2000-40, 26 *NJPER* 19 (¶31005 1999).

Discipline

Binding arbitration of minor discipline is mandatorily negotiable. *Camden Cty. Sheriff*, P.E.R.C. No. 2000-25, 25 *NJPER* 431 (¶30190 1999).

An employer can agree to fair procedures for initiating and hearing disciplinary charges, subject to the employer's ultimate power, after complying with negotiated procedures, to make a disciplinary determination. *City of Passaic*, P.E.R.C. No. 2000-54, 26 *NJPER* 75 (¶31027 1999).

The Commission restrained arbitration under a just cause provision over the employer's decision not to accept the chief's

recommendation to promote a police officer. *Township of Nutley*, P.E.R.C. No. 99-109, 25 *NJPER* 331 (¶30142 1999). Management retains the right to leave a promotional position vacant. *See Paterson Police PBA No. I v. Paterson*, 87 N.J. 78 (1981).

Evaluation/Reprimand

Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 *NJPER* 824 (¶17316 1986), aff'd *NJPER Supp.2d* 183 (App. Div. 1987), explains the distinction between annual evaluations of teaching performance and disciplinary reprimands. The Commission presumes that the substantive comments of an evaluation relating to teaching performance are not disciplinary, but that statements or actions which are not designed to enhance teaching performance are disciplinary.

In *Bergenfield Bd. of Ed.*, P.E.R.C. No. 99-112, 25 *NJPER* 336 (¶30145 1999), the Commission found that comments on an evaluation were not a reprimand; but that a separate memorandum was a reprimand that could be contested in arbitration. In *Wanaque Borough Bd. of Ed.*, P.E.R.C. No. 2000-7, 25 *NJPER* 371 (¶30161 1999), a memorandum was not punitive and did not threaten future discipline. *See also Downe Tp. Bd. of Ed.*,

P.E.R.C. No. 2000-49, 26 *NJPER* 62 (¶31022 1999) (observation reports criticizing lessons are not disciplinary).

Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 *NJPER* 502 (¶12223 1981), sets the ground rules governing an employer's responses to the activities of one of its employees when that person acts as an official of an employee organization. In *Ridgefield Bd. of Ed.*, P.E.R.C. No. 2000-58, 26 *NJPER* 92 (¶31037 2000), a memorandum to the Association president over a labor-management issue that did not appear in the president's personnel file was not a disciplinary reprimand subject to arbitration under *N.J.S.A. 34:13A-29*.

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 in making such determinations. 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. *Randolph Tp. Bd. of Ed.*, P.E.R.C. No. 99-94, 25 *NJPER* 238 (¶30100 1999)(failure to manage student behavior and provide proper instructional setting); *East Orange Bd. of Ed.*, P.E.R.C. No. 99-102, 25 *NJPER* 292 (¶30122 1999)(unsatisfactory evaluations, performance deficiencies, and classroom observations); *Parsippany-Troy Hills Bd. of Ed.*, P.E.R.C. No. 2000-28, 25 *NJPER* 442 (¶30194 1999) (classroom management, organization of lesson plans, instruction, and communication with students); *Essex Cty. Voc. Schools Bd. of Ed.*, P.E.R.C. No. 2000-23, 25 *NJPER* 427 (¶30188 1999)(classroom management and disciplinary techniques); *Ramsey Bd. of Ed.*, P.E.R.C. No. 2000-59, 26 *NJPER* 94 (¶31038 2000) (interaction with students); *Sterling H.S. Dist. Bd. of Ed.*, P.E.R.C. No. 2000-75, 26 *NJPER* ____ (¶_____ 2000)(in-school interactions between vice-principal and student).

Withholdings not based predominately on the evaluation of teaching performance may be reviewed by an arbitrator. *Boonton Bd. of Ed.*, P.E.R.C. No. 99-101, 25 *NJPER* 288 (¶30121 1999)(incident occurring during after-school extracurricular coaching assignment); *Montclair Bd. of Ed.*, P.E.R.C. No. 2000-1, 25 *NJPER* 361 (¶30155 1999) (athletic director's alleged failure to follow administrative procedures regarding gate receipts did not predominately relate to evaluation of his performance in overseeing delivery of educational services).

Compensation

A grievance claiming a contractual right to incremental salary increases was found legally arbitrable. *Township of Wayne*, P.E.R.C. No. 2000-48, 26 *NJPER* 61 (¶31021 1999).

