

MINUTES OF MEETING
NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION
September 27, 2012
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:

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

Also present were:

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 15, 2011 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 September 24, 2012, 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 17, 2012 special meeting. A motion to adopt the minutes was made by Commissioner Eskilson and seconded by Commissioner Boudreau. Commissioners Voos and Wall abstained from voting as they were not present at the meeting. The motion to adopt the minutes was unanimously approved (Chair Hatfield, Commissioners Boudreau and Eskilson).

The next item for consideration was the minutes of the August 23, 2012 special meeting. A motion to adopt the minutes was made by Commissioner Voos and seconded by Commissioner Boudreau. Commissioners Eskilson and Wall abstained from voting as they were not present at the meeting. The motion to adopt the minutes was unanimously approved (Chair Hatfield, Commissioners Boudreau and Voos).

The next item for consideration was the minutes of the September 6, 2012 regular meeting. A motion to adopt the minutes was made by Commissioner Eskilson and seconded by Commissioner Boudreau. The motion to adopt the minutes was unanimously approved (Chair Hatfield, Commissioners Boudreau, Eskilson, Voos and Wall).

Chair Hatfield provided each Commissioner with a copy of the 2012 Annual Report of the Police and Fire Public Interest Arbitration Task Force report. This task force has the responsibility to provide the Governor and the Legislature an

annual report every year. This report is an analysis of the impact and effect that the 2% cap has had on interest arbitration.

Commissioner Jones joined the meeting at this time.

Chair Hatfield then directed the Commissioner's attention to two resumes for James M. Lenaghan and Robert E. Meehan who are both being considered for appointment as Super Conciliators for the Health Plan Design and Pension Committees. Recent legislation, P.L. 2011, c. 78, established committees for reviewing and modifying public employee health benefit and pension plans. There are sections within the law that provide for the committee to ask the Public Employment Relations Commission to appoint a super conciliator to resolve any impasses if a majority of the committee is not able to decide any disputed plan associated issue. Super conciliation is limited to investigatory proceedings involving disputes emanating from committees established pursuant to the law. Both of these individuals are highly qualified in the area of health plans and pension issues. Commissioner Eskilson made a motion to affirm the appointments and Commissioner Boudreau seconded the motion. Commissioner Jones recused himself because he currently participates on one of the Health Plan Design and Pension Committees. The motion to adopt the appointments was approved by

a vote of four in favor (Chair Hatfield, Commissioners Boudreau, Eskilson and Wall), and one abstention (Commissioner Voos).

Chair Hatfield advised the Commissioners that there are two new interest arbitration appeals involving Morris County and Borough of Point Pleasant. A suggested meeting date of Thursday, October 11, 2012 at 1:00 p.m. was scheduled.

The Counsel's Office distributed a monthly report.

Don Horowitz, Deputy General Counsel, reported on a case in Voorhees Tp. which was an affirmance of a Commission decision holding that a grievance filed by the union challenging the employer's increase in co-pays for already retired officers was mandatorily negotiable or at least permissibly negotiable and the dispute could be resolved by a grievance arbitrator. This issue has been arising frequently both for retired personnel and current personnel.

He continued reporting on another case of interest in a New Jersey Supreme Court decision involving a public employee who worked for North Hudson Fire & Rescue. The employee had a disciplinary hearing on a discharge before the Office of Administrative Law ("OAL") which did not consider his allegations that he was engaged in whistle blowing activities. The issue was whether or not he had an opportunity to raise and try that issue before the OAL. A majority of the court stated that the employee did have an opportunity to raise the issue, and accordingly could

not thereafter file a civil lawsuit raising a whistle blower violation.

The first case for consideration was the draft decision in Passaic County Prosecutor's Office and Machinists and Aerospace International Union District 15, Docket No. CO-2008-231.

Commissioner Wall moved the draft decision and Commissioner Eskilson seconded the motion. Commissioner Jones stated that he does not believe that the statute requires an overt act.

