

MINUTES OF MEETING  
NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION  
October 31, 2013  
10:00 p.m.  
495 West State Street  
Trenton, New Jersey

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

Present were:

Commissioners:

Paul Boudreau  
John H. Eskilson  
David Jones  
Paula B. Voos  
Richard Wall

Also present were:

David Gambert, Deputy General Counsel  
Mary E. Hennessy-Shotter, Deputy General Counsel  
Don Horowitz, Deputy General Counsel  
Christine Lucarelli-Carneiro, Deputy General Counsel  
Martin R. Pachman, General Counsel  
Annette Thompson, who acted as Stenographer

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 13, 2012 a copy of such notice was:

(a) prominently posted in a public place at the offices of the Public Employment Relations Commission;

(b) sent to the business offices of the Trenton Times, the Bergen Record, and the Camden Courier Post, as well as to the State House press room addresses of 25 media outlets;

(c) mailed to the Secretary of State for filing; and

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

Furthermore on October 25, 2013, copies of an additional written "Notice of Meeting" were posted and sent in a similar manner.

The first item for consideration was the minutes of the August 8, 2013 regular meeting. A motion to adopt the minutes was made by Commissioner Eskilson and seconded by Chair Hatfield. Commissioner Boudreau abstained because he was not present at this meeting. The motion to adopt the minutes was approved by a vote of four in favor (Chair Hatfield, Commissioners Eskilson, Voos and Wall), one abstention (Commissioner Boudreau), and one opposed (Commissioner Jones).

The next item for consideration was the minutes of the April 18, 2013 executive session meeting. A motion to adopt the minutes was made by Commissioner Eskilson and seconded by Commissioner Wall. Commissioner Boudreau abstained because he was not present at this meeting. The motion to adopt the minutes was approved by a vote of four in favor (Chair Hatfield, Commissioners Eskilson, Voos and Wall), one abstention (Commissioner Boudreau), and one opposed (Commissioner Jones).

The next item for consideration was the minutes of the September 26, 2013 regular meeting. A motion to adopt the minutes was made by Commissioner Boudreau and seconded by Commissioner Eskilson. Commissioner Voos abstained because she was not present at this meeting. The motion to adopt the minutes was approved by a vote of four in favor (Chair Hatfield, Commissioners Boudreau, Eskilson and Wall), one abstention (Commissioner Voos), and one opposed (Commissioner Jones).

The Counsel's Office distributed a monthly report.

Deputy General Counsel Don Horowitz reported that since the last meeting there was an affirmance of an unfair practice decision in Denise Cole and State of NJ, Office of the Public Defender. The Court found that there was no proof that a shop steward who received two minor suspensions, a one day and a five day, were proven to be on account of her protected activity.

Mr. Horowitz stated there is also one new appeal. He continued his reporting on other cases of note. The Belfiore v. Hoboken case involves a public employer who created an incentive program to induce certain city employees to retire early.

He concluded his reporting with Ganzweig v. Tp. of Lakewood and Del Mastro. This case involves the Open Public Records Act. Police disciplinary records or notices are excluded from OPRA. This person made a request for police records involving a pedestrian traffic incident, which was later the subject of an internal affairs investigation, and also sought records from the disciplinary proceeding. The Court held that those records were excluded from the definition of public records.

The first case for consideration was the draft decision in Robbinsville Township Board of Education and Washington Township Education Association, Docket No. CO-2010-484. Commissioner Voos moved the draft decision and Commissioner Wall seconded the motion.

Commissioner Boudreau asked if the Board attempted to negotiate with the Association.

General Counsel Martin Pachman responded the Association did not attempt to negotiate. They simply said no, they said we have a contract and we are going to stick to our existing contract.

Commissioner Eskilson stated in light of the reversal in the Belmar/Mount Laurel/Keyport appellate decision he is not sure where we are going with this decision.

Mr. Pachman responded that our job internally was to fashion the decision that comported with the Commission's previous decision back in August. The draft decision also references the more recent court decision because frankly to vote in favor of this draft decision would be voting contrary to and after the Appellate Division has spoken on the issue.

Commissioner Voos asked if the decision of the Appellate Court was being appealed and if their decision was intermediate or a final decision.

Mr. Pachman responded they have applied for certification, but because it was a unanimous opinion of the Appellate Division they must ask the Supreme Court for permission to appeal and we do not have an answer yet.

Commissioner Voos stated she feels uncomfortable going back and forth as the courts are ruling. She suggested that we postpone voting on the draft decision before us until the Supreme Court rules.

Commissioner Eskilson stated he feels we should deal with the motion that is before us on the table.

Mr. Pachman stated he is a little concerned about further delay only because the parties' negotiations have been stalled because of this situation.