An employer's decision to allow employees to use employer-owned vehicles for commuting is not mandatorily negotiable; but compensation for loss of the use of the vehicles is. *Union Cty. Prosecutor*, P.E.R.C. No. 2000-64, 26 *NJPER* 106 (¶31043 2000); *see also City of Elizabeth*, P.E.R.C. No. 2000-42, 26 *NJPER* 22 (¶31007 1999).

A union could legally arbitrate a claim that the employer reneged on an agreement that it would not reduce the salary of an employee who accepted a demotion. *Piscataway Tp.*, P.E.R.C. No. 99-106, 25 *NJPER* 299 (¶30126 1999).

A proposal to include clothing allowance and hazardous pay in base pay is mandatorily negotiable; whether those items will be in base pay for pension purposes must be addressed by the Division of Pensions. *City of Newark*, P.E.R.C. No. 2000-29, 25 *NJPER* 444 (¶30195 1999).

Workload and Overtime

The Commission has held that when no volunteers are available, a public employer may unilaterally mandate that a certain number of employees will work overtime. Thus, a school board was found to have a prerogative to require custodians to work overtime. *Rumson-Fair Haven Reg. H.S. Bd. of Ed.*, P.E.R.C. No. 99-111, 25 *NJPER* 335 (¶30144 1999).

The allocation of overtime opportunities among qualified employees is generally mandatorily negotiable. *Wayne Tp.*, P.E.R.C. No. 97-74, 23 *NJPER* 42 (¶28029 1996), *aff'd* 24 *NJPER* 141 (¶29071 App.

Div. 1998). Thus, a dispute over which of two qualified classes of employees may fill a temporary vacancy to earn overtime was found legally arbitrable. *Borough of West Paterson*, P.E.R.C. No. 2000-62, 26 *NJPER* 101 (¶31041 2000). However, a municipality had a prerogative to deviate from established overtime arrangements to respond to a snow emergency as quickly as possible. *Washington Tp.*, P.E.R.C. No. 2000-18, 25 *NJPER* 415 (¶30180 1999).

Compensatory time for kindergarten teachers required to work longer on the days preceding holidays was found mandatorily negotiable. *Egg Harbor Tp. Bd. of Ed.*, P.E.R.C. No. 2000-50, 26 *NJPER* 65 (¶31023 1999). A requirement of a four and one-half hour day before holidays was found not mandatorily negotiable. Equitable distribution of workload was found negotiable for non-teaching workloads, but not teaching assignments. *Ibid.*

An employer has a right to deny or revoke leaves when necessary to ensure adequate staffing, but the Commission found that an arbitration award requiring the employer to grant leave time did not prevent the employer from meeting its staffing needs and was therefore within the scope of

negotiations. *Town of Secaucus*, P.E.R.C. No. 2000-73, 26 *NJPER* (¶_____ 2000).

Health Benefits

Health benefits are mandatorily negotiable unless preempted. Preemption questions often require the interpretation of statutes and regulations governing those issues. The text and legislative history of *N.J.S.A.* 40A:10-23 indicate that the Legislature intended to give a public employer the discretion to pay for health coverage premiums for retirees and their dependents provided it did so uniformly for eligible retirees. *Township of Pemberton*, P.E.R.C. No. 2000-5, 25 *NJPER* 369 (¶30159 1999) (retiree health benefit proposal not mandatorily negotiable unless modified to clarify that changes do not take effect until the uniformity requirements of *N.J.S.A.* 40A:10-23 are met).

N.J.S.A. 40A:10-23 does not prohibit submitting all retiree health benefit proposals to interest arbitration. A union could submit a proposal to codify the current practice of paying premiums for certain spouses and dependents. *Borough of Matawan*, P.E.R.C. No. 99-107, 25 *NJPER* 324 (¶30140 1999).

And an arbitrator could determine whether a grievant came within the terms of the borough's resolution providing health benefits for surviving spouses of retired police officers, even though construction of the resolution might also require an interpretation of State Health Benefits Program regulations. *Borough of Bradley Beach*, P.E.R.C. No. 2000-17, 25 *NJPER* 412 (¶30179 1999).

No statute or regulation preempts negotiations over a proposal that the State contribute to a union's health and welfare fund to provide benefits for employees not covered by the State Health Benefits Program. *State of New Jersey*, P.E.R.C. No. 2000-12, 25 *NJPER* 402 (¶30174 1999), app. pending App. Div. Dkt. No. A-001383-99T5.

