OTHER AGENCIES

(a)

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Notice of Proposed Substantial Changes Upon Adoption to Proposed Amendment and Proposed New Rules

Representation Procedures

Negotiations and Impasse Procedures; Mediation, Fact-Finding, Super Conciliation, Grievance Arbitration, Special Disciplinary Arbitration, Mediation, and Binding Arbitration to Resolve Impasses Over Employee Organization Access to Employees

Proposed Changes: N.J.A.C. 19:11-1.5 and 19:12-7.2 and 7.3

Proposed: September 17, 2018, at 50 N.J.R. 1988(a).

Authorized By: Public Employment Relations Commission, Joel M. Weisblatt, Chair.

Authority:

As to N.J.A.C. 19:11: N.J.S.A. 34:13A-5.4e, 34:13A-6d, 34:13A-11, and 34:13A-5.15d; and P.L. 2018, c. 15.

As to N.J.A.C. 19:12: N.J.S.A. 34:13A-5.4.c, 34:13A-6.b, 34:13A-11, and 34:13A-5.13h; and P.L. 2018, c. 15.

Proposal Number: PRN 2018-085.

Submit comments by September 13, 2019, to:

Joel M. Weisblatt, Chair
Public Employment Relations Commission
PO Box 429
Trenton, New Jersey 08625-0429
Comments may also be submitted via facsimile to 609-777-0089 or to rulecomments@perc.state.nj.us via e-mail.

Take notice that the Public Employment Relations Commission (Commission) proposed amendments at N.J.A.C. 19:11-1.5 and new rules at N.J.A.C. 19:12-7 on September 17, 2018, at 50 N.J.R. 1988(a), to implement the provisions of the Workplace Democracy Enhancement Act (WDEA), P.L. 2018, c. 15, § 1 through 5, effective May 18, 2018. The WDEA added N.J.S.A. 34:13A-5.11 through 5.15 to the New Jersey Employer-Employee Relations Act. The public comments received have prompted the Commission to propose several substantial changes to the amendment and new rules contained in the original notice of proposal. A summary of the public comments and the agency's responses thereto are provided below. This notice of proposed substantial changes is published pursuant to N.J.S.A. 52:14B-4.10.

Office of Administrative Law Note: Please note that due to a formatting error merging similar comments, but not individually identifying the commenters (as is indicated below), the notice published on July 1, 2019, at 51 N.J.R. 1109(a) is replaced by this notice of substantial changes upon adoption. The changes proposed by the Commission have not changed, nor has the substance of the comments and the responses, but the formatting has been adjusted.

Summary of Public Comments and Agency Responses:

Comments were received from the following interested persons and parties:

1. Craig S. Gumpel, Esq., for New Jersey State Firefighters Mutual Benevolent Association (FMBA);

2. Mark Lesniak of the Rahway Library;

3. Aileen O'Driscoll, Esq., Managing Attorney, New Jersey Education Association (NJEA);

4. Susan Pigula, Esq., Director, Division of Legislative, Administrative and Regulatory Actions, New Jersey Department of Transportation (NJDOT);

5. Steven P. Weissman, Esq., and Ira W. Mintz, Esq., of the firm of Weissman & Mintz on behalf of the following labor organizations (collectively "Union Commenters"): New Jersey State AFL-CIO; Communications Workers of America, AFL-CIO; American Federation of Teachers-NJ, AFL-CIO; the Health Professionals and Allied Employees, AFT; the American Association of University Professors, Biomedical Health Sciences New Jersey; the Committee of Interns and Residents, SEIU; the American Association of University Professors-AFT (Rutgers); and Union of Rutgers Administrators-AFT;

6. Paul A. Kleinbaum, Esq., of Zazzali, Fagella, Nowak, Kleinbaum & Friedman on behalf of the American Federation of State, County and Municipal Employees, Council 63 (AFSCME);

7. Debra L. Davis, Staff Representative, on behalf of Council of New Jersey State College Locals, AFT/AFL-CIO (CNJSCL);

8. David A. Cohen, Associate Vice President and Deputy General Counsel, Rutgers, the State University of New Jersey (Rutgers); and

9. Joseph M. Hannon, Esq. of Genova, Burns on behalf of the New Jersey State League of Municipalities (NJSLOM).

Craig Gumpel, Esq., on behalf of New Jersey State Firefighters Mutual Benevolent Association (FMBA)

Comments Pertinent to Rules to Implement N.J.S.A. 34:13A-5.15

COMMENT: Noting that N.J.S.A. 34:13A-5.15 refers to all "**regular** full-time and part-time employees," the FMBA suggests that a rule is necessary to define "**regular**."

