
Recent Case Law & Policy Developments – 2004

Public Employment Relations Commission

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What follows is an overview of Commission case law since the April 2003 Annual Conference.

Discrimination and Protected Rights

The New Jersey Employer-Employee Relations Act prohibits discrimination to encourage or discourage union activity protected by the Act.

The Commission found illegal motivation in *Camden Bd. of Ed.*, P.E.R.C. No. 2003-77, 29 *NJPER* 223 (¶68 2003) (grievance illegally motivated transfer decision); *Irvington Bd. of Ed.*, P.E.R.C. No. 2003-83, 29 *NJPER* 218 (¶65 2003), app. pending App. Div. Dkt. No. A-005244-02T3 (non-appointment of Association vice-president to stipended position motivated by hostility to her Association leadership); *Irvington Bd. of Ed.*, P.E.R.C. No. 2004-23, 29 *NJPER* 484 (¶152 2003) (failure to appoint Association president to technology coordinator position motivated by hostility to her Association leadership).

The Commission found no illegal motivation in *Camden Bd. of Ed.*, P.E.R.C. No. 2003-77 (interview team not hostile to protected activity); *Somerset Hills Reg. Bd. of Ed.*, P.E.R.C. No. 2003-78, 29 *NJPER* 226 (¶69 2003) (transfer of custodian to evening shift not motivated by anti-union animus); *Town of Secaucus*, P.E.R.C. No. 2004-3, 29 *NJPER* 370 (¶115 2003) (grievance filing did not motivate demotion); and *Wood-Ridge Bd. of Ed.*, P.E.R.C. No. 2004-12, 29 *NJPER* 400 (¶129 2003) (board proved that it would not have renewed a custodian's contract even absent his protected activity).

Assignments and Transfers

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. See, e.g., *Local 195, IFPTE v. State*, 88 N.J. 393 (1982); *Ridgefield Park Ed. Ass'n v.*

Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978).

Arbitration was restrained to the extent a grievance challenged an employer's selection of employees to assign to senior citizen bus driving duties during regular work hours. *Borough of Hawthorne*, P.E.R.C. No. 2004-33, 29 *NJPER* 513 (¶164 2003). The Commission denied a restraint to the extent the grievance alleged a violation of contractual overtime or job posting provisions.

An employee's ability to earn additional compensation did not outweigh the employer's determination that changing daily assignments of regular bus drivers would not be in the best interests of the children. *Elizabeth Bd. of Ed.*, P.E.R.C. No. 2003-92, 29 *NJPER* 285 (¶86 2003).

Allegations that the managerial prerogative to assign was exercised discriminatorily must be litigated through an unfair practice proceeding, not binding arbitration. *Millville Bd. of Ed.*, P.E.R.C. No. 2004-5, 29 *NJPER* 375 (¶117 2003).

Employers may unilaterally assign duties if they are incidental or comprehended within an employee's job description or normal duties. *See, e.g., City of Newark*, P.E.R.C. No. 85-107, 11 *NJPER* 300 (¶16106

1985). The Commission held that requiring homeroom teachers to collect lunch money was intertwined with regular homeroom duties and not negotiable. *Guttenberg Bd. of Ed.*, P.E.R.C. No. 2003-71, 29 *NJPER* 178 (¶52 2003).

An arbitrator could determine whether non-courtroom duties are outside a judiciary clerk's job description and whether the employer breached the contract by assigning those duties. *New Jersey State Judiciary*, P.E.R.C. No. 2004-51, 30 *NJPER* ____ (¶____ 2004). Should the arbitrator sustain the grievance, the employer would be permitted to refile its petition for consideration of whether it had a managerial prerogative to cross-train employees by assigning the grievant to perform clerical duties and another clerk to courtroom duties.

Contract provisions allowing employees to bid for work hours or shifts by seniority are mandatorily negotiable, provided management may deviate from a seniority system when necessary to accomplish a governmental policy goal. The Commission held that enforcement of an alleged right to have platoon assignments determined by seniority would substantially limit government's policymaking powers. *Union*

Tp., P.E.R.C. No. 2003-81, 29 *NJPER* 214 (¶63 2003).

