
Recent Case Law & Policy Developments – 2005

Public Employment Relations Commission

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What follows is an overview of Commission case law since the April 2004 Annual Conference.

Interference with Protected Rights

The New Jersey Employer-Employee Relations Act prohibits interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act. In *Newark State-Operated School Dist.*, P.E.R.C. No. 2005-49, 31 *NJPER* ___ (¶__ 2005), the Commission found that the District had a substantial and legitimate security concern justifying the denial of access to its central office by one former employee/union official and that the District had made reasonable accommodations to ensure that employees were properly represented in grievance and discipline hearings.

In *Lakehurst Bd. of Ed.*, P.E.R.C. No. 2004-74, 30 *NJPER* 186 (¶69 2004), app. pending App. Div. Dkt. No. A-005624-03T1, the Commission found that the employer violated the Act when its superintendent and

principal took actions and made remarks to employees that tended to interfere with the exercise of protected rights. The Commission ordered the Board to cease and desist from committing such violations, not consider certain reprimands in any future employment, and post a notice of its violations. Other unfair practice allegations were dismissed.

In *Florham Park Bd. of Ed.*, P.E.R.C. No. 2004-83, 30 *NJPER* 230 (¶86 2004), the Commission found that the employer violated the Act when its superintendent issued two memoranda criticizing and retaliating against the Association's president in his role as a teacher for a telephone message he left in his role as Association president.

Discrimination

A school board violated the Act when it subcontracted its regular bus routes and terminated its full-time and regular part-time bus drivers and mechanic in retaliation for the bus drivers' electing to have union representation. *Warren Hills Reg. Bd. of Ed.*,

P.E.R.C. No. 2005-26, 30 *NJPER* 439 (¶145 2005), app. pending App. Div. Dkt. No. App. Div. Dkt. No. A-001747-04T5. The Commission ordered reinstatement and back pay.

Good Faith Negotiations

In *Hillsborough Bd. of Ed.*, P.E.R.C. No. 2005-54, 31 *NJPER* ___ (¶__ 2005), the Commission found that an employer violated the Act by dealing directly with part-time clerical assistants regarding waivers of health insurance benefits if their hours were increased to levels ordinarily entitling employees to such benefits. The Commission further found, however, that the Board was not seeking to punish or retaliate against employees when it reduced their hours after the filing of the unfair practice charge, but was simply acting to protect itself from a financial obligation it never wanted to incur.

An employer violated the Act when it inserted language into the contract that the union had not agreed to in negotiations. *Town of Kearny*, P.E.R.C. No. 2005-12, 30 *NJPER* 352 (¶114 2005). The Commission ordered the employer to remove the inserted language, process grievances without the inclusion of the language, and post a notice of its violation.

An employer violated the Act when it refused to negotiate over compensation for employees required to attend an overnight field trip. *Hackettstown Bd. of Ed.*, P.E.R.C. No. 2005-5, 30 *NJPER* 328 (¶107 2005).

Where an appellate court reviewing an arbitration award determined that the employer had a contractual right to change a compensatory time policy unilaterally, the Commission deferred to that determination and dismissed an unfair practice charge on summary judgment. *City of Paterson*, P.E.R.C. No. 2005-57, 31 *NJPER* __ (¶__ 2005).

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). However, employees have a mandatorily negotiable interest in seeking to have shift assignments based on seniority if qualifications among employees are equal.

The Commission denied a request for a restraint of binding arbitration over challenges to a decision to assign patrol officers to a swing shift based on an officer's productivity rather than seniority. *Middletown Tp.*, P.E.R.C. No. 2004-70, 30 *NJPER* 138 (¶55 2004). The parties' contract contained mandatorily negotiable language requiring that shift assignments be based on seniority only "upon all other things being equal." The Commission concluded that the employer's policymaking powers would not be substantially limited by permitting an arbitrator to determine whether the shift denials violated the parties' negotiated seniority provision.

An employer announced that it transferred certain firefighters to promote cross-training, improve efficiency, increase diversity, and decrease response time. The Commission held that arbitration challenging transfers based on those reasons would substantially limit the City's policymaking powers. *City of Newark*, P.E.R.C. No. 2005-2, 30 *NJPER* 294 (¶102 2004), app. pending App. Div. Dkt. No. A-493-04T3.