RESPONSE "Regular" employment has often been an issue in Commission decisions involving the structure of collective negotiations units. The determination of what constitutes regular employment is fact-sensitive and is resolved on a case-by-case basis. See, for example, *Mount Olive Board of Education*, P.E.R.C. No. 82-66, 8 *NJPER* 102 (¶13041 1982); *In re Bridgewater-Raritan Regional Bd. of Ed.*, D.R. No. 79-12, 4 *NJPER* 444 (¶4021 1978). The Commission acknowledges that N.J.S.A. 34:13A-5.15b provides that employees who work four hours per week over a period of 90 days are "casual employees," but believes that continuing to resolve such issues through adjudication rather than rulemaking is the better way to administer the New Jersey Employer-Employee Relations Act and does not conflict with the terms or intent of N.J.S.A. 34:13A-5.15.

Comments Regarding N.J.A.C. 19:11-1.5

COMMENT: Referring to the proposed amendment to N.J.A.C. 19:11-1.5(c)2iii, the FMBA asserts that, in addition to confidential employees and managerial executives, other types of employees (for example, casual employees, members of boards and commissions) may not be eligible to be included in the unit in dispute. The FMBA suggests that the rule be "broad enough to encompass other possible reasons for the public employer to dispute the inclusion of a particular employee in the negotiations unit," as well as "account for the possibility that [a petitioning organization] may not be aware of the employer's reasons..."

RESPONSE: Most of the positions referenced in the FMBA's comment are already statutorily excluded from the definition of public employee set forth at N.J.S.A. 34:13A-3, which excludes from the definition of public employees "elected officials, members of boards and commissions, managerial executives and confidential employees." Commission cases have consistently excluded "casual employees" from collective negotiations units. Other issues concerning an employee's eligibility to be added to an existing unit can be resolved, as it has been since the Commission's inception, on a case-by-case basis. Recently the Commission resolved an issue as to whether, pursuant to N.J.S.A. 34:13A-5.15, a craft employee could be added to an existing collective negotiations unit without conducting a "craft option" vote in accordance with 34:13A-6d. See Jefferson *Tp. Bd. of Ed.*, P.E.R.C. No. 2019-11, 45 *NJPER* 149 (¶38 2018).

COMMENT: Referring to the proposed amendment to N.J.A.C. 19:11-1.5(c)3 (recodified in this notice of substantial changes as N.J.A.C. 19:11-1.5(e)), the FMBA suggests that the 60-day deadline to resolve unit inclusion issues arising under N.J.S.A. 34:13A-5.15, mirror the statute's mandate that the time limit is 60 calendar days.

RESPONSE: The Commission's existing rule on the computation of time, N.J.A.C. 19:10-2.1(a) is consistent with the 60-calendar-day limit set by the statute. However, the Commission has no objection to the modifier "calendar" and has incorporated that suggestion in its revised rule proposal.

Comments on Rules to Implement N.J.S.A. 34:13A-5.13

COMMENT: Referring to N.J.S.A. 34:13A-5.13, addressing employee organization access to members of a collective negotiations unit it represents, the FMBA observes that N.J.S.A. 34:13A-5.13(a) through (f) set forth the "minimum requirements for access to and communication with negotiations unit employees by an exclusive representative employee organization"

RESPONSE: The FMBA is quoting the last line of N.J.S.A. 34:13A-5.13(g). Nothing in the Commission's rulemaking would limit the ability of a public employer and an exclusive majority representative to agree to communications and/or access language that would exceed the minimums contained in N.J.S.A. 34:13A-5.13(a) through (f). In the Commission's view, the rule proposal would not preclude an arbitrator, appointed pursuant to N.J.S.A. 34:13A-5.13(h), to resolve an impasse over communications/access issues to issue an award that includes provisions that exceed the minimum requirements set by N.J.S.A. 34:13A-5.13(a) through (f).

COMMENT: FMBA states that under proposed N.J.A.C. 19:12-7.3, which is designed to implement the requirement of N.J.S.A. 34:13A-5.13(h), any arbitration award resolving an impasse over language governing employee organization access to, and communications with, negotiations unit employees be issued within 45 days of the close of the record. Further, the rule does not explicitly provide that where a written and timely request by the arbitrator seeking to extend the time to issue the award is made that:

1. The parties will receive notice of that request; and

2. The parties will be allowed to state their positions on the request before the Director acts on it.

RESPONSE: Given the statute's mandates that disputes over workplace access to, and communications with, employees be resolved expeditiously, by an arbitration award, if necessary, the Commission deems it necessary for the Director of Conciliation and Arbitration (Director) to rule on extension requests without input from the parties. N.J.A.C. 19:12-7.3(b) is changed to allow the Director to allow a designee to rule on an extension request. The grant or denial of an extension request will be served on the parties.