A contract cannot be construed to give a senior employee an absolute preference for a day shift position, but it can be construed to give a senior employee a preference absent a demonstrated need to select a different employee. *Scotch-Plains Fanwood Bd. of Ed.*, P.E.R.C. No. 2004-55, 30 *NJPER* ____ (¶____ 2004).

A contract proposal that permits employees to notify the employer of their interest in filling vacancies or transferring laterally was found mandatorily negotiable. *Passaic Cty.*, P.E.R.C. No. 2003-96, 29 *NJPER* 297 (¶91 2003). But an employer has a prerogative to assign employees within a shift based on criteria other than seniority or service record.

A union could arbitrate a challenge to the assignment of extra teaching periods, but the arbitrator could not issue an order that prevented the board from assigning extra periods if the board could not have hired qualified staff. *Clifton Bd. of Ed.*, P.E.R.C. No. 2003-80, 29 *NJPER* 211 (¶62 2003).

Almost all aspects of assignments to extracurricular activities in school districts are mandatorily negotiable. *N.J.S.A.* 34:13A-23.

Assignment and compensation for the extracurricular duty of administering S.A.T. test on Saturdays was found negotiable and legally arbitrable. *Westwood Reg. School Dist. Bd. of Ed.*, P.E.R.C. No. 2004-37, 29 *NJPER* 544 (¶175 2003).

Staffing

An employer has a nonnegotiable right to determine whether and when to fill vacancies. An alleged agreement to create and fill positions cannot be enforced through binding arbitration. *City of Elizabeth*, P.E.R.C. No. 2004-8, 29 *NJPER* 388 (¶122 2003).

Employers have a prerogative to determine staffing levels associated with the delivery of services. *Old Bridge Bd. of Ed.*, P.E.R.C. No. 2003-79, 29 *NJPER* 228 (¶70 2003). Arbitration was therefore restrained over grievances seeking to require an employer to fill vacant positions and seeking to prevent the employer from reassigning employees to cover vacancies during their regular work hours at other locations. Arbitration was permitted over work schedule changes. *New Jersey Turnpike Auth.*, P.E.R.C. No. 2003-90, 29 *NJPER* 281 (¶84 2003).

The Commission restrained arbitration to the extent a grievance challenged an employer's decision not to call in a second officer on a shift. *Town of Harrison*, P.E.R.C. No. 2004-31, 29 *NJPER* 510 (¶162 2003). The union could arbitrate its safety concerns.

Discipline

Proposals to grant tenure or job security protections to school board custodians are mandatorily negotiable. *Phillipsburg Bd. of Ed.*, P.E.R.C. No. 2003-73, 29 *NJPER* 181 (¶54 2003). Parties may legally agree that just cause will be required before custodians are terminated midyear or before their employment contracts are non-renewed. *Ibid*; see also *Linwood Bd. of Ed.*, P.E.R.C. No. 2004-26, 29 *NJPER* 492 (¶155 2003) (non-renewal of custodian could be submitted to binding arbitration).

Reassignments or transfers of police officers may not be submitted to binding arbitration, even if the alleged reassignment is disciplinary. *City of Trenton*, P.E.R.C. No. 2004-52, 30 *NJPER* ____ (¶____ 2004). Police officers who believe that they have been unjustly reassigned or transferred as a form of discipline must file a Superior Court action in lieu of prerogative writ.

Unions may not negotiate or use a disciplinary review procedure to challenge discipline imposed on non-unit employees. *City of Trenton*, P.E.R.C. No. 2004-16, 29 *NJPER* 413 (¶138 2003).

Contested Transfer Determinations

School districts may not transfer employees between work sites for disciplinary reasons. *N.J.S.A.* 34:13A-25.

Contested transfer petitions must be filed within 90 days of the notice of transfer. *Hamilton Tp. Bd. of Ed.*, P.E.R.C. No. 2004-2, 29 *NJPER* 323 (¶99 2003).

A petition was dismissed where the employee's work site was not changed. *Camden Bd. of Ed.*, P.E.R.C. No. 2003-76, 23 *NJPER* 222 (¶67 2003).