State Health Benefit Program statutes and regulations do not prohibit a participating local employer from agreeing to provide a level of prescription drug coverage different from that offered by the State prescription drug plan; uniformity of benefits with respect to State and local employers is required only for basis benefits. Thus, an arbitrator could determine whether a local employer agreed to provide prescription drug benefits different from the State plan. *Hudson Cty.*, P.E.R.C. No. 2000-53, 26 *NJPER* 71(¶31026 1999).

For State employees, the State Health Benefits Commission's actions increasing dental co-payments did not repudiate union contracts or trigger a negotiations obligation. *State of New Jersey*, P.E.R.C. No. 2000-36, 26 *NJPER* 12 (¶31001 1999), recon. granted P.E.R.C. No. 2000-71, 26 *NJPER* (¶_____ 2000). The union could seek binding arbitration, but deferral to arbitration was not appropriate given the posture of the case and because the employer would not agree to waive contractual arbitrability defenses. *Ibid.*

Sick Leave

In *Piscataway Tp. Bd. of Ed.*, P.E.R.C. No. 82-64, 8 *NJPER* 95, 96 (¶13039 1982), the Commission held that the employer had a prerogative to establish a sick leave verification policy and to use "reasonable means to verify employee illness or disability." In *Township of Maplewood*, P.E.R.C. No. 2000-9, 25 *NJPER* 374 (¶30163 1999), the Commission held that the employer generally need not negotiate over proposals to justify a home check by a valid compelling reason, to limit home checks to normal day time business hours, to prohibit all home checks in the middle of the night, and to limit

home confinement to when a treating physician has so ordered.

A sick leave verification policy that includes non-disciplinary conferences cannot be contested through binding arbitration. *City of Elizabeth*, P.E.R.C. No. 2000-42, 26 *NJPER* 22 (¶31007 1999).

The State as employer had a prerogative to adopt a 12-month period for counting sick leave days authorized by Civil Service regulations. *State of New Jersey*, P.E.R.C. No. 2000-32, 25 *NJPER* 448 (¶30198 1999).

Proposals concerning borrowing sick leave and extended sick leave in school districts cannot contravene education statutes. A proposal to borrow sick days from the following year was preempted by an education law requiring a minimum of ten fully-paid sick leave days each year. *Holmdel Tp. Bd. of Ed.*, P.E.R.C. No. 2000-43, 26 *NJPER* 27 (¶31008 1999). A proposal for additional sick days after all other leave days are exhausted was preempted by a requirement that extended sick leave be granted only on a case-by-case basis. *State-Operated School Dist. of the City of Newark*, P.E.R.C. No. 2000-51, 26 *NJPER* (¶31024 1999). A proposal for up to five paid

leave days for family illness was found mandatorily negotiable. *Ibid.*

Job Security

School employees not covered by tenure laws may negotiate comparable protections. *Egg Harbor Tp. Bd. of Ed.*, P.E.R.C. No. 2000-39, 26 *NJPER* 18 (¶31004 1999); *see also Kenilworth Bd. of Ed.*, P.E.R.C. No. 99-96, 25 *NJPER* 241 (¶30102 1999)(issues of contractual tenure and compensation legally arbitrable).

Unilateral Changes in Working Conditions

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 employer violated the Act when it replaced three full-time secretarial positions with six part-time secretarial positions with

concomitant reductions in hours and salaries and the elimination of health benefits. *Pascack Valley Reg. H.S. Dist. Bd. of Ed.*, P.E.R.C. No. 99-104, 25 *NJPER* 295 (¶30124 1999), app. pending App. Div. Dkt. No. A-005756-98T2.

An employer violated the Act by unilaterally reducing the rate at which it paid workers' compensation. *City of East Orange*, P.E.R.C. No. 2000-14, 25 *NJPER* 405 (¶30176 1999).

A municipality breached its duty to negotiate in good faith when it unilaterally changed its practice of starting officers with experience at step one of the salary guide. *Town of West New York*, P.E.R.C. No. 99-110, 25 *NJPER* 332 (¶30143 1999).

Promotions

Public employers have a non-negotiable right to fill vacancies and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs. *Local 195, IFPTE v. State*, 88 *N.J.* 393 (1982). The Commission therefore restrained arbitration of a grievance contesting a decision to promote a secretary with less service than another candidate. *Pascack Valley Reg. H.S. Dist. Bd. of Ed.*,

P.E.R.C. No. 2000-27, 25 *NJPER* 423 (¶30185 1999). The Commission also restrained arbitration over a grievance contesting a decision to fill a vacant position with a junior custodian who did not have a license the board decided was preferred, but not required. *West Windsor-Plainsboro Bd. of Ed.*, P.E.R.C. No. 2000-26, 25 *NJPER* 436 (¶30191 1999).

