
Recent Case Law & Policy Developments – 2003

Public Employment Relations Commission

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What follows is an overview of Commission case law since the April 2002 Annual Conference.

Discrimination and Protected Rights
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The New Jersey Employer-Employee Relations Act prohibits discrimination to encourage or discourage union activity protected by the Act, and interference with protected rights.

The Commission found illegal motivation in *Middlesex Cty. Sheriff and Middlesex Cty.*, P.E.R.C. No. 2003-4, 28 *NJPER* 308 (¶33115 2002), app. pending App. Div. Dkt. No. A-000057-02T2 (reassignment and suspension for questioning unit members about drug testing). It found unlawful interference in *City of Somers Point*, P.E.R.C. No. 2003-40, 28 *NJPER* 586 (¶33182 2002) (reprimand and suspension in retaliation for filing a grievance seeking shift change to accommodate National Guard training).

The Commission found no illegal motivation in *City of Trenton*, P.E.R.C. No.

2002-70, 28 *NJPER* 243 (¶33092 2002), app. pending App. Div. Dkt. No. A-5765-01T3 (less than a preponderance of the evidence indicated that protected activities figured in decision not to promote deputy chief to chief); *Middlesex Cty. Sheriff and Middlesex Cty.* (reassignment of six sheriff's officers); *Burlington Cty.*, P.E.R.C. No. 2003-13, 28 *NJPER* 348 (¶33124 2002) (protected activity was not a substantial or motivating factor in suspension or reassignment); *State of New Jersey Judiciary*, P.E.R.C. No. 2003-41, 28 *NJPER* 588 (¶33183 2002) (union did not meet burden of proof on its allegations concerning the reassignment of nine senior probation officers).

The Commission denied a motion for reconsideration of an interim relief decision restraining an employer from implementing a planned work schedule change. *Borough of Chester*, P.E.R.C. No. 2002-59, 28 *NJPER* 220 (¶33076 2002). The Commission designee had found that the union had demonstrated a substantial likelihood of success on the merits of its claim that the

Borough planned to change from a 12-hour to an 8-hour schedule in retaliation for a police officer's grievance about special duty assignments. The designee also found that the Association had demonstrated irreparable harm if the schedule was changed and that the Borough had not asserted any harm to it or the public in maintaining the current work schedule. The Commission concluded that no extraordinary circumstances warranted reconsideration of the designee's determinations.

The Commission declined to restrain binding arbitration of a grievance alleging that the termination of a provisional security guard was discriminatory. *Jersey City State-Operated School Dist.*, P.E.R.C. No. 2003-31, 28 *NJPER* 454 (¶33169 2002). The Commission restrained arbitration to the extent, if any, the grievance sought to have the guard placed in a permanent Civil Service position.

Work Schedules, Work Hours, and Shift Selection
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The Commission concluded that a police work schedule was mandatorily negotiable and could be submitted to interest arbitration. *Borough of Peapack and*

Gladstone, P.E.R.C. No. 2002-62, 28 *NJPER* 227 (¶33081 2002). The arbitrator could consider the parties' factual presentations and arguments in light of the statutory criteria and prior Commission decisions and, if necessary, the Commission could review any work schedule award to ensure that the criteria have been considered and its guidelines have been followed.

The Commission restrained arbitration to the extent a grievance challenged a city's right to assign police officers to 8-hour rather than 12-hour shifts to meet its staffing, fatigue and supervision concerns. *City of Millville*, P.E.R.C. No. 2003-21, 28 *NJPER* 418 (¶33153 2002).

A clause which provides that work schedules shall not be changed for the purpose of avoiding the payment of overtime is negotiable and enforceable because it protects the employees' interests in negotiating over their work hours and does not interfere with any governmental policy interests. *Camden Cty.*, P.E.R.C. No. 2003-54, 29 *NJPER* ____ (¶_____ 2002).

A grievance contested a change in work hours and compensation for sergeants called in to cover for lieutenants. Rather than pay sergeants overtime for time spent covering

for absent lieutenants, the employer required sergeants to change to the lieutenants' shifts. The Commission concluded that the employer's governmental policy interest in guarding against supervision gaps would not be substantially limited by paying officers for their regular shift, in addition to overtime for hours worked outside their regular schedules. *Woodbridge Tp.*, P.E.R.C. No. 2003-55, 29 *NJPER* ____ (¶____ 2002).