COMMENT: With respect to proposed N.J.A.C. 19:12-7.3(d), the FBMA states that the factors identified in paragraphs (d)1 through 6 are not mandated by N.J.S.A. 34:13A-5.13 and, thus, should be identified as discretionary, not mandatory. FMBA also suggests that a "catch-all" provision be added to the list. FMBA also requests that N.J.A.C. 19:12-7.3(e) be clarified to state that the award sets forth the minimum requirements regarding a majority representative's right of access to and communications with employees in the workplace.

RESPONSE: The Commission acknowledges the suggestions with regard to proposed N.J.A.C. 19:12-7.3(d). The Commission will change "shall" to "may" in the first sentence of N.J.A.C. 19:12-7.3(d) to provide that use of the factors is discretionary and the Commission will add a "catch-all" item to the list of factors allowing other factors the arbitrator identifies as relevant.

With respect to FMBA's suggested change to N.J.A.C. 19:12-7.3(e), the statute makes it clear that subsections (a) through (f) are minimum requirements regarding a majority representative's right of access to, and communications with, employees in the workplace. However, where an arbitration award is required, it will necessarily resolve a dispute over such issues with specific language to be added to a collective negotiations agreement (CNA). Describing the award as setting minimums would create uncertainty over the contents of employee access and communications provisions in a CNA resulting from an arbitration award.

Aileen O'Driscoll, Esq., Managing Attorney, New Jersey Education Association (NJEA)

Comment Regarding N.J.A.C. 19:12-7.2(e)

COMMENT: The NJEA, referring to proposed N.J.A.C. 19:12-7.2(e), asserts that where a CNA so provides, such CNA shall govern how the arbitrator's fee will be borne, if other than equally as set forth in the proposed regulation.

RESPONSE: As the arbitration mandated by N.J.S.A. 34:13A-5.13 is statutory, rather than contractual, the Commission deems it appropriate to have the parties share the costs of the arbitrator's fees and expenses. The reference to contractual grievance arbitration in N.J.S.A. 34:13A-5.13g, refers to enforcement of employee access and communications provisions, once those items have been incorporated into a CNA through negotiations or an arbitration award. In such disputes, the provisions of the CNA regarding the cost of arbitration would govern.

Comment Regarding N.J.A.C. 19:12-7.2

COMMENT: Regarding the proposed N.J.A.C. 19:12-7.2, as it pertains to procedures and guidelines concerning voluntary mediation or binding arbitration of disputes over CNA provisions concerning employee access and communications, the NJEA proposes that the rule contain:

1. That arbitrators are to be guided by the objectives and principles set forth in the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" of the National Academy of Arbitrators, the

American Arbitration Association, and the Federal Mediation and Conciliation Service;

2. That arbitrators have the same powers and authority as arbitrators on the Commission grievance arbitration panel, including to arrange and/or set a date, time, and place for a hearing; to proceed in the absence of any party who, having failed to obtain an adjournment, does not appear at the hearing; to issue subpoenas and deadlines for submission of post-hearing briefs; and

3. That where voluntary mediation is used, information disclosed by a party to a neutral while functioning in a mediatory capacity shall not be divulged by the neutral voluntarily or by compulsion and that documents or other papers received or prepared by an arbitrator while serving in a mediatory capacity shall be classified as confidential. The arbitrator shall not produce any confidential records of, or testify in regard to, any mediation conducted by the arbitrator.

RESPONSE: The Commission believes that the NJEA's suggestions could be useful and the Commission will add them as new N.J.A.C. 19:12-7.2(f) through (m) as a proposed change.

Comment Regarding N.J.A.C. 19:12-7.3(d)

COMMENT: The NJEA states that N.J.A.C. 19:12-7.3(d) should be clarified to make clear that the listed factors may not contradict or supersede the rights granted by N.J.S.A. 34:13A-5.13.

Specifically, NJEA suggests that paragraph (d)1 be eliminated as N.J.S.A. 34:13A-5.12 already delineates the public interest in connection with the WDEA. The NJEA proposes that N.J.A.C. 19:12-7.3(d)6 be clarified to provide that N.J.S.A. 34:13A-5.13 supersedes any existing provisions bearing on access to and communications with employees that are set by past practice, contracts, and case law.

RESPONSE: No administrative rule may contradict the statute it implements. Thus, the statutes to which NJEA refers would trump any contrary provision of an administrative rule, with the possible exception of contracts entered into prior to the effective date of the WDEA, and then only for the remaining term of such agreement. In addition, the Commission notes that the revised rule makes application of the factors listed in N.J.A.C. 19:12-7.3(d) discretionary, rather than mandatory, by substituting the word "may" for "shall."