Chair Hatfield stated she is comfortable voting on the draft decision before us. If we vote "no", depending on how the vote comes out, it could be redrafted to support the appellate court decision, which we would comport with the court.

Commissioner Eskilson stated we have no guarantee that the Supreme Court is going to grant certification.

Commissioner Voos stated what we are saying is that these teachers are not owed this money. They should be able to bargain over this issue.

Mr. Pachman responded that the problem is, as the original draft held, this is a managerial prerogative. It affects what issues are on the table for the ensuing contract.

Commissioner Jones stated he is troubled and he is not sure what the exit strategy would be. He continued by stating that they can bargain. We always have issues set aside, and then we go forward with everything else. If it resolves itself as a side agreement or in this arena, they can still bargain compartmentalizing just this issue. It is not large enough to shut down the operation. It is key that management wants to. We

can still send them back to the table, and let the courts decide this other issue, it has been done. If both parties choose not to do it, then shame on them. I agree with what Commissioner Voos is saying. Do we order them back to the table?

Mr. Pachman responded we can not order them back.

Chair Hatfield stated that her issue is that this draft is a case of first impressions that the court said is wrong, and we do not want to obviously be overturned. I am comfortable with the courts decision, and I am comfortable with the first draft. I feel that the parties, not just Robbinsville, need to hear from us on this case, so I think we need to have a vote on it.

Commissioner Wall asked the Chair if she is saying she is not in agreement with this draft decision, but you are in agreement with the original decision because the courts have ruled that the original order if it had gone through was correct.

The Chair responded yes.

Commissioner Voos stated the issue is whether or not management has to bargain over furloughs. I would say that many furloughs are simply a unilateral pay cut. I feel the appellate court was wrong but maybe the Supreme Court will uphold it and it will be the law, and when it is the law it's the law. The other case has been appealed and I feel we should wait.

Commissioner Eskilson responded that he did not feel we should wait to see what the court decides before making a decision on this.

Mr. Horowitz stated that if the Supreme Court grants certification that just brings it before the court, then an argument has to be scheduled and then the court has to rule. That could take another year or so for them to grant the certification.

Chair Hatfield stated that if the Supreme Court were to overturn the appellate court decision then our decision would be moot.

Commissioner Jones stated we will have a whole host of people relying on this going forward in other negotiations.

Chair Hatfield responded absolutely that is why I think we need to have a vote on this.

Mr. Pachman stated that the very first step in front of the Supreme Court is their petition for certification. There is no timeline by which the Supreme Court must make that determination. Normally it is taken care of within three months or so. We are already beyond that now, so that in addition to whatever timeline for an ultimate resolution there might be, the first step is an open-ended timeline. That is one thing that you need to keep in mind. The other thing is, and yes there is an application to appeal the Appellate Division decision to the Supreme Court, but until the Supreme Court changes that opinion that is still the law of the state. It is an Appellate Division decision and legally we are bound to follow it. We have a determination as to

what the law of the land is whether we like it or we don't like it, that is what it is. For us as a subservient body to the court system, to be ruling in the way that this draft would have us rule, it just leaves a bad taste in my mouth because that is not the way things are supposed to happen. If it was a decision that went the other way I would be saying exactly the same thing.

Commissioner Voos asked if it is being suggested that the Commission vote no on this draft and then go back and redraft the earlier version that refers to this court decision and bring it back?

Mr. Pachman responded that this draft could just be modified as has been done in the past just by striking out certain language and putting in certain language.

Commissioner Wall asked if when they locked out the teachers on that day did everybody take a furlough. If you are going to be fair then everybody should be furloughed instead of picking and choosing.

Deputy General Counsel Christine Lucarelli-Carneiro stated it was not clear within the record, we know for certain it was the teaching staff, we do not know if it involved others.

Chair Hatfield responded the school was closed, so she doubts if anyone was in there.

Commissioner Boudreau stated he does not feel it is our role to say this case might be coming up for a decision soon and we should just wait and see.

Commissioner Jones stated if we are going to rewrite this and look at this perhaps we should put it in writing and have a telephone meeting to vote on it.

Chair Hatfield responded we can certainly do that. It was decided that a revised draft will be ready for the agenda at the November 21, 2013 Commission meeting.

The motion to adopt the draft decision was not approved by a vote of two in favor (Commissioners Jones and Voos), and four opposed (Chair Hatfield, Commissioners Boudreau, Eskilson and Wall).

The next case for consideration was the draft decision in County of Warren and Warren County Corrections FOP Lodge 171, Docket No. IA-2014-001. Commissioner Eskilson moved the draft decision and Commissioner Boudreau seconded the motion. Commissioner Jones is recused from voting on this matter because this case involves the Loccke law firm.

Commissioner Wall stated the arbitrator is freezing the step award after the expiration of the contract. If the contract is expired it is not in effect so how is the arbitrator freezing the step award after the contract has expired?