A proposal concerning shift exchanges was not mandatorily negotiable unless the contract also provided that exchanges are subject to the chief's approval. *Town of Kearny*, P.E.R.C. No. 2002-77, 28 *NJPER* 264 (¶33101 2002).

A grievance contested an employee's temporary assignment to out-of-title work on a different shift. The Commission concluded that the employees' interests in not having to perform work outside their job description and title, their interest in working their normal negotiated hours of work, and their interest in negotiating over the allocation of work hours and overtime pay opportunities outweighed the employer's interests. *Rahway Valley Sewerage Auth.*, P.E.R.C. No. 2002-79, 28 *NJPER* 283 (¶33106 2002).

A provision concerning guaranteed overtime for custodians was found not mandatorily negotiable to the extent it would require the employer to schedule services when it has determined that services are not needed. *Bound Brook Bd. of Ed.*, P.E.R.C. No. 2003-43, 28 *NJPER* 592 (¶33185 2002). The provision was found mandatorily negotiable to the extent it would require that needed work hours be distributed pursuant to a negotiated overtime allocation system. Such an allocation system is subject to an employer's prerogative to deviate from that system in an emergency or should an employee with special qualifications be needed. *Ibid.*

Discipline

Under *State v. State Troopers Ass'n*, 134 *N.J.* 393 (1993), a reassignment or transfer of a police officer may not be arbitrated, even if it was disciplinary. *Union Cty. Sheriff*, P.E.R.C. No. 2003-2, 28 *NJPER* 303 (¶33113 2002); *State of New Jersey (Div. of State Police)*, P.E.R.C. No. 2002-78, 28 *NJPER* 265 (¶33102 2002); *State of New Jersey (Div. of State Police)*, P.E.R.C. No. 2003-27, 28 *NJPER* 449 (¶33163 2002) (restraining arbitration over a challenge to the

scoring, ranking and rating system used to determine an assignment).

The question of whether a police officer is entitled to be represented by an attorney at a due process hearing is a procedural one that is legally arbitrable. *New Jersey Institute of Technology*, P.E.R.C. No. 2003-9, 28 *NJPER* 343 (¶33120 2002), app. pending App. Div. Dkt. No. A-000222-02T2.

The Commission found that placement in a school district's Professional Supervision Evaluation System was an application of evaluative criteria, not a disciplinary action, and therefore restrained arbitration over a challenge to that placement. *West Morris Reg. H.S. Bd. of Ed.*, P.E.R.C. No. 2003-3, 28 *NJPER* 304 (¶33114 2002).

Below standard ratings do not transform an evaluation of teaching performance into a reprimand that can be challenged through binding arbitration. *Knowlton Tp. Bd. of Ed.*, P.E.R.C. No. 2003-47, 29 *NJPER* ____ (¶_____ 2002). A related transfer was intended to move a teacher to a more appropriate setting rather than to punish her. *Ibid.*

A grievance contested the transfers of three clerical employees. The employer did not provide any reasons for the reassignments

and the union contended that the reassignments were disciplinary. The Commission concluded that an arbitrator could decide in the first instance whether two of the transfers were disciplinary, and if so, whether they were for cause. *Howell Tp.*, P.E.R.C. No. 2003-30, 28 *NJPER* 452 (¶33166 2002). Should the arbitrator find that the transfers were not disciplinary and issue an award which the employer believes would significantly interfere with its prerogative to transfer based on an assessment of relative qualifications, the employer may refile its petition. The Commission restrained binding arbitration over a claim that a confidential employee was transferred for disciplinary reasons.

The Commission declined to restrain binding arbitration of a grievance asserting that an alleged mid-year termination of an instructional aide lacked just cause and violated contractual notice provisions. *Tinton Falls Bd. of Ed.*, P.E.R.C. No. 2002-68, 28 *NJPER* 241 (¶33090 2002). The Commission concluded that the employer made no negotiability argument distinguishing a long line of cases declining to restrain binding arbitration of mid-year terminations of non-professional school employees.

Increment Withholdings

Withholding an increment is generally a form of discipline, but not all increment withholdings can go to binding arbitration. Since the 1990 amendments to the PERC Act, *N.J.S.A. 34:13A-22 et seq.*, the Commission has been empowered to determine the proper forum for reviewing increment withholding disputes involving teaching staff members. *Scotch Plains-Fanwood Bd. of Ed.*, P.E.R.C. No. 91-67, 17 *NJPER* 144 (¶22057 1991), sets out the analysis the Commission uses in making such determinations.