Comment regarding N.J.A.C. 19:11-1.5

COMMENT: The NJEA, addressing the proposed amendments to N.J.A.C. 19:11-1.5, the clarification of unit rule, proposes: the elimination of a requirement that a certification be filed contemporaneously with the petition and that the petitioner should not be required to attest that the public employer has not asserted that any of the positions sought to be added are managerial or confidential.

RESPONSE: The Commission concurs with NJEA's position that the relevant information or evidence can be developed during the course of the proceeding. Accordingly, the revised rule eliminates the certification requirement at paragraph (c)2, instead the added text provides that the information that would have been submitted by certification will have been discovered during the investigation to be conducted by the Director of Representation during which the relevant information will be disclosed and determined.

Susan Pigula, Esq., Director, Division of Legislative, Administrative and Regulatory Actions, New Jersey Department of Transportation (NJDOT)

Comment Regarding N.J.A.C. 19:12-7.2

COMMENT: NJDOT suggests that N.J.A.C. 19:12-7.2(c) be clarified, noting that the modifier "may" is used with respect to voluntary mediation, but that "shall" is used in connection with binding arbitration. It suggests an alternate wording of N.J.A.C. 19:12-7.2(c)1 and 2. NJDOT also suggests that N.J.A.C. 19:12-7.2(e) be reworded to clarify that the parties' obligation regarding the arbitrator's fees applies to both mediation and binding arbitration.

RESPONSE: The Commission believes that the language of N.J.A.C. 19:12-7.2(c)1 and 2 does not require further clarification, as N.J.S.A. 34:13A-5.13(h), mandating that, absent agreement, an arbitrator "shall" issue a binding award resolving disputes over contract language pertaining to employee access and communications. However, the Commission concurs with NJDOT that a change in proposed N.J.A.C. 19:12-7.2(e) would be helpful to clarify the parties' obligations to pay for the arbitrator's fees and expenses. Thus, the Commission will delete from the subsection that the "cost of arbitration" shall be borne equally by the parties and replace with the "arbitrator's fees and expenses" shall be borne equally by the parties.

Comment Regarding N.J.A.C. 19:12-7.3

COMMENT: The NJDOT suggests that notice of an arbitrator's request for an extension be served on the parties and questions how many extensions are permissible. The NJDOT further suggests that the award be in writing and simultaneously served on the parties. Finally, the NJDOT suggests that at N.J.A.C. 19:12-7.3(d), the rule should substitute "In determining the award" for the proposed language "Where relevant."

RESPONSE: The proposed rules require, absent an extension approved by the Director of Conciliation, an arbitration award within 45 days. The Director's control of this process will prevent lengthy extensions of the deadline and delay in issuing an award. As originally proposed, N.J.A.C. 19:12-7.3(c) already mandates a written award and simultaneous service on the parties. The Commission is making changes in this rule to make the factors at N.J.A.C. 19:12-7.3(d) discretionary, rather than mandatory.

Joseph M. Hannon, Esq., of the firm, Genova, Burns on behalf of the New Jersey State League of Municipalities (NJSLOM)

Comment Regarding N.J.A.C. 19:12-7.3

COMMENT: NJSLOM suggests that proposed N.J.A.C. 19:12-7.3(a), (b), and (d) not be adopted because they "exceed what is required by the provisions of the WDEA and will impose unnecessary financial and administrative burdens on public employers." NJSLOM further comments that because the WDEA has no deadline for the issuing an arbitration award, the deadlines imposed by N.J.A.C. 19:12-7.3(a) and (b) are inappropriate. NJSLOM asserts that disputes should be resolved expeditiously. NJSLOM asserts that using the factors proposed in N.J.A.C. 19:12-7.3(d) would make the proceeding similar to interest arbitration. The dispute should be resolved in a more efficient and timely manner.

RESPONSE: The Commission agrees that N.J.S.A. 34:13A-5.13 does not put a specific deadline on an arbitration award. However, N.J.S.A. 34:13A-5.13(h) requires that arbitration proceedings are to be initiated if, after 30 days, the parties are unable to reach an agreement through collective negotiations. The Commission views this language as a directive for a fast resolution of disputes over a majority representative's workplace access to, and communications with employees. Thus, the proposed time deadlines are consistent with the WDEA and are necessary to implement it. As discussed in response to other comments, the Commission is revising N.J.A.C. 19:12-7.3(d), to make application of the factors discretionary, rather than mandatory. This change would ameliorate NJSLOM's concern that the arbitrations would be similar to costly interest arbitration proceedings.