Mr. Pachman responded that is a decision for the arbitrator to make. We have supported challenges to arbitrators who have awarded them and we have supported arbitrators who have curtailed them.

Ms. Lucarelli-Carneiro responded that the contract expires at the end of December, so they will be back in negotiations. That next contract will be subject to the cap. If there was movement on the step guide it would have eaten into the funds that would have been available within the 2% cap. The arbitrator found in order to give each party enough room for the next negotiation it was best to freeze the step movement. That was her rationale for doing it.

Commissioner Eskilson stated that kind of decision provides flexibility for both parties because the simple step movement and changing the longevity can go well beyond the 2% and therefore eliminate the flexibility of both parties to negotiate the agreement that they want.

The motion to adopt the draft decision was approved by a vote of four in favor (Chair Hatfield, Commissioners Boudreau, Eskilson and Voos), and one opposed (Commissioner Wall).

The next case for consideration was Cherry Hill Fire District No. 13 and IAFF Local 2663, Docket No. SN-2013-015. Commissioner Voos moved the draft decision and Commissioner Wall seconded the motion.

Commissioner Boudreau stated he was going to support the draft decision but he finds it very unfortunate that they would have a document that would have the word "infraction" on it. These guys were doing this for a long time without getting

anyone's permission and all of a sudden someone says you have committed an infraction by continuing what you have been doing with permission for years, it is disciplinary. I do not know why a community would not have a different form if they want to talk to an employee about something they want to change.

The motion to adopt the draft decision was unanimously approved (Chair Hatfield, Commissioners Boudreau, Eskilson, Jones, Voos and Wall).

The next case for consideration was Burlington County Institute of Technology and Burlington County Institute of Technology Education Association, Docket No. SN-2013-022.

Commissioner Eskilson moved the draft decision and Commissioner Wall seconded the motion. The motion to adopt the draft decision was approved by a vote of five in favor (Chair Hatfield, Commissioners Boudreau, Eskilson, Voos and Wall), and one opposed (Commissioner Jones).

The next case for consideration was Mercer County Sheriff's Office and PBA Local 187, Docket Nos. SN-2013-026, SN-2013-027 and SN-2013-028. Commissioner Boudreau moved the draft decision and Commissioner Jones seconded the motion. Commissioner Wall is recused from voting on this matter because of his affiliation with the PBA. Commissioner Eskilson is recused from voting because the firm of Trimboli and Prusinowski, representing one of the parties in this case, is also labor counsel for the County of Sussex.

Commissioner Boudreau stated that he had a conversation with a staff member about the issue of law firms that are members of the Chamber and Commerce. He stated for the record that Steven Trimboli's firm is a member of the Morris County Chamber of Commerce.

Commissioner Jones asked about recusal when a union for a local is a member of a larger PBA.

Ms. Lucarelli-Carneiro responded that any legal representative, if they are a member of the union, have been forced to recuse themselves on all cases on whatever union they are involved with. We have a decision from the State Ethics Commission which I will be glad to give you, which was issued a long time ago. This is an old issue and the SEC has not changed their position.

Commissioner Jones asked if any of the three officers made application through the normal hiring process.

Mr. Pachman responded we do not know that. We know that they were rejected pursuant to the Rice statute, which would have enabled them to transfer to a local municipality.

Commissioner Jones stated he was talking about specifically the Sheriff's Department. He asked did they attempt to do a regular parallel employment thing.

Mr. Pachman responded there is nothing in the record to indicate same.

The motion to adopt the draft decision was unanimously approved (Chair Hatfield, Commissioners Boudreau, Jones and Voos).

The next case for consideration was New Jersey Turnpike Authority and International Federation of Professional and Technical Engineers, Local 200/200A, Docket No. SN-2013-033. Commissioner Wall moved the draft decision and Commissioner Boudreau seconded the motion.

Commissioner Jones stated for the record that he previously worked with the Director's brother. The Director's brother is a trooper and he has visited his home. He further stated he has no financial interest, nor has he done any business with the Turnpike. He did not feel this was a reason to recuse himself. He has a one person away relationship by knowing the Director through his brother.

Ms. Lucarelli-Carneiro responded that there was no need for a recusal.

Commissioner Jones stated we have layers that come between direct supervisors and department heads and executives. When you get high enough in a system of employment, if you are the head of a department, anyone in theory is under you. There really has to be a direct line of supervision. Here we have a couple that has been married through the Corzine, McGreevey and Christie administration. We do not have a statute we have a policy. We

have the same type of regulatory process, meaning this body's decisions that says that does not qualify. Nobody including the Turnpike Authority disputes the fact that there are levels above this women collecting tolls and counting quarters and a boss at a remote location doing his job. It has been going on forever. It is not a direct supervisory thing. We have regulation on that. We have dealt with cases like this and it is the law of the land. This is a Turnpike policy, it is not the law of the land. The case rulings that we have, and there are multiple ones that have been cited, it is clear that it has to be supervisor subordinate. When you get that high in the pyramid everybody at some point in time falls under that chain. This is not a managerial prerogative this is arbitrary and capricious.