A petition was found moot after the employee was returned to her former work site. *Sparta Bd. of Ed.*, P.E.R.C. No. 2004-38, 29 *NJPER* 547 (¶176 2003).

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. *Paramus Bd. of Ed.*, P.E.R.C. No. 2004-30, 29 *NJPER* 508 (¶161 2003) (alleged failure to develop lesson plans and allegedly inadequate classroom performance); *Matawan-Aberdeen Reg. Bd. of Ed.*, P.E.R.C. No. 2004-47, 30 *NJPER* ____ (¶____ 2004) (withholding triggered by conclusion that hacking by students into school computers and other student misconduct occurred during the teacher's class); *Old Bridge Bd. of Ed.*, P.E.R.C. No. 2004-57, 30 *NJPER* ____ (¶____ 2004) (withholding based on allegations of inappropriate in-class comments and conduct).

Withholdings not based predominately on the evaluation of teaching performance may be reviewed by an arbitrator. *Elizabeth Bd. of Ed.*, P.E.R.C. No. 2003-86, 29 *NJPER*

247 (¶74 2003) (alleged insubordination and poor attitude towards students and staff that did not directly impact on students).

Parties may legally agree to submit all increment withholdings from non-teaching staff members to binding arbitration. *Atlantic City Bd. of Ed.*, P.E.R.C. No. 2003-72, 29 *NJPER* 180 (¶53 2003).

Leaves of Absence

Under *N.J.S.A.* 40A:14-177, convention leave must be granted to duly authorized PBA representatives, subject to a maximum of ten percent of the PBA's membership. The statute does not grant the employer discretion to determine the number of employees eligible for convention leave. *Hillsborough Tp.*, P.E.R.C. No. 2003-82, 29 *NJPER* 216 (¶64 2003).

Restoration of expended leave time in the event an injury is deemed covered by the Workers' Compensation Act is mandatorily negotiable. *City of Orange*, P.E.R.C. No. 2003-91, 29 *NJPER* 283 (¶85 2003).

Appeals of denials of Sick Leave Injury benefits for State employees must be filed with the Merit System Board. *New Jersey State Judiciary*, P.E.R.C. No. 2004-28, 29 *NJPER* 503 (¶159), recon. den. P.E.R.C.

No. 2004-42, 30 *NJPER* ____ (¶__ 2004). Accordingly, a restraint of arbitration challenging a denial was granted. But a restraint was denied concerning the employer's alleged failure to comply with a contractual obligation to notify the employee of her SLI appeal rights.

An employer has a managerial prerogative to require verification of the proper use of bereavement leave that parties have agreed may be used only under certain circumstances. *Leonia Bd. of Ed.*, P.E.R.C. No. 2004-4, 29 *NJPER* 373 (¶116 2003).

A grievance over the mandatorily negotiable issue of vacation pay or entitlement does not become non-arbitrable because the arbitrator may be called on to construe a settlement agreement as well as a contract clause. *City of Newark*, P.E.R.C. No. 2004-15, 29 *NJPER* 411 (¶127 2003).

Compensation

Extra compensation for the assignment of additional duties is generally negotiable and legally arbitrable. Teachers could legally arbitrate a claim for additional compensation for having to teach additional instructional periods. *Penns Grove-Carneys Point Reg. Bd. of Ed.*, P.E.R.C. No. 2003-93, 29 *NJPER* 287

(¶87 2003). Cafeteria workers could legally arbitrate a claim for additional compensation for having to perform duties allegedly outside their job descriptions. *Hamilton Bd. of Ed.*, P.E.R.C. No. 2003-95, 29 *NJPER* 291 (¶89 2003). Maintenance employees could legally arbitrate a claim for premium pay for having to perform certain tasks. *Jackson Tp. Bd. of Ed.*, P.E.R.C. No. 2004-56, 30 *NJPER* ____ (¶__ 2004).

The Commission declined to restrain binding arbitration of a grievance alleging that an employee was promised a full step salary increase when she was promoted to a higher classification. *Camden Cty. Superintendent of Elections*, P.E.R.C. No. 2003-97, 29 *NJPER* 293 (¶90 2003).