The State police cannot be required to promote employees currently under investigation who otherwise meet the employer's promotional criteria. *State of New Jersey (Division of State Police)*, P.E.R.C. No. 2000-61, 26 *NJPER* 98 (¶31040 2000), mot. for recon. pending. Requiring the employer to permanently promote these employees while they are under investigation would unduly encroach on the employer's prerogative to make promotional decisions. *Ibid.*

Mootness

The successful completion of negotiations alone does not necessarily moot a negotiations dispute moot. *Borough of Paramus*, P.E.R.C. No. 99-105, 25 *NJPER* 298 (¶30125 1999). *But see Middletown Tp. Bd. of Ed.*, P.E.R.C. No. 2000-24, 25 *NJPER*

429 (¶30189 1999)(past dispute cannot and need not, given the unfolding of events, be resolved).

Representation

An employer cannot be compelled to negotiate over waiving its right to file a clarification of unit petition invoking a statutory exclusion from the Act's coverage. *City of Newark*, P.E.R.C. No. 2000-30, 25 *NJPER* 445 (¶30196 1999).

The Commission denied a county's request for review of a Director's decision permitting withdrawal of a representation petition after the Prosecutor voluntarily recognized a unit of assistant prosecutors. *Morris Cty. Prosecutor's Office*, P.E.R.C. No. 99-103, 25 *NJPER* 294 (¶30123 1999). The County was seeking a ruling that is the co-employer. *Ibid.*

Procedures

In *Borough of Roseland*, P.E.R.C. No. 2000-46, 26 *NJPER* 56 (¶31019 1999), the Commission articulated its overall approach to applying time limits for filing scope petitions in interest arbitration cases.

In *East Brunswick Bd. of Ed.*, P.E.R.C. No. 2000-41, 26 *NJPER* 21 (¶31006 1999), the Commission reaffirmed that it is for an arbitrator to decide whether a union should be able to arbitrate an issue not properly raised in the early stages of the grievance procedure.

Miscellaneous

Education law preempts negotiations over union leave with no loss of seniority. *State-Operated School Dist. of the City of Newark*, P.E.R.C. No. 2000-51, 26 *NJPER* 66 (¶31024 1999).

The Commission found legally arbitrable a grievance asserting that requiring police officers to patrol on shifts where staffing fell below employer-set minimums violated contractual safety assurances and entitled employees to premium pay. *Borough of West Paterson*, P.E.R.C. No. 2000-62, 26 *NJPER* 101 (¶31041 2000).

Whether the employer complied with contractual obligations concerning faculty parking is not preempted by federal and state mandates on handicapped parking, or the policy decision to provide additional handicapped parking. *Sussex Cty. Community College*, P.E.R.C. No. 2000-76, 26 *NJPER* ____ (¶____).

A contract clause requiring notification to the union 14 days before promulgation of new rules was found mandatorily negotiable. *North Hudson Reg. Fire and Rescue*, P.E.R.C. No. 2000-78, 26 *NJPER* ____ (¶____ 2000). But not the requirement that no new rules go into effect until the union's rights pursuant to law are exhausted. *Ibid.*

Six months notice of all subcontracting decisions, regardless of whether a subcontracting decision is necessitated by a fiscal emergency or is based on non-economic concerns, was found not mandatorily negotiable, although the parties may negotiate over a notice period that would take into account their competing interests. *Holmdel Tp. Bd. of Ed.*, P.E.R.C. No. 2000-43, 26 *NJPER* 27 (¶31008 1999). Six months notice of changes in the evaluation form was found to be too restrictive. The parties could negotiate over a period that gives the union an opportunity for input and the employer the ability to respond to educational policy needs. *Ibid.*

A union could legally arbitrate whether the employer's light duty policy applies to off-duty injuries. *Borough of*

Belmar, P.E.R.C. No. 2000-4, 25 *NJPER* 367 (¶30158 1999).

A contract provision mandating expungement of a police officers personnel file is not mandatorily negotiable. *Borough of Highland Park*, P.E.R.C. No. 99-93, 25 *NJPER* 237 (¶30099 1999).