Withholdings based predominately on the evaluation of teaching performance cannot be reviewed by an arbitrator and can only be reviewed by the Commissioner of Education. *Trenton Bd. of Ed.*, P.E.R.C. No. 2002-67, 28 *NJPER* 239 (¶33089 2002) (stated reasons for withholding concern administration of a district reading program); *Phillipsburg Bd. of Ed.*, P.E.R.C. No. 2003-8, 28 *NJPER* 340 (¶33119 2002) (assistant principal's alleged failure to perform duties to ensure student safety); *Knowlton Tp. Bd. of Ed.* (withholding centered on parental complaints and the teacher's interactions with students in class); *Northern Highlands Reg. Bd. of Ed.*, P.E.R.C. No. 2003-49, 29 *NJPER* ____ (¶_____ 2002)

(alleged inappropriate classroom behavior and inappropriate instructional methodology).

Withholdings not based predominately on the evaluation of teaching performance may be reviewed by an arbitrator. *Hackettstown Bd. of Ed.*, P.E.R.C. No. 2003-48, 29 *NJPER* ____ (¶_____ 2002) (nurse's alleged insubordinate refusal to attend a field trip, not evaluation of her performance as a school nurse).

Randolph Tp. Bd. of Ed. and Randolph Ed. Ass'n, 328 *N.J. Super.* 540 (App. Div. 2000), certif. den. 165 *N.J.* 132 (2000), does not bar parties from agreeing to binding arbitration of all increment withholdings involving non-teaching staff members. *Flemington-Raritan Bd. of Ed.*, P.E.R.C. No. 2003-64, 29 *NJPER* ____ (¶_____ 2003). The opportunity to seek such agreements through negotiations existed under *N.J.S.A. 34:13A-5.3* prior to the 1990 education amendments to the PERC Act and those amendments did not restrict or limit any 5.3 rights. *N.J.S.A. 34:13A-28*. The 1990 amendments were intended to provide additional rights and *Randolph* clarifies that the additional right to mandatory binding arbitration extends only to increment withholdings that are "disciplinary" as defined by that amendment.

Transfers and Assignments

The superintendent of State Police's substantive decision to transfer or reassign a State trooper is preeminently a policy determination. *State of New Jersey (Div. of State Police)*, P.E.R.C. No. 2002-78, 28 *NJPER* 265 (¶33102 2002). Characterizing a trooper's transfer or reassignment as disciplinary does not make that personnel action negotiable given *State v. State Troopers Ass'n*, 134 *N.J.* 393 (1993). However, the Commission declined to restrain binding arbitration of a grievance to the extent it claimed that the employer violated contractual procedures allegedly applicable to filling an acting unit head position. *Ibid.* Arbitration of this grievance was restrained over any claim that the grievant was denied the position for discriminatory or political reasons. *See Howell Tp.*, P.E.R.C. No. 96-59, 22 *NJPER* 101 (¶27052 1996).

The Commission restrained arbitration over a challenge to an employer's prerogative to abolish positions and transfer duties. *City of Asbury Park*, P.E.R.C. No. 2003-53, 29 *NJPER* ____ (¶____ 2002).

Public employers and unions may agree that seniority can be a factor in shift assignments where all qualifications are equal

and managerial prerogatives are not otherwise compromised. *City of New Brunswick*, P.E.R.C. No. 2003-37, 28 *NJPER* 578 (¶33179 2002). However, public employers have a non-negotiable prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs.

The Commission declined to restrain binding arbitration of a grievance contesting the assignment of toll supervisors to relieve toll collectors during breaks on the midnight shift. *New Jersey Hwy. Auth.*, P.E.R.C. No. 2002-76, 28 *NJPER* 261 (¶33100 2002), app. pending App. Div. Dkt. No A-6397-01T3. The Commission concluded that arbitration would not significantly interfere with the Authority's governmental policy right to manage its operations.