A grievance seeking full-time employee benefits for a plumber who had worked for more than six months as permanent employee was found legally arbitrable. *Elizabeth Bd. of Ed.*, P.E.R.C. No. 2003-94, 29 *NJPER* 290 (¶88 2003).

A proposal to eliminate longevity for new hires was found mandatorily negotiable. *Borough of Waldwick*, P.E.R.C. No. 2004-45, 30 *NJPER* ____ (¶__ 2004).

A proposal to have holiday pay paid along with the regular payroll was found to be

mandatorily negotiable, so long as the proposal did not seek to have an interest arbitrator rule on pension creditability. *Passaic Cty.*, P.E.R.C. No. 2003-96, 29 *NJPER* 297 (¶91 2003). Proposals to include longevity and holiday pay in base pay for compensation purposes were also found to be mandatorily negotiable. *Camden Cty. Corrections*, P.E.R.C. No. 2004-7, 29 *NJPER* 385 (¶121 2003).

A proposal for salary guide credit for prior service in other jurisdictions and a proposal relating to lump sum payments for unused sick leave time were held to be mandatorily negotiable. *Township of Winslow*, P.E.R.C. No. 2004-40, 29 *NJPER* 548 (¶178 2003).

The Commission restrained arbitration to the extent, if any, a grievance sought to pursue an illegal parity claim, but denied a restraint to extent the union argued that the contract required the reopening of a wage provision because another unit had received greater salary increases. *Township of Middletown*, P.E.R.C. No. 2004-32, 29 *NJPER* 512 (¶163 2003).

Representation

Any supervisory conflict of interest issues that might arise post-certification can be addressed through the Commission's unfair practice jurisdiction. *Washington Tp.*, P.E.R.C. No. 2003-84, 29 *NJPER* 221 (¶66 2003), recon. den. P.E.R.C. No. 2004-1, 29 *NJPER* 323 (¶98 2003).

Given common law agency principles and the Act's purposes, the Commission concluded that free-lance court interpreters are public employees entitled to seek representation under the Act. *New Jersey State Judiciary*, P.E.R.C. No. 2003-88, 29 *NJPER* 254 (¶76 2003).

The Commission sustained the Director of Representation's decision to re-run a mail ballot election because incorrect addresses resulted in disenfranchising enough voters to affect the outcome of the original election. *State of New Jersey*, P.E.R.C. No. 2004-49, 30 *NJPER* ____ (¶__ 2004).

In rerun elections, the payroll period determining eligibility will be the latest completed payroll period preceding the date of issuance of the notice of rerun election. *Cumberland Cty. Bd. of Social Services*,

P.E.R.C. No. 2003-89, 29 *NJPER* 240 (¶72 2003).

Motions for Reconsideration

In an interim relief proceeding, a Commission designee acts on behalf of the full Commission. Only in cases of exceptional importance will the full Commission intrude into the regular interim relief process by granting reconsideration. *City of Passaic*, P.E.R.C. No. 2004-50, 30 *NJPER* ___ (¶__ 2004); *see also Irvington Tp.*, P.E.R.C. No. 2004-13, 29 *NJPER* 408 (¶135 2003) and *City of Passiac*, P.E.R.C. No. 2004-21, 29 *NJPER* 483 (¶150 2003) (motions for reconsideration denied)

Grievance Procedures

A proposal that changed the first step of the grievance procedure from being heard by the warden to being heard by the chief of investigations was found mandatorily negotiable. *Camden Cty. Corrections*, P.E.R.C. No. 2004-7, 29 *NJPER* 385 (¶121 2003).

An employer repudiated the grievance procedure when it refused to implement certain grievance decisions sustained at steps

one and two of the grievance procedure. *Borough of Keansburg*, P.E.R.C. No. 2004-29, 29 *NJPER* 506 (¶160 2003).

Work Schedules

A proposal to memorialize the existing work schedule for police sergeants was found mandatorily negotiable. *Howell Tp.*, P.E.R.C. No. 2003-74, 29 *NJPER* 183 (¶55 2003).