Steven P. Weissman, Esq., and Ira W. Mintz, Esq., of the firm of Weissman & Mintz on behalf of the following labor organizations (collectively "Union Commenters"): New Jersey State AFL-CIO; Communications Workers of America, AFL-CIO; American Federation of Teachers-NJ, AFL-CIO; The Health Professionals and Allied Employees, AFT; The American Association of University Professors, Biomedical Health Sciences New Jersey; The Committee of Interns and Residents, SEIU; The American Association of University Professors-AFT (Rutgers); and Union of Rutgers Administrators-AFT

Comment Regarding N.J.A.C. 19:11-1.5

COMMENT: The Union Commenters assert that the proposed amendments requiring a certification effectively put a burden of proof on a petitioning union in what is normally an investigatory rather than adversarial proceeding. The Union Commenters have drafted a revised N.J.A.C. 19:11-1.5(c) that includes, *inter alia*, an obligation that a public employer respond to a majority representatives request for information before a clarification of unit petition is filed, language that would subject the public employer not complying with the request to unfair practice liability, and entitling the majority representative to interim relief.

RESPONSE: The Commission concurs with Union Commenters' position that the relevant information or evidence can be developed during the course of the proceeding. Accordingly, the revised rule eliminates the certification requirement. The Commission appreciates the efforts made by the Union Commenters in drafting alternative amendments to N.J.A.C. 19:11-1.5(c). The Commission's revised rulemaking reflects some, but not all, of its suggestions. The Commission's revised rulemaking does not address pre-petition disclosure of relevant information, nor does it address unfair practice liability and/or entitlement to interim relief.

Comment Regarding N.J.A.C. 19:12-7.2 and 7.3

COMMENT: The Union Commenters recite the rights of a majority representative for access to, and communications with, employees as set forth in N.J.S.A. 34:13A-5.13 and further observe that disputes over those issues shall be resolved through collective negotiations and/or binding arbitration, with the incorporation of such agreements or determinations into collective negotiations agreements. The Union Commenters do not specifically address any of the provisions of proposed rule N.J.A.C. 19:12-7.2.

Regarding N.J.A.C. 19:12-7.3, the Union Commenters assert that the factors listed in N.J.A.C. 19:12-7.3(d)1 through 6 are unnecessary and suggests excising this subsection from the rule proposal. the Union Commenters note that N.J.S.A. 34:13A-5.12 already proclaims that the public interest favors the implementation of the WDEA, including the provisions guaranteeing majority representatives access to and communications with employees in the workplace.

RESPONSE: Although the Union Commenters have not specifically addressed the proposed N.J.A.C. 19:12-7.2, the Commission notes that, as set forth in its response to the NJEA and as reflected in its revised rulemaking, provisions concerning the ethical responsibilities of arbitrators and confidentiality rules when the arbitrator is mediating, as well as rules governing the arbitration proceeding, the arbitrator's powers and authority are being proposed for inclusion in revised N.J.A.C. 19:12-7.2.

With respect to N.J.A.C. 19:12-7.3(d), to emphasize that consideration of the listed factors are discretionary, not mandatory, the Commission is changing "shall" to "may." The revised rulemaking would add new paragraph (d)7 providing for any other factors the arbitrator identifies as relevant.

Paul A. Kleinbaum, Esq., of Zazzali, Fagella, Nowak, Kleinbaum & Friedman on behalf of the American Federation of State, County and Municipal Employees, Council 63 (AFSCME).

Reference to the Submission of Union Commenters

COMMENT: AFSCME notes that has reviewed the comments of the Union Commenters and shares the concerns raised in their submission.

RESPONSE: The Commission refers AFSCME to its written response to the comments submitted by the Union Commenters above.

Comment Regarding N.J.A.C. 19:11-1.5

COMMENT: Like other parties submitting comments, AFSCME opposes the requirement of proposed N.J.A.C. 19:11-1.5(c) that would require the submission of a certification with the Clarification of Unit petition. AFSCME asserts that it should not be the burden of a petitioning union to amass information that may be in the employer's possession and control. AFSCME suggests that the statutory deadline of resolving unit work disputes within 60 days can be met by an orderly employer-union exchange of information after the petition is filed.

RESPONSE: As set forth in its responses to the commenters raising similar concerns, the Commission concurs that the relevant information or evidence can be developed during the proceeding. Thus, the revised rulemaking eliminates the certification requirement.

Comment Regarding N.J.A.C. 19:12-7.2

COMMENT: Similar to comments submitted by the NJEA, AFSCME urges that language should be added to proposed N.J.A.C. 19:12-7.2 regarding: arbitrators adhering to relevant professional responsibility codes; powers and authority of arbitrators similar to pertinent sections of the Commission's grievance arbitration rules (N.J.A.C. 19:12-5); and confidentiality of mediation activities and information when the arbitrator is functioning in that capacity.