Commissioner Jones stated that protected activity resulted in a negative impact on the employees. Mr. Pachman responded that our standard does not require an overt act, but it does require a demonstration based on the evidence in the case that there was some animus present that lead to the adverse action. 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 the draft decision in State of New Jersey (Department of Corrections) and PBA Local 105 and Stacy Grant, Docket No. CO-2010-124. Commissioner Voos 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. The motion to adopt the draft decision was unanimously approved (Chair Hatfield, Commissioners Boudreau, Eskilson, Jones and Voos).

The next case for consideration was the draft decision in County of Essex and IBEW Local 1158, Docket No. CO-2010-399. Commissioner Wall moved the draft decision and Commissioner Boudreau seconded the motion. 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 the draft decision in County of Hudson and Hudson County Union, Local 1 Amalgamated and International Union of Painters and Allied Trades, District Council 711, Local 1007, Docket No. RO-2012-009. Commissioner Wall moved the draft decision and Commissioner Eskilson seconded the motion. The motion to adopt the draft decision was unanimously approved (Chair Hatfield, Commissioners Boudreau, Eskilson, Jones, Voos and Wall).

The next item for consideration was a Resolution to Invoke the Doctrine of Necessity regarding the Morris County Sheriff's Office and PBA Local 298 decision. Chair Hatfield read the resolution for the record. The Chair asked the Commissioners that would normally be recused from voting to state on the record the reason for recusal. Commissioner Eskilson, Sussex County Administrator, stated that the law firm of Knapp, Trimboli and Prusinowski represents the County of Sussex as labor counsel. Commissioner Boudreau stated that he is President of the Morris County Chamber of Commerce and they have a partnership with the

Freeholders of Morris County, who make financial contributions to the Economic Development program, which is a division of the Chamber. Commissioner Wall stated he has two issues. First is his affiliation with the PBA, and the second reason is that this case involves his department. Commissioner Eskilson moved to adopt the resolution and Commissioner Boudreau seconded the motion. Commissioner Jones stated there are two critical issues here. There is nothing in the PERC law that defines what constitutes a quorum for this Commission. He stated that there is a letter from the Attorney General's Office that is over 20 years old that indicates when a Commission or an empowering legislation that creates the Commission is silent on what constitutes a quorum. Mr. Pachman responded that he interprets the Attorney General's Opinion differently. It does not comment on what number is a quorum for this Commission or any other Commission. We disagree with regard to the import and the legal standing of that opinion letter. Commissioner Voos commented that she would not like to see a Commission decision overturned by the court because the Doctrine of Necessity was invoked improperly. Mr. Pachman responded that the scope of a Commissioner's recusal is determined by the State Ethics Commission. The motion to adopt the resolution 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 the draft decision in Morris County Sheriff's Office and PBA Local 298, Docket No. SN-2011-092. Commissioner Voos moved the draft decision and Commissioner Boudreau seconded the motion. Commissioner Jones abstained. Commissioner Eskilson asked if there has been this type of petition before. Mr. Pachman responded, in a scope context, no we have not. Mr. Horowitz responded that in this new era, as opposed to pre-2007/2008, these cases were routinely allowed to go to grievance arbitration if the union grieved that the employer failed to pay the increments on the first day of the next year. Also, there were interim relief decisions in unfair practice cases. In a scope case the agency's function is essentially to be a gatekeeper, rather than a decider of the merits of the issues. The issue is whether this subject matter can legally go before a grievance arbitrator. In an unfair practice case, the Commission can decide what the contract language means and what the law is, and whether or not the employer is obligated to pay the increments. The agency can not do that here. The Chair responded we just decide whether or not it is negotiable. Mr. Horowitz continued by stating if the arbitrator comes up with something that would violate a statute or would intrude into managerial prerogative, it could be challenged once again. The merits of the grievance arbitration can also be appealed, as opposed to the scope decision, to the

court. 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 abstention (Commissioner Jones).

The next case for consideration was the draft decision in Township of South Brunswick and AFSCME Council 73, Local 2242, Docket No. SN-2011-094. Commissioner Eskilson moved the draft decision and Commissioner Boudreau seconded the motion.