Ms. Lucarelli-Carneiro responded that the employee did not receive an immediate reduction in pay. The employee is asserting that she will incur some reduction in pay due to a loss of opportunity for overtime. The employee's base salary was not cut.

Commissioner Voos stated that the wife is the lower level union represented employee, the husband is the higher level manager, he does not get transferred. Maybe in their life they do not stay together and she is permanently hurt. This is a typical way that nepotism policies are done in practice and as a woman it makes me very uncomfortable. At the university I work

for the Dean who has direct supervision of a family member, it happens all the time. It is a very hard policy given the level. On the other hand I think that the Turnpike Authority has the right to figure out what application of the anti-nepotism policy makes sense.

Ms. Lucarelli-Carneiro responded that their anti-nepotism policy states that when there are two employees who are related and one needs to get transferred, the one with the least seniority will get transferred. Although we don't specifically have that in the record we can assume that she had the least seniority since she was the one who got transferred.

Mr. Pachman stated that the issue in this case is not whether we think the policy is good, bad or indifferent, fair or unfair. The only question that comes before us is does the Authority have the right to establish whatever nepotism policy it chooses to do. On that the answer seems to be yes they have a managerial prerogative to do it. If it is unfair in its content that is for the Authority's authority, the people who oversee them to deal with, or for them to take to court and claim that it is a constitutional violation. If she believes, this woman who happens to be the person who is the grievant, to use a better word in this case, that she was selected for an improper purpose as opposed to her husband, she could have filed an unfair labor practice charge or a charge under the EEOC or under the Division

of Civil Rights. Those are all ancillary issues to what we are really being called upon to look at here. What we are being called to look at is does a public employer have a managerial prerogative to establish a nepotism policy.

Commissioner Wall stated you are right, but in this case it affects her financially. This is contractual, she is losing \$6,000. She is getting the worst end of the stick. I work where the female was the Chief and her husband was under her. I do understand what you are saying. You are right that management does have the right to set up a policy as long as it is within the boundaries of not intruding on the financial aspect of it.

Mr. Horowitz stated that beyond the adoption of a nepotism policy the particular personnel action involved here is a transfer. The Supreme Court held long ago that a transfer is a managerial prerogative. Now, the separate issue of the compensation of the transferred employee, and the court case I'm thinking of is the situation where a high school principal in the following year was transferred to the position of junior high school principal without any immediate reduction in salary and asserted that her future salary expectation would be lower than if she had remained a high school principal and the court said that is simply a function of the transfer. She suffered no immediate loss. We also had a case that involved a police officer who later became the President of the State PBA and a

Commissioner who was transferred from the night shift to the day shift and therefore lost the shift differential and we held, as we have held in several other cases, that the loss of the differential is an unseverable consequence of the transfer. There have been certain cases where extraordinary circumstances are presents perhaps the person can hold onto the differential for a period of time. If you are transferred to another position which has a lower future earning expectation then your prior position that is a consequence of the managerial decision to transfer.

Commissioner Jones responded that the matter before this Commission is whether this issue is arbitrable or not. Can we send it in front of an arbitrator, and we are saying no. That being the case the matter here is abundantly clear that this case should go to an arbitrator and we should not be grating a restraint of binding arbitration. Let the factfinders find out and review the same case law. This is tremendously unfair to this woman. There is no question about the assignment that she gets causes her to lose shift differential and other compensation that are built into the one job and she loses with the other job. She is going to lose this money. We are not arguing whether or not they can have a nepotism policy that is management's prerogative. Here what we are talking about is the existing policy if applied correctly says that she doesn't have to move.

Commissioner Voos abstained from voting. The motion to adopt the draft decision was approved by a vote of four in favor (Chair Hatfield, Commissioners Boudreau, Eskilson, Wall), and one opposed (Commissioner Jones).

The next case for consideration was Township of Galloway and PBA Local 77, Docket No. SN-2013-049. Commissioner Eskilson moved the draft decision and Commissioner Boudreau seconded the motion. Commissioner Wall is recused from voting on this matter because of his affiliation with the PBA. The motion to adopt the draft decision was approved by a vote of four in favor (Chair Hatfield, Commissioners Boudreau, Eskilson and Voos), and one opposed (Commissioner Jones).

Commissioner Wall made a motion to adjourn the meeting and Chair Hatfield seconded the motion. The motion was unanimously approved. The meeting was then adjourned.

The next regular meeting is scheduled to be held on Thursday, November 21, 2013.