

MINUTES OF MEETING
NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION
January 25, 2018
10:00 a.m.
495 West State Street
Trenton, New Jersey

The meeting was called to order by Chair P. Kelly Hatfield.

Present were:

Commissioners:

John Bonanni
Paul Boudreau
John Eskilson
David Jones
Paula Voos

Also present were:

Robin McMahon, General Counsel
Don Horowitz, Senior Deputy General Counsel
Christine Lucarelli-Carneiro, Deputy General Counsel
Frank Kanther, Deputy General Counsel
Joseph Blaney, Deputy General Counsel
Kellie Hullfish, who acted as Stenographer.

Also in attendance were approximately 46
members of the CWA or law enforcement
employee organizations or their
representatives.

At the commencement of the meeting, Chair Hatfield, pursuant to Section 5 of the Open Public Meetings Act, entered this announcement into the minutes of the meeting:

Adequate notice has been provided by the dissemination of a written "Annual Notice of Meeting." On December 21, 2017 a copy of such notice was:

- (a) prominently posted in a public place at the offices of the Public Employment Relations Commission;
- (b) e-mailed to the business offices of the Trenton Times and the Courier Post;
- (c) e-mailed to the Secretary of State for filing; and

(d) posted on the agency's web site.

Furthermore on January 19, 2018, copies of an additional written "Notice of Meeting" were posted and sent in a similar manner.

Chair Hatfield read a letter from her to the Governor dated January 24, 2018 advising that she was offering to resign as Chair of the Commission effective upon the appointment and qualification of her successor as set forth in N.J.S.A. 34:13A-5.2. She next advised that she had been provided a copy of a letter from the Governor to the Acting Secretary of State also dated January 24, 2018 in which the Governor designated Commissioner Voos to be the Commission Chair effective immediately. The Chair indicated that she would turn the floor over to Commissioner Voos for any remarks the latter would like to express, after which General Counsel would address the designation.

Commissioner Voos stated that she had been in communication with the Governor's Office and that they know this meeting will go ahead under the chairmanship of Kelly Hatfield under Commissioner Voos' and their protest and that there are differing legal opinions. Commissioner Voos then asked General Counsel if she would like to speak.

General Counsel read a statement, a summary of which is attached to these minutes, conveying her legal opinion that the attempted designation of Commissioner Voos as Chair Hatfield's

successor is legally ineffective in that N.J.S.A. 34:13A-5.2 requires appointments to be made "by and with the consent of the Senate." She noted that prior Governors and the Senate had interpreted the statute, as evidenced by previous appointments documented in the Legislative Digest, to require nominations to be submitted to, and acted upon by, the Senate and that such nominations have been either "to be a Member" of the Commission or "to be a Member and the Chair" of the Commission. After providing three such examples, including Commissioner Voos' "to be a Member" of the Commission, General Counsel indicated that taking action on matters before the Commission without a lawful appointment creates doubt as to the validity of the action and is contrary to the interests of the public, public employers, and public employees.

The first item for consideration was the minutes of the December 21, 2017 regular meeting. A motion to adopt the minutes was made by Commissioner Boudreau and seconded by Commissioner Eskilson. The motion to adopt the minutes was unanimously approved (Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos).

The next item for consideration was the draft decision in William Toolen, et al. and State of New Jersey, Docket No. MC-2017-001 and State Troopers Fraternal Association of New Jersey, Docket No. MC-2017-002. Commissioner Boudreau moved the draft

decision and Commissioner Eskilson seconded the motion. The motion to adopt the draft decision was approved by a vote of four in favor (Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson). Commissioners Jones and Voos voted against this decision.

The next case for consideration was the draft decision in Township of West Orange and International Brotherhood of Teamsters, Local 560, Docket No. CO-2016-288. Commissioner Eskilson moved the draft decision and Commissioner Boudreau seconded the motion. The motion to adopt the draft decision was unanimously approved (Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos). Commissioner Jones did not vote.

The next case for consideration was the draft decision in State of New Jersey and Communications Workers of America, AFL-CIO, Docket No. SN-2016-011. The Chair removed this case from the agenda at the request of the parties. This case will be heard at the February 22, 2018 meeting.

The next item for consideration was the draft decision in Dumont Board of Education and Dumont Education Association, Docket No. SN-2017-051. Commissioner Boudreau moved the draft decision and Commissioner Eskilson seconded the motion. The motion to adopt the draft decision was unanimously approved (Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos). Commissioner Jones did not vote.

The next item for consideration was the draft decision in City of Atlantic City and International Association of Fire Fighters Local 198, Docket No. CU-2015-004. The Chair removed this case from the agenda at the request of the parties. This case will be heard at the February 22, 2018 meeting.