A contract may not prohibit the assignment of teachers to duty assignments as it interferes with a school board's ability to ensure student safety and supervision. However, issues of compensation and rotation of such duties are mandatorily negotiable. *Princeton Reg. Bd. of Ed.* An article restricting inter-school travel unduly restricts teacher assignments and is not mandatorily negotiable, but travel requirements may raise

mandatorily negotiable issues of compensation and workload. *Ibid.*

A union could not legally challenge a police chief's decision to assign an on-duty officer or not to require the presence of an off-duty officer around construction projects. *Borough of Belmar*, P.E.R.C. No. 2003-52, 29 *NJPER* ____ (¶____ 2002), recon. den. P.E.R.C. No. 2003-61, 29 *NJPER* ____ (¶____ 2003).

Health Benefits

The level of health benefits is mandatorily negotiable, but the identity of a carrier is permissively negotiable. *Kearny*. An interest arbitrator could not consider sections of a contract proposal that would modify benefits under the State Health Benefits Program. *Ibid.*

Compensation and Leave

The hourly rate of pay for road work performed by sheriff's officers for outside contractors was found mandatorily negotiable. *Somerset Cty. Sheriff*, P.E.R.C. No. 2002-60, 28 *NJPER* 221 (¶33077 2002). A proposal did not appear to restrict the employer's power to ban road jobs if required by law or public safety considerations, but merely set an hourly

rate of pay covering compensation and benefit costs for any road jobs actually done.

The Commission denied a request for a restraint of binding arbitration of a grievance contesting the salary guide placement of a newly-hired teacher. *Marlboro Tp. Bd. of Ed.*, P.E.R.C. No. 2002-61, 28 *NJPER* 222 (¶33078 2002). The Commission concluded that initial placement on a salary guide is a mandatorily negotiable issue. However, the Commission recognized that there is a critical statewide shortage of world language teachers and held that arbitration may not be used to block the board's ability to hire qualified staff in this area. The Commission retained jurisdiction so that the board may reactivate its petition if the arbitrator finds a contractual violation and the board believes that the award significantly interferes with its educational obligation to provide necessary staff.

Initial salary guide placement is a mandatorily negotiable issue and an employer's arguments about the timeliness of a grievance address contractual arbitrability issues rather than negotiability concerns. *Cranford Bd. of Ed.*, P.E.R.C. No. 2003-19, 28 *NJPER* 415 (¶33151 2002); *Wayne Tp.*, P.E.R.C. No. 2003-67, 29 *NJPER* ____ (¶____ 2003).

An agreement providing for the payment of additional compensation to employees who work overtime on holidays, or at times when other workers do not ordinarily work, is mandatorily negotiable. *Roselle Bd. of Ed.*, P.E.R.C. No. 2003-20, 28 *NJPER* 417 (¶33152 2002). An arbitrator could consider the board's argument that Monday, November 12, the day after Veterans Day, was not a holiday within the meaning of the negotiated agreement.

Overtime work and the form of payment for overtime are mandatorily negotiable issues. *Borough of Spring Lake*, P.E.R.C. No. 2003-38, 28 *NJPER* 579 (¶33180 2002). The Commission's scope of negotiations jurisdiction does not extend to deciding whether a grievant is in a negotiations unit or covered by an arbitration clause. That issue must be addressed to the arbitrator or a court. *Ibid.*

An employer violated the Act when it changed employee pay dates. *Brick Bd. of Ed.*, P.E.R.C. No. 2003-25, 28 *NJPER* 436 (¶33160 2002). The Commission concluded that timing of paychecks is negotiable and that the employer had an obligation to negotiate with the union prior to changing a 15-year practice.

The Commission declined to restrain arbitration to the extent a union claimed that the contract required that a teacher be awarded additional compensation for having to teach two additional students added to her eighth period resource center classroom. *Franklin Tp. Bd. of Ed.*, P.E.R.C. No. 2003-58, 29 *NJPER* ____ (¶____ 2002). The Commission restrained arbitration to the extent a grievance sought to have a board maintain class size in compliance with the State's special education code. *Ibid.*

The Commission also declined to restrain arbitration to the extent a union claimed that the parties' contract required that special area teachers be renumerated for additional class assignments. *Wanaque Bor. Bd. of Ed.*, P.E.R.C. No. 2003-69, 29 *NJPER* ____ (¶____ 2003).