RESPONSE: As set forth in its responses to the NJEA, the Commission's revised rulemaking incorporates each of AFSCME's suggestions. As revised, N.J.A.C. 19:12-7.2 would add provisions concerning the ethical responsibilities of arbitrators and confidentiality rules when the arbitrator is mediating, as well as rules governing the arbitration proceeding, the arbitrator's powers and authority.

Comment Regarding N.J.A.C. 19:12-7.3(d)

COMMENT: Regarding N.J.A.C. 19:12-7.3, AFSCME asserts that the factors listed in N.J.A.C. 19:12-7.3(d)1 through 6 are unnecessary and suggests excising this subsection from the rulemaking. It notes that N.J.S.A. 34:13A-5.12 already proclaims that the public interest favors the implementation of the WDEA, including the provisions guaranteeing majority representatives access to, and communications with, employees in the workplace.

RESPONSE: As set forth in its response to the NJEA and the Union Commenters, with respect to N.J.A.C. 19:12-7.3(d), the revised rulemaking substitutes "may" for "shall" to emphasize that the listed factors are discretionary, not mandatory. The revised rulemaking would also add paragraph (d)7, providing for any other factors the arbitrator identifies as relevant.

Mark Lesniak of the Rahway Library

COMMENT: Mr. Lesniak does not address the specific provisions of the notice of proposal, except to address the proposed amendments to N.J.A.C. 19:11-1.5, Clarification of Unit. He states:

> How is that first rule Constitutional??? Are they forcing all employees into the union? Are they suspending their rights to negotiate in their own interests? What if someone wants to start a new union and negotiate separately? Are they still obligated to belong?

These people are disgusting. "Democracy" firmly within quotes.

RESPONSE: The rulemaking does not require any employees who are added to a collective negotiations unit to become members of the majority representative organization. The Commission's enabling authority and implementing rules describe when and how employees can try to change their majority representative and also address procedures to make changes in the composition of collective negotiations units.

Debra L. Davis, Staff Representative on Behalf of Council of New Jersey State College Locals, AFT/AFL-CIO (CNJSCL)

Comment Regarding the Economic Impact and Rules Pertaining to Employee Access

COMMENT: The CNJSCL observes that the Economic Impact statement notes the possibility that public employers may have to hire and compensate substitute employees to fill in for employee/union representatives who are engaged in activities addressed by N.J.S.A. 34:13A-5.13. It asserts that the collective negotiations agreement covering employees represented by CNJSCL address such instances and as a result no State college or university will incur such an expense.

RESPONSE: The Commission acknowledges CNJSCL's comments but notes that the proposed rules apply Statewide, including where collective negotiations units that do not have agreements that contain similar terms.

David A. Cohen, Associate Vice President and Deputy General Counsel, Rutgers, the State University of New Jersey (Rutgers)

Comment Regarding N.J.A.C. 19:11-1.5

COMMENT: Rutgers has drafted and attached to its written submission, alternative language for this rule that would reflect its comments and suggestions. Rutgers suggests that two paragraphs be added to N.J.A.C. 19:11-1.5(c). It proposes that the rule be amended to prohibit, subject to the requirements of N.J.S.A. 34:13A-5.15(c), a unit clarification petition from seeking the addition of any employees who are excluded from that negotiations unit pursuant to a certification of representative, recognition clause, or other provision in a collective negotiations agreement. It contends that employers and exclusive representative employee organizations have long had the ability to negotiate exclusions (for example, probationary employees) from negotiations units. The WDEA only specifically repeals the ability to

negotiate exclusions with respect to employees who did not meet the threshold number of hours or percent of time worked requirements set forth in a certification of representative, recognition clause, or other provision in a collective negotiations agreement.

Rutgers proposes an amendment providing that a unit clarification petition must be accompanied by a certification that attests that the public employer has not asserted that the disputed title(s) is inappropriate for the unit for all the reasons identified in the statute, N.J.S.A. 34:13A-5.15(b), including other statutory exclusions in addition to managerial and confidential employees.

Rutgers further asserts that amendments at N.J.A.C. 19:11-1.5 (which it has drafted) are needed to clarify the definition of "casual employee(s)," which the WDEA defines as "employees who work an average of fewer than four hours per week over a period of 90 calendar days," N.J.S.A. 34:13A-5.15(c), and to define when the 90-day period starts and ends.

RESPONSE: N.J.S.A. 34:13A-5.15 provides that employees, other than casual employees, as defined by the statute, who are performing the work of a unit represented by a majority representative organization shall be included in that bargaining unit. The Commission believes that the restriction proposed by Rutgers regarding employees who have been excluded through a certification, recognition clause, or other provision in a CNA may conflict with the statute. Such circumstances can be addressed on a case-by-case basis.

As set forth in its responses to comments made by the Union Commenters and the NJEA, the Commission has decided to revise the rulemaking to eliminate the certification requirement.