The next item for consideration was the draft decision in Point Pleasant Beach Borough and PBA Local 106, Docket No. SN-2018-010. Commissioner Eskilson moved the draft decision and Commissioner Boudreau seconded the motion. Commissioner Jones was recused from voting on this matter because he resides in Point Pleasant Beach. The motion to adopt the draft decision was unanimously approved (Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos).

The next item for consideration was the Readoption with Amendments of Representation Rules; N.J.A.C 19:11. Commissioner Eskilson moved to adopt the amendments and Commissioner Boudreau seconded the adoption. The motion to adopt the amendments of Representation Rules was unanimously approved (Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos). Commissioner Jones did not vote.

The next item for consideration was the Adoption of Amendments to Interest Arbitration Rules; N.J.A.C. 19:16. Commissioner Bonanni moved to adopt the amendments and Commissioner Eskilson seconded the adoption. The motion to adopt

the amendments of Representation Rules was unanimously approved (Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos). Commissioner Jones did not vote.

Commissioner Eskilson made a motion to adjourn the meeting and Commissioner Boudreau seconded the motion. The motion was unanimously approved. The meeting was then adjourned.

The next meeting is scheduled to be held on Thursday, February 22, 2018.

Synopsis of Legal Opinion Provided
at January 25, 2018 Commission Meeting

The New Jersey Employer-Employee Relations Act, at N.J.S.A. 34:13A-5.2, establishes the Commission and provides in pertinent part as follows:

The commission shall consist of seven members to be appointed by the Governor, by and with the advice and consent of the Senate. Of such members, two shall be representative of public employers, two shall be representative of public employee organizations and three shall be representative of the public including the appointee who is designated as chairman. Of the first appointees, two shall be appointed for two years, two for a term of three years and three, including the chairman, for a term of four years. Their successors shall be appointed for terms of three years each, and until their successors are appointed and qualified, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whose office has become vacant.

In other words, commission members serve "until their successors are appointed and qualified," and "appointed and qualified," as used in the statute, means at a minimum, "appointed by the Governor, by and with the advice and consent of the Senate."

This process for the appointment of commission members and the terms of their service is consistent with, if not compelled by the NJ Constitution, which provides in Article 5, Sec. 3, Par. 2 and 4 for the appointment of executive branch department heads or boards constituting such "by the Governor, with the advice and consent of the Senate" except for the Secretary of State and the Attorney General.

Our Act is clear that Commission members serve until their successors are appointed by the Governor, by and with the consent of the Senate. Senate consent is not an empty requirement. Article III, paragraph 1 of the New Jersey Constitution provides that "[t]he powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No

person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."

Our Act and the constitutional principals on which it is evidently based, respect the separation of powers principal. While they give the Governor the primary role in executive branch appointments, they nevertheless also require Senate advice and consent. This balance protects the Governor's authority but also recognizes that the legislature's role in executive department appointments. The point is that the Governor cannot appoint a commission member or the commission chair unilaterally and any purported designation without Senate consent is of no legal force or effect.

That this is a correct interpretation of our Act is evidenced by the practice of prior Governors and the Senate.

This is a matter of public record. Thus, with respect to Commission Voos, the governor who appointed her appointed her "to be a member of the [NJ PERC] to replace Pierre Joanis," as recorded in the legislative digest of 12/14/2009. This nomination was withdrawn, as reflected in the legislative digest of 1/4/2010. However, the legislative digest of 1/7/2010 notes that on 1/4/2010, the legislature received another nomination for Paula Voos to "be a member of the [NJPERC] to replace" Commissioner Joanis. The digest of 1/11/2010 reflects the "nominations advice and consent" for Dr. Voos "to be a member of the [NJ PERC]."

In contrast, the legislative digest of 3/22/2010 records the receipt of the nomination of P. Kelly Hatfield "to be a member and the Chair of the [NJPERC]... to replace Lawrence Henderson, resigned." The legislative digest of 9/23/2010 records that the nomination of P. Kelly Hatfield "to be a member and the Chair of the [NJPERC]" and the digest of 11/22/2010 records the "Nominations Advice and Consent" for P. Kelly Hatfield, Ph.D. "to be a member and Chair of the [NJPERC] to replace Lawrence Henderson, resigned."

Similarly, the legislative digest reflects that Larry Henderson was nominated on 11/24/2003 "as a member and chair of the [NJPERC] to replace" Millicent Wassell, and that he was confirmed by the Senate on 12/15/2003.

Thus in all three illustrative cases, the appointment was not effective until the Senate gave advice and consent, and in all cases, the commissioner being replaced and the office to

which the successor was being appointed are specifically identified. Accordingly, until the Senate takes action to consent to the designation of Cmr. Voos as Chair of the Commission or until Chair Hatfield's successor is appointed and qualified, with Senate advice and consent, the Chair of this Commission remains P. Kelly Hatfield.

Any action taken on matters before the Commission without a lawful appointment and qualification invites litigation and does not serve the interest of the taxpayers, public employers, or public employees.