A charge alleged that the employer violated the Act when it unilaterally removed four doctors from a negotiations unit of professional employees and reduced their compensation, hours, and benefits and when it did not provide requested information concerning the doctors' current employment status. The Commission affirmed the Hearing Examiner's decision to grant summary judgment dismissing as untimely the

allegations concerning the removal from the negotiations unit. *State of New Jersey*, P.E.R.C. No. 2003-56, 29 *NJPER* ____ (¶____ 2002). Her recommendation to find that the employer violated the Act by refusing to provide the union with relevant information concerning the employment status of the asserted employees was adopted.

Parties may agree to permit police officers to take leave in numbers that do not compromise minimum staffing levels. Thus, an arbitrator could consider whether an employer had agreed that up to four officers, not three, could be off on a given shift. *Galloway Tp.*, P.E.R.C. No. 2003-65, 29 *NJPER* ____ (¶____ 2003).

Sick Leave and Tardiness

A grievance contested a policy requiring employees to submit doctors' notes for weekend call outs and docking their pay if they did not. *Passaic Cty.*, P.E.R.C. No. 2002-63, 28 *NJPER* 234 (¶33085 2002). The Commission held that the employer had a prerogative to require its employees to submit doctors' notes when calling out on weekends, but the issue of who pays for any required doctors' notes was legally arbitrable. The Commission also held legally arbitrable any

dispute over docking of pay or discipline that may stem from an employee not producing a doctor's note upon returning to work.

The Commission restrained arbitration over a change in a doctor's note requirement and in the employer's definition of excessive absenteeism. *City of Jersey City*, P.E.R.C. No. 2003-57, 29 *NJPER* ____ (¶____ 2003). The Commission, however, declined to restrain arbitration over a requirement that employees endeavor to schedule elective surgery on days off. *Ibid.*

A grievance protested a home visit that an employer contended was conducted in part to verify that a police officer on sick leave was at his residence. The Commission concluded that the grievance was legally arbitrable; it did not challenge the employer's adoption of a sick leave verification policy, but protested a particular home visit. *Borough of Dumont*, P.E.R.C. No. 2003-7, 28 *NJPER* 337 (¶33118 2002). The Commission concluded that an arbitrator could evaluate whether the visit was conducted for reasons other than implementing a sick leave verification policy or constituted an egregious and unjustifiable violation of the officer's privacy.

A grievance claimed that the employer harassed an employee and violated the

contract by requiring an absent police dispatcher to be examined by the employer's doctor the day the employee called in sick and to be escorted to the doctor by a uniformed police officer. The Commission held that the employees' interests in arbitrating the claim of harassment and improper treatment outweighed the employer's interest in unilaterally insisting that employees be examined by the employer's doctor instead of the employee's own doctor. *Borough of Belmar*, P.E.R.C. No. 2003-63, 29 *NJPER* ____ (¶____ 2003).

Worker's compensation laws do not bar majority representatives either from seeking to enforce a safety clause on behalf of all employees or from pursuing a contract remedy such as restoration of sick leave days. *Paterson State-Operated School Dist.*, P.E.R.C. No. 2002-75, 28 *NJPER* 259 (¶33099 2002). The Commission also concluded that nothing in *N.J.S.A.* 18A:30-2.1 would preclude an agreement to restore sick leave days to an employee who was absent for a short period of time because of an allergic reaction to pesticides used in the workplace.

A grievance asserted that a supervisor was injured on the job, sought to return to work, and was unjustly denied permission to

return to work. The grievance sought reimbursement for sick, vacation and credit days taken after he was denied permission to return to work. The Commission concluded that the dispute did not involve a claim for reimbursement for a work-related injury under *N.J.S.A.* 18A:30-2.1 and that a factual dispute over the physical condition of an employee seeking to return to work is legally arbitrable. *Jersey City State-Operated School Dist.*, P.E.R.C. No. 2003-35, 28 *NJPER* 575 (¶33177 2002).

Promotions

Public employers have a non-negotiable right to fill vacancies and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs. *See, e.g., Local 195, IFPTE v. State*, 88 *N.J.* 393 (1982). Promotional criteria are not mandatorily negotiable, although the procedural aspects of promotions are. *Bethlehem Ed. Ass'n v. Bethlehem Bd. of Ed.*, 91 *N.J.* 38 (1982); *State v. State Supervisory Employees Ass'n*, 78 *N.J.* 54 (1978). Indeed, the opportunity to apply for a promotion intimately and directly affects the work and welfare of employees and is itself a mandatorily negotiable term and

condition of employment. *State Supervisory* at 90-91; *State of New Jersey, Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n, of N.J.*, 179 N.J. Super. 80, 94 (App. Div. 1981).