A proposal for a 24/72 work schedule for firefighters could be submitted to interest arbitration. *City of New Brunswick*, P.E.R.C. No. 2004-27, 29 *NJPER* 494 (¶156 2003).

The Commission found a proposal for a 4/4 police work schedule to be mandatorily negotiable. *City of Clifton*, P.E.R.C. No. 2004-20, 29 *NJPER* 477 (¶149 2003). However, the portion of the proposal mandating that shift starting times and shift staffing levels be set by a study of calls for police services compromised the City's prerogative not to adopt a proportional staffing policy and was not mandatorily negotiable. The Commission further concluded that the City's additional concerns -- including the need to purchase new police vehicles, coverage overlaps, and other additional expenditures -- could be considered

by the arbitrator without impeding governmental policy.

The Commission declined to restrain binding arbitration of a grievance seeking overtime compensation for officers whose schedules were changed to accommodate firearms training. *City of Atlantic City*, P.E.R.C. No. 2004-25, 29 *NJPER* 490 (¶154 2003).

Health Benefits

A contract proposal concerning eligibility for retiree health benefits was found not mandatorily negotiable because it was preempted by the uniformity requirements of *N.J.S.A.* 40A:10-23. *Essex Cty. Prosecutor*, P.E.R.C. No. 2004-19, 29 *NJPER* 473 (¶148 2003).

N.J.S.A. 52:14-17.38 does not prohibit an employer from entering into an agreement to pay State Health Benefit Program premiums for surviving spouses of eligible retirees. *Borough of Woodcliff Park*, P.E.R.C. No. 2004-24, 29 *NJPER* 489 (¶153 2003).

Interim Relief

Interim relief in unfair practice cases requires a finding that the charging party has

a substantial likelihood of success on the merits and that it will suffer irreparable harm if immediate relief is not granted. Applications for interim relief were denied by Commission designees where: the contract contained a sunset provision on an experimental work schedule, *Irvington Tp.*, I.R. No. 2004-1, 29 *NJPER* 307 (¶95 2003); there were substantial and material facts in dispute about firefighter transfers, *City of Newark*, I.R. No. 2003-11, 29 *NJPER* 162 (¶47 2003); the employer colorably claimed that a work schedule change was based on a managerial prerogative, *Hillside Tp.*, I.R. No. 2004-4, 29 *NJPER* 378 (¶119 2003); the parties' contract permitted the employer to change insurance carriers so long as substantially similar benefits were provided, *Town of Secaucus*, I.R. No. 2004-5, 29 *NJPER* 391 (¶124 2003); the employer colorably claimed that it had a prerogative to require a minimum number of senior patrol officers on each shift, *City of Passaic*, I.R. No. 2004-7, 30 *NJPER* 5 (¶2 2004); and there were facts in dispute about a change in vacation benefits, *City of Trenton*, I.R. No. 2004-10, 30 *NJPER* ____ (¶____ 2004).

Applications for interim relief were granted where an employer: restricted

corrections officers' use of contractual sick, vacation and other leave time, *Sussex Cty. and Sussex Cty. Sheriff*, I.R. No. 2003-13, 29 *NJPER* 274 (¶81 2003); changed its biweekly payroll schedule for custodians, *Atlantic City Bd. of Ed.*, I.R. No. 2003-14, 29 *NJPER* 305 (¶94 2003); unilaterally imposed a new work schedule, *City of Passaic*, I.R. No. 2004-2, 29 *NJPER* 310 (¶96 2003); changed working conditions after the certification of a new majority representative, *City of Atlantic City*, I.R. No. 2004-3, 29 *NJPER* 376 (¶118 2003); repudiated a contractual provision on paid medical benefits in retirement, *Camden Cty. Sheriff's Office*, I.R. No. 2004-6, 29 *NJPER* 496 (¶157 2003); limited employees' eligibility to bid on certain positions, *Burlington Cty.*, I.R. No. 2004-8, 30 *NJPER* ____ (¶____ 2004); unilaterally modified a work schedule providing for a ten-hour tour of duty for police officers, *Borough of Hamburg*, I.R. No. 2004-9, 30 *NJPER* ____ (¶____ 2004); unilaterally eliminated a compressed workweek pending negotiations, *Gloucester Cty.*, I.R. No. 2004-11, 30 *NJPER* ____ (¶____ 2004); and unilaterally changed a payroll system, *Middletown Tp.*, I.R. No. 2004-12, 30 *NJPER* ____ (¶____ 2004).