As noted in the Commission's response to comments made by the FMBA, further clarification of the difference between regular and casual employment can be found in Commission case law. The WDEA does not set a start and end date for the 90-day period (such as a calendar quarter), so the Commission does not believe it has authority to adopt a rule that would delineate specific 90-day periods. Any disputes can be resolved case-by-case basis.

Comment Regarding N.J.A.C. 19:12-7.3(d)

COMMENT: As with N.J.A.C. 19:11-1.5, Rutgers has drafted alternative language that would implement its suggested changes in the rule. Rutgers suggests that proposed new N.J.A.C. 19:12-7.3(d) be expanded to provide further instructions to arbitrators. Rutgers proposes that arbitrators issuing an award under this rule be required to engage in the same analysis an interest arbitrator conducts pursuant to N.J.S.A. 34:13A-16(g).

Rutgers suggests that arbitrators be required to consider these additional factors: (1) the operations of the employer; (2) the operational impact on the employer; (3) the location(s) where negotiations unit members are assigned; (4) the impact on the safety of employees and non-employees; and (5) the ownership or lease of the location for which access is sought. These factors are relevant to assess how the access will impact the employer. For example, if any employee works in a building that is not owned or leased by the public employer, the public employer would not control access to the location. Arbitrators should account for such a fact in any ruling on access rights.

RESPONSE: As noted in its responses to the FMBA, the Union Commenters, the NJEA, and NJDOT, the Commission is modifying N.J.A.C. 19:12-7.3(d) to make consideration of the listed factors discretionary, as opposed to mandatory. It is adding a "catch-all" criterion. Neither the WDEA, nor the proposed rule, would bar Rutgers from presenting to an arbitrator evidence or argument on the additional factors it proposes. Such issues may not be relevant to less complex (for example, single building) workplaces.

Effect of Proposed Changes on Impact Statements Included in Original Proposal

There should be no impact on any of the impact statements in the original notice of proposal.

Full text of the proposed substantial changes to the proposed amendment and proposed new rules follows (additions to proposal indicated in italicized boldface ***thus***; deletions from proposal indicated in italicized cursive brackets *{*thus*}*):

CHAPTER 11
REPRESENTATION PROCEDURES

SUBCHAPTER 1. REPRESENTATION PETITIONS

19:11-1.5 Petition for clarification of unit

(a) (No change.)

(b) A petition for clarification of unit shall contain:

1.-2. (No change.)

3. A statement by petitioner listing and explaining fully the reasons for the proposed clarification. The reasons may include:

i.-v. (No change.)

vi. A dispute concerning the addition to a certified or recognized unit for collective negotiations of employees who perform negotiations unit work; and

[vi.] **vii.** (No change in text.)

4. (No change.)

(c) A petition for clarification of unit filed pursuant to (b)3vi above shall:

1. Not seek the addition of any employees of the same public employer who are included in an existing unit for collective negotiations;

***{*2. Be accompanied by a certification, or certifications, based on personal knowledge, supported by exhibits, such as official job descriptions, that:**

i. Describes the job duties of the petitioned for title(s);

ii. Lists the job duties of and specifically identifies job title(s) in the petitioner's collective negotiations unit that have the same or substantially similar duties to those of the petitioned-for titles;

iii. Attests that the public employer has not asserted that the disputed title(s) is confidential or a managerial executive; and

iv. Lists the name(s) of all employee organizations that might have an interest in the proceeding; and*}*

2. Identify the positions/titles the petitioner seeks to include in an existing negotiations unit, along with a statement explaining fully the reasons for the proposed inclusion.

i. The reasons for the inclusion of the positions/titles identified in the petition shall include a description of the negotiations unit work the petitioner alleges the employees in the disputed positions/titles perform, and an explanation of why that work is negotiations unit work.

ii. Along with the petition, the petitioner shall provide a copy of the most recent collective negotiations agreement between the petitioner and the employer and any documents upon which petitioner relies in support of its petition.

(d) Upon the filing of any petition, the Director of Representation shall investigate the petition to determine the facts. The Director shall issue a written request to the employer for relevant information, which shall be supplied to the Director and the petitioner within 10 calendar days of receipt of the request.

***{*3.*}* *(e) {Be} The petition shall be* resolved within 60 *calendar* days after such petition is filed with the Commission.**

CHAPTER 12
NEGOTIATIONS AND IMPASSE PROCEDURES; MEDIATION, FACT-FINDING, SUPER-CONCILIATION, AND GRIEVANCE ARBITRATION

SUBCHAPTER 7. IMPASSES OVER EMPLOYEE ORGANIZATION ACCESS TO EMPLOYEES

19:12-7.2 Resolution of collective negotiations impasses over access to employees

(a) If the parties are unable to reach agreement within 30 calendar days from the commencement of negotiations in accordance with N.J.S.A. 34:13A-5.13g regarding access to, and communications with, negotiations unit members, the exclusive employee organization, or the public employer may file a petition with the Public Employment Relations Commission to resolve the negotiations dispute.