The line between a substantive and procedural matter is sometimes indistinct, and giving a matter a particular label may not resolve the issue. See, *Bethlehem*, 91 N.J. at 50. However, mandatorily negotiable procedures include notice of promotional criteria and changes in such, *State Troopers NCO Ass'n*; guarantees that employees meeting all of the employer's promotional criteria will be considered, *Englewood Bd. of Ed.*, P.E.R.C. No. 98-75, 24 *NJPER* 21 (¶29014 1997); and requirements that employees be informed of their scores on oral examinations, *Montclair Tp.*, P.E.R.C. No. 90-9, 15 *NJPER* 499 (¶20206 1989). The Commission applied these principles in deciding the negotiability of issues involving a broad range of promotional practices. *Washington Tp.*, P.E.R.C. No. 2002-80, 28 *NJPER* 294 (¶33110 2002), recon. granted P.E.R.C. No. 2003-23, 28 *NJPER* 432 (¶33158 2002); *Middlesex Cty. College*, P.E.R.C. No. 2003-6, 28 *NJPER* 335 (¶33117 2002); *Maplewood Tp.*, P.E.R.C. No. 2003-51,

29 *NJPER* ____ (¶____ 2002); *Middlesex Cty. College*, P.E.R.C. No. 2003-62, 29 *NJPER* ____ (¶____ 2003).

The Commission restrained binding arbitration of a grievance contesting the selection of an employee to serve as acting criminal investigation officer. *State of New Jersey (Div. of State Police)*, P.E.R.C. No. 2003-16, 28 *NJPER* 410 (¶33148 2002). The substantive assessment of relative qualifications is preeminently a policy determination not subject to binding arbitration.

The State Police's interest in knowing the results of internal investigations before permanently promoting employees outweighs the employees' interest in being promoted. *State of New Jersey (Div. of State Police)*, P.E.R.C. No. 2003-18, 28 *NJPER* 414 (¶33150 2002). Also, any claim that the retroactive date of a promotion constituted a new disciplinary procedure or sanction is neither negotiable nor legally arbitrable for State police. *Ibid.*

A grievance asserted that the employer violated the contract by not filling a position and by not paying an employee a higher rate of compensation for the duties he allegedly performed in that capacity. The Commission

restrained arbitration over the claim that the position had to be filled since such claims are non-negotiable. *Borough of Lincoln Park*, P.E.R.C. No. 2003-36, 28 *NJPER* 576 (¶33178 2002). The Commission also restrained arbitration over the claim that the position had to be reclassified since the Department of Personnel had rejected that claim and an arbitrator cannot second-guess DOP's rulings in classification appeals. Finally, the Commission restrained arbitration over a compensation claim because it was not separable from the claim that the employee's title had to be reclassified and would also have required an arbitrator to second-guess DOP's ruling. *Ibid.*

Procedural

Requests for review of decisions of the Director of Representation are due within thirteen days of when a decision is sent by mail – ten days for the request and three days added to account for the time it takes to receive the decision by mail. *Borough of Kenilworth*, P.E.R.C. No. 2003-26, 28 *NJPER* 438 (¶33161 2002); *N.J.A.C.* 19:11-8.1. Requests are not due thirteen days after a decision is actually received.

The Commission will normally dismiss a scope petition seeking a restraint of advisory arbitration unless the petition alleges that the subject of the grievance is preempted by statute or regulation. In *Eastampton Bd. of Ed.*, P.E.R.C. No. 2002-64, 28 *NJPER* 236 (¶33086 2002), the Commission found no assertion that the subject of the grievance was preempted by statute or regulation and the grievance could legally be submitted to advisory arbitration. Whether the parties have agreed to advisory arbitration of a particular type of dispute is an issue of contractual arbitrability outside the Commission's jurisdiction. *Cinnaminson Tp. Bd. of Ed.*, P.E.R.C. No. 2003-44, 28 *NJPER* 593 (¶33186 2002).

A motion for reconsideration of a Commission decision filed more than a month late and after the time to appeal had run was untimely. *Glen Ridge School Personnel Ass'n and NJEA*, P.E.R.C. No. 2003-29, 28 *NJPER* 451 (¶33165 2002).