Miscellaneous

The decision to subcontract cafeteria services is not mandatorily negotiable or legally arbitrable. *Matawan-Aberdeen Reg. Bd. of Ed.*, P.E.R.C. No. 2004-35, 29 *NJPER* 541 (¶173 2003).

Arbitration was restrained over the decisions to assume administration of the off-duty employment program and to require the Public Safety Director's approval of any off-duty employment calling for police officers to perform police-type services in police uniforms. *City of Paterson*, P.E.R.C. No. 2004-6, 29 *NJPER* 381 (¶120 2003).

An employer's policymaking powers would be substantially limited if a negotiated agreement could override the decision not to permit a police officer to bring criminal charges against a civilian for providing false information to a police department. *Hillsborough Tp.*, P.E.R.C. No. 2004-44, 30 *NJPER* ____ (¶____ 2004).

Based on a record consisting only of admissions in the employer's Answer and the testimony of one witness without first-hand knowledge of the incident, a charging party did not prove its *Weingarten* allegations. *New*

Jersey Transit Corp., P.E.R.C. No. 2004-41, 29 *NJPER* 550 (¶179 2003).

An arbitration award requiring the city to rearm a police officer would substantially limit the city's policymaking power to determine the conditions under which it is proper for its police officers to be armed. *City of Newark*, P.E.R.C. No. 2004-36, 29 *NJPER* 543 (¶174 2003).

The Civil Service "rule of three," which allows an employer to choose from among the top three promotional candidates, preempted arbitration of a grievance alleging contract violations when two higher-ranked employees were bypassed for promotion in favor of the third employee. *City of Elizabeth*, P.E.R.C. No. 2004-34, 29 *NJPER* 515 (¶165 2003).

No statute, regulation or court rule preempted negotiations over a proposal that the employer pay counsel's fees in arbitration or court litigation should the union prevail on any issue. *Camden Cty. Sheriff*, P.E.R.C. No. 2004-46, 30 *NJPER* ___ (¶__ 2004).

A decision to implement block scheduling was found not mandatorily negotiable or legally arbitrable; but an alleged uncompensated increase in workload could be

arbitrated. *Elizabeth Bd. of Ed.*, P.E.R.C. No. 2004-9, 29 *NJPER* 389 (¶123 2003).

A union cannot require that an employer show a higher standard than "reasonable individualized suspicion" before subjecting an sheriff's officers to urinalysis or blood screening. *Passaic Cty.*, P.E.R.C. No. 2003-96, 29 *NJPER* 297 (¶91 2003).

The Commission ordinarily will not decide scope of negotiations petitions unless a negotiability dispute has arisen during negotiations for a successor agreement or a demand for arbitration has been filed and the petitioner is seeking to restrain binding arbitration of a grievance. *City of Cape May*, P.E.R.C. No. 2004-22, 29 *NJPER* 483 (¶151 2003); *see N.J.A.C. 19:13-2.2(a)(4)*.

A scope of negotiations petition challenging the negotiability of a proposal to be submitted to interest arbitration must be filed within 14 days of receipt of the notice of filing of the interest arbitration petition. *Essex Cty. Prosecutor*, P.E.R.C. No. 2004-19, 29 *NJPER* 473 (¶148 2003) (dismissing certain issues as untimely).

Commission designees have issued 19 decisions under the 2002 amendment permitting 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*. One decision issued this past year has been appealed on constitutional grounds. *Raritan Valley Community College*, P.D.D. No. 2004-4, P.E.R.C. No. , 29 *NJPER* 133 (¶132 2003), app. pending App. Div. Dkt. No. __.