Commissioner Voos asked if this case was dealt with before. Ms. Hennessy-Shotter responded that the prior draft decision was a 2-2 tie, and it was a breakable tie, so it is back before the Commission again. Commissioner Voos asked if this happens automatically if there is a tie vote. The Chair responded that only if it is not a permanent recusal issue. The motion to adopt the draft decision was approved by a vote of four in favor (Chair Hatfield, Commissioners Boudreau, Eskilson and Wall), and two opposed (Commissioners Jones and Voos).

Commissioner Jones stated the prior case was revisited because of a non-permanent recusal. Ms. Lucarelli-Carneiro responded that recusals that have been determined by the State Ethics Commission are permanent in nature, unless circumstances change, and then it can be revisited. Commissioner Jones asked how do we decide what cases we are going to revisit within a certain time frame. Ms. Hennessy-Shotter responded this case did

not fail to pass because of recusals, it failed because of a tie vote at a meeting where Commissioners were absent.

The next case for consideration was the draft decision in County of Camden and Camden County Park Police, New Jersey Fraternal Order of Police, Lodge #76, Docket No. SN-2012-009. Commissioner Eskilson moved the draft decision and Commissioner Jones seconded the motion. 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 the draft decision in Rutgers, The State University of New Jersey and Union of Rutgers Administrators American Federal of Teachers, Local 1766, AFL-CIO, Docket No. SN-2012-010. Commissioner Boudreau moved the draft decision and Commissioner Eskilson seconded the motion. Commissioner Voos recused herself because she is a Rutgers employee. Commissioner Wall stated that the position was eliminated because there was not enough money raised. The Chair responded it is unclear, but it goes back to the arbitrator who determines the facts of the case. Ms. Hennessy-Shotter responded that it was undisputed that no dollar amount for fund-raising could be assessed for this title, even though that was the reason she was hired. The motion to adopt the draft decision was unanimously approved (Chair Hatfield, Commissioners Boudreau, Eskilson, Jones and Wall).

The next case for consideration was the draft decision in Township of South Brunswick and AFSCME Council 73, Local 2242, Docket No. SN-2012-013. Commissioner Eskilson moved the draft decision and Commissioner Boudreau seconded the motion. Ms. Lucarelli-Carniero responded that the record did not provide much information. Commissioner Jones stated that a civilian employee was governed by a past practice. Ms. Lucarelli-Carniero states that the record does not clearly support that this was a past-practice. The police department sick leave policy does state that it is applicable to both police officers and non-police officers employed by the department. Commissioner Wall asked if that was stated in their policy or contract. Ms. Lucarelli-Carniero responded that it is in their policy and separately there is a contract that covers all the employees covered by AFSCME. The sick leave policy and the contract both state that sick leave can be verified. Commissioner Eskilson stated that management has a managerial prerogative to verify sick leave. Mr. Pachman responded that we are going beyond the scope of this case. All we are deciding here is if this issue is negotiable, which it is not. Commissioner Voos asked was this sick leave verification applied in an arbitrary and capricious manner. It seems that the record was not clear, but the union could make their case with the arbitrator. Ms. Lucarelli-Carniero responded under the Plainfield case where the Commission made that

distinction between managerial prerogative to implement the policy versus whether it was applied in an arbitrary, egregious or such an invasive manner. All the cases referenced in this draft decision contained a lot of facts about what happened that allowed the situation to meet that standard. We just do not have that here, there is not enough to send it to arbitration. The motion to adopt the draft decision was approved by a vote of four in favor (Chair Hatfield, Commissioners Boudreau, Eskilson and Wall), and two opposed (Commissioners Jones and Voos).

The next case for consideration was the draft decision in City of Plainfield and Plainfield Fire Officers Association, Local No. 207 and FMBA Local 7, Docket Nos. SN-2012-014 & SN-2012-017. Commissioner Jones moved the draft decision and Commissioner Boudreau seconded the motion. Commissioner Eskilson abstained from consideration. The motion to adopt the draft decision was unanimously approved (Chair Hatfield, Commissioners Boudreau, Jones, Wall and Voos).

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

The next regular meeting is scheduled to be held on Thursday, October 25, 2012 at 10:00 a.m.