A scope petition was untimely when it was filed almost nine months after the parties petitioned for interest arbitration. *City of Passaic*, P.E.R.C. No. 2003-50, 29 *NJPER* ____ (¶____ 2002); *see also N.J.A.C.* 19:16-5.5(c). The petition was not independent of

the interest arbitration because the city also asked the arbitrator to delete the disputed clause and the union had proposed a modification to the clause.

There was no basis for a scope of negotiations determination where the only issue was whether the dispute had been resolved in an unfair practice settlement. *Rumson-Fair Haven Regional H.S. Bd. of Ed.*, P.E.R.C. No. 2002-65, 28 *NJPER* 236 (¶33087 2002).

Once the parties have reached agreement on a successor contract, there is normally no longer a scope of negotiations dispute, unless the parties have agreed to reserve the issue raised by the petition. *Passaic Bd. of Ed.*, P.E.R.C. No. 2003-66, 29 *NJPER* ____ (¶____ 2003) (parties' participation in scope proceeding indicated their understanding that Commission would decide scope petition).

<p>Payroll Deduction Determinations Representation Fees</p>
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Effective August 1, 2002, the Legislature amended the Act to permit a majority representatives to file a petition seeking an order requiring the employer to deduct representation fees from paychecks of

non-members, provided certain statutory conditions are met. *P.L. 2002, c. 45*. In its first case applying the new statute, the Commission ordered an employer to institute a payroll deduction of the representation fee in lieu of dues from the wages or salaries of the negotiations unit employees who are not members of the majority representative. *Hunterdon Cty.*, P.E.R.C. No. 2003-24, 28 *NJPER* 433 (¶33159 2002), app. pending App. Div. Dkt. No. A-001869-02T5. The Commission concluded that the statutory conditions had been met. The Commission also ordered the employer to post a Notice To Employees which explains the investigation process and informs employees that fees will now be deducted.

Rules implementing the new statute have been adopted. *N.J.A.C. 19:19-1 et seq.* Under those rules, a Commission designee found that the pendency of the appeal in *Hunterdon Cty.* did not warrant delaying processing of a petition where the union had met the mandated statutory conditions. *Salem Cty.*, P.D.D. 2003-1, 29 *NJPER* ____ (¶____ 2003). The designee ordered the employer to deduct fees after being notified by the majority representative that it had complied with the requirements of *N.J.A.C. 19:17-3.3* and -4.1.

Miscellaneous

The Commission reaffirmed that tenure and other forms of job security for custodians are mandatorily negotiable. *Nutley Bd. of Ed.*, P.E.R.C. No. 2002-69, 28 *NJPER* 242 (¶33091 2002).

The Commission declined to restrain binding arbitration over a grievance alleging a violation of a union's contractual right to present its views at all steps of the grievance procedure. *Lakehurst Bd. of Ed.*, P.E.R.C. No. 2002-66, 28 *NJPER* 238 (¶33088 2002). The employer's contractual defenses concerning the applicability and conditions of the parties' grievance procedure had to be addressed by the arbitrator.

A union did not breach its duty of fair representation in the way it conducted the contract ratification process or pursued a grievance to arbitration. *Egg Harbor Tp. Ed. Ass'n*, P.E.R.C. No. 2002-71, 28 *NJPER* 249 (¶33094 2002). Another union was ordered to reimburse a unit member at reasonable and customary rates for the attorney of his choice to represent him in his grievance arbitration proceeding. *Glen Ridge School Personnel Ass'n and NJEA*, P.E.R.C. No. 2002-72, 28 *NJPER* 251 (¶33095 2002). The member had

filed an unfair practice charge alleging that the respondent violated the Act by misleading him into trusting the union to provide him with representation in his arbitration and discrimination cases related to his termination.

A charge alleging a mere breach of a settlement agreement does not warrant a Complaint and Notice of Hearing. Accordingly, where a charge sought enforcement of a settlement agreement resolving two prior unfair practice charges or reinstatement of those charges, the Commission denied an appeal of a decision of the Director of Unfair Practices refusing to issue a Complaint. *City of Asbury Park and IAFF Local 384*, P.E.R.C. No. 2002-73, 28 *NJPER* 253 (¶33096 2002). The Commission also found that the Director did not abuse his discretion in refusing to reopen the prior charges.

The Commission, however, found a violation of the Act when an employer repudiated an agreement settling an unfair practice charge. *Irvington Bd. of Ed.*, P.E.R.C. No. 2003-5, 28 *NJPER* 334 (¶33116 2002), app. pending App. Div. Dkt. No. A-000407-02T5. The employer took no action to comply with the terms of the agreement.