1. Forms for filing a request for the appointment of an arbitrator to resolve a negotiations impasse regarding access to, and communications with, negotiations unit members will be supplied

upon request. Address requests to: Public Employment Relations Commission, PO Box 429, Trenton, New Jersey 08625-0429. The form is also available on the Commission's website: www.state.nj.us/perc.

(b) The Commission shall create an arbitration panel drawn from experienced members of its grievance arbitration panel who indicate a willingness to resolve negotiations impasses through voluntary mediation or the issuance of a binding award concerning disputes about proposed contract language pertaining to access to, and communications with, negotiations unit members as set forth in N.J.S.A. 34:13A-5.13a through f.

(c) The Director of Conciliation and Arbitration shall assign arbitrators to cases, who:

1. May resolve the dispute through voluntary mediation; or

2. Shall issue a binding award resolving the parties' negotiations disputes consistent with N.J.S.A. 34:13A-5.13a through f.

(d) The arbitrator shall charge a fee pursuant to a per diem fee schedule as set forth in the arbitrator's Commission grievance arbitration panel resume.

(e) The *{*cost of arbitration*}* *arbitrator's fees and expenses* shall be borne equally by the parties.

(f) The arbitrator shall be guided by the objectives and principles set forth in the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" of the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service.

(g) Information disclosed by a party to an arbitrator while functioning in a mediatory capacity shall not be divulged by the arbitrator voluntarily or by compulsion. All files, records, reports, documents, or other papers received or prepared by an arbitrator while serving in a mediatory capacity shall be classified as confidential. The arbitrator shall not produce any confidential records of, or testify in regard to, any mediation conducted by the arbitrator, on behalf of any party in any type of proceeding under the New Jersey Employer-Employee Relations Act, as amended, including, but not limited to, unfair practice proceedings under N.J.A.C. 19:14.

(h) The conduct of the arbitration proceeding shall be under the exclusive jurisdiction and control of the arbitrator.

(i) The arbitrator, after appointment, shall communicate with the parties to arrange for a date, time, and place for a hearing. In the absence of an agreement, the arbitrator shall have the authority to set the date, time, and place for a hearing. The arbitrator shall submit a written notice containing arrangements for a hearing within a reasonable time period before the hearing.

(j) The arbitrator shall have the authority to grant adjournments for good cause shown, upon either party's application or the arbitrator's own motion.

(k) The arbitrator, after duly scheduling the hearing, shall have the authority to proceed in the absence of any party who, having failed to obtain an adjournment, does not appear at the

hearing. Such party shall be deemed to have waived its opportunity to provide argument and evidence.

(l) The arbitrator may administer oaths, conduct hearings, and require the attendance of such witnesses and the production of such books, papers, contracts, agreements, and documents as the arbitrator may deem material to a just determination of the issues in dispute, and for such purpose may issue subpoenas and shall entertain any motions to quash such subpoenas. Any hearings conducted shall not be public unless all parties agree to have them public.

(m) The parties, at the discretion of the arbitrator, may file post-hearing briefs. The arbitrator, after consultation with the parties, shall have the authority to set a time period for the submission of briefs. The parties shall not be permitted to introduce any new factual material in the post-hearing briefs, except upon special permission of the arbitrator.

19:12-7.3 Award

(a) The arbitrator shall issue an award as soon as possible after the close of the record, but not more than 45 days thereafter.

(b) An arbitrator may not extend the timeline for issuing a written award without approval from the Director of Conciliation and Arbitration (Director)*, or his or her designee*. Extension requests shall be in writing and filed before the 35th day. The Director*, or his or her designee,* shall respond to extension requests within five days of receipt.

(c) The award shall be in writing and shall be submitted to the parties simultaneously, and electronically to the Public Employment Relations Commission.

(d) Where relevant, the arbitrator *{*shall*}* *may* take into account the following factors:

1. The interests and welfare of the public;

2. Any stipulations of the parties;

3. The lawful authority of the employer;

4. The financial impact on the employer;

5. Comparability; *{*and*}*

6. Existing provisions bearing on the exclusive representative's access to employees, whether set by past practice, contract, statute, or case law*{.}; and*

7. Any other factors the arbitrator identifies as relevant.

(e) The award or a voluntary settlement must provide that language on the subjects covered by N.J.S.A. 34:13A-5.15a through f be incorporated into the parties' collective negotiations agreement.