An article concerning conducting union business on work time was found to be mandatorily negotiable. *Kearny*.

An article that would establish a 30-month phase-out period for old uniforms was found to be not mandatorily negotiable. *Ibid*.

The Commission denied a motion for reconsideration of an interim relief decision enjoining an employer from shifting certain transport duties from corrections officers to non-unit sheriff's officers until negotiations are completed. *Union Cty.*, P.E.R.C. No. 2003-14, 28 *NJPER* 352 (¶33126 2002).

The Commission also denied a motion for reconsideration of an interim relief decision refusing to rescind a unilateral extension of the work year of four child study team members during successor contract negotiations. *Lakehurst Bd. of Ed.*, P.E.R.C. No. 2003-28, 28 *NJPER* 451 (¶33164 2002). A Commission designee had found that requiring the team members to work an extended work year may have been the exercise of a managerial prerogative and that therefore, the Association had not demonstrated that it had a substantial likelihood of prevailing in a final Commission decision.

The Commission denied a motion for reconsideration of a denial of interim relief in a case involving a change in the number of lieutenants on the first shift. *Union Cty.*, P.E.R.C. No. 2003-46, 29 *NJPER* ____ (¶_____ 2002). The Commission designee had determined that the union had not demonstrated a substantial likelihood of prevailing on its unilateral change claim and that there was a material factual dispute over whether the alleged change was intended to discriminate against the PBA's president.

The amount of time for classes, homeroom, and passing between classes, is an educational policy determination and is not mandatorily negotiable. *Princeton Reg. Bd. of Ed.*, P.E.R.C. No. 2003-15, 28 *NJPER* 399 (¶33143 2002).

An article requiring that teachers receive copies of all texts used in courses does not significantly interfere with a board's right to determine curriculum and is mandatorily negotiable. *Ibid*. However, the decision whether a teacher should have a Teacher's Edition of a textbook is predominately one of educational policy. *Passaic Bd. of Ed.*

The Commission declined to restrain binding arbitration of a grievance contesting the school board's denial of a teacher's request

for professional leave days to attend the annual convention of the New Jersey School Boards Association. *Bethlehem Tp. Bd. of Ed.*, P.E.R.C. No. 2003-10, 28 *NJPER* 345 (¶33121 2002). The Commission concluded that the number of personal leave days and the reasons for allowing personal leave are negotiable and that although a board may have a managerial prerogative to deny leaves when necessary to assure adequate staffing, this board did not cite staffing in denying the grievance.

A majority representative has a right under the New Jersey Employer-Employee Relations Act to request and receive a list of unit member home addresses. *Morris Cty.*, P.E.R.C. No. 2003-22, 28 *NJPER* 421 (¶33154 2002), app. pending App. Div. Dkt. No. A-000837-02T1; *Morris Cty.*, P.E.R.C. No. 2003-32, 28 *NJPER* 456 (¶33168 2002), app. pending App. Div. Dkt. No. A-000175-02T3. No executive order or other statute prohibits such disclosure.

The Civil Service Act, when read in light of the Employer-Employee Relations Act, grants the choice of an attorney or union representative to the employee in a statutorily-mandated pre-disciplinary hearing. *Essex Cty.*, P.E.R.C. No. 2003-42, 28 *NJPER* 589

(¶33184 2002), app. pending A-002659-02T3. Accordingly, the Commission concludes that the employer did not violate the Act when it dealt directly with the employee's private attorney.

An arbitrator ordered an employer to indemnify a police officer \$30,000 for a civil judgment. The Commission held that the employer's argument that enforcement of the award would violate public policy had to be raised in a court action seeking to vacate the award, not in a scope of negotiations proceeding. *City of Newark*, P.E.R.C. No. 2003-68, 29 *NJPER* ____ (¶_____ 2003).

The unit work rule provides that an employer must negotiate before using non-unit employees to do work traditionally performed by negotiations unit employees alone. The Commission held that an employer had a prerogative to temporarily transfer unit work while it did not have a full complement of qualified unit employees. *Rutgers, the State Univ.*, P.E.R.C. No. 2003-70, 29 *NJPER* ____ (¶_____ 2003). The employer had vigorously sought to fill the vacant positions.