A grievance alleged that regular cafeteria workers were being denied the opportunity to cover one hour of the shift of

absent cafeteria workers and thus to accumulate extra hours toward eligibility for paid health benefits. The Commission was not convinced that the employer's governmental policy interests would be compromised by enforcing an alleged agreement to use regular four-hour employees to cover the first hour of absent five-hour employees. It therefore declined to restrain binding arbitration. *Jackson Tp. Bd. of Ed.*, P.E.R.C. No. 2005-6, 30 *NJPER* 330 (¶108 2005).

The Commission restrained binding arbitration of a grievance to the extent, if any, it challenged a school board's right to assign teachers to Academy Success and Pride Program duties or to determine which teachers would be assigned such duties. *Millville Bd. of Ed.*, P.E.R.C. No. 2005-13, 30 *NJPER* 354 (¶115 2005). The Commission declined to restrain arbitration to the extent the grievance sought additional compensation for the assignment of these duties.

The Commission found not mandatorily negotiable portions of a contract provision prohibiting the filling of vacancies by involuntary transfer or reassignment if there is a qualified volunteer available to fill the position and requiring the filling of a vacancy by seniority. *Franklin Tp. Bd. of Ed.*,

P.E.R.C. No. 2005-18, 30 *NJPER* 408 (§133 2005).

The Commission restrained binding arbitration of a grievance alleging that a more senior employee was denied a shift preference in violation of the parties' contract. *Camden Cty.*, P.E.R.C. No. 2005-21, 30 *NJPER* 417 (§136 2005). The Commission concluded that the employer's prerogative to assign the best qualified employee to an electronic monitoring unit barred the union from seeking to have an arbitrator second-guess that determination.

Employees have an interest in not being required to perform duties outside their job description. No significant interference with governmental policy arose from a union's arbitrating the assignment of library and park duties not incidental to a crossing guard's regular duties during summer recess. *Bloomfield Tp.*, P.E.R.C. No. 2005-36, 30 *NJPER* 470 (§157 2005).

A contractual restriction on an employer's right to require police officers to complete certain job-related forms was not legally arbitrable. *City of Newark*, P.E.R.C. No. 2005-39, ___ *NJPER* ___ (§__ 2005).

The Commission concluded that an employer had a managerial prerogative to

require supervisors to complete a Competency Development Plans given that the assignment was within the scope of a supervisor's job duties. *New Jersey State Judiciary (Middlesex Vicinage)*, P.E.R.C. No. 2005-16, 30 *NJPER* 406 (§131 2005).

A portion of a contract article that requires police officers to perform minor vehicle maintenance was found to be mandatorily negotiable where there were public works employees available at all times to perform these tasks. *City of Union City*, P.E.R.C. No. 2004-78, 30 *NJPER* 210 (§79 2004).

The Commission concluded that an alleged past practice of permitting firefighters to choose shift assignments based on seniority when all qualifications are equal and of returning firefighters to those assignments after an extended sick leave could be enforced through binding arbitration without substantially limiting governmental policymaking powers. *City of Newark*, P.E.R.C. No. 2005-45, 30 *NJPER* 510 (§174 2005). However, one employee was not allowed to seek a transfer to a position for which he was no longer qualified.

Staffing

A grievance alleged that the employer breached the parties' collective negotiations agreement by denying bus drivers the right of first refusal on extra midday bus runs. These runs were given instead to employees of outside contractors. The Commission could not discern any interference with the employer's need to subcontract to address its busing needs if district employees were offered an opportunity to refuse an assignment. *Howell Tp. Bd. of Ed.*, P.E.R.C. No. 2005-7, 30 *NJPER* 333 (¶109 2005).

Another grievance sought to arbitrate a claim that a school board violated the parties' agreement when it decided not to fill three eight-hour bus driver vacancies. The Commission held that the employer's governmental policy interest in setting the size of its workforce and determining how many employees it needed to perform required tasks outweighed the union's interest in preserving work and guaranteeing employment for employees it represented. *Woodbridge Tp. Bd. of Ed.*, P.E.R.C. No. 2005-8, 30 *NJPER* 335 (¶110 2005). The Commission found that the employer had determined that it no longer needed 32 eight-hour bus drivers and that the

Association could not enforce a minimum staffing provision that would have required the Board to staff its workforce with more eight-hour drivers than it wanted or needed.

The Commission declined to restrain binding arbitration of a grievance contesting a police chief's order banning all off-duty employment. There was no indication that any overtime was mandated, that any emergency existed, or that the City could not have filled positions without suspending the opportunity to engage in off-duty work. *Borough of Clayton*, P.E.R.C. No. 2005-19, 30 *NJPER* 411 (¶134 2005).

Applying the negotiability balancing test to an unusual set of facts, the Commission concluded that Denville Township made a non-negotiable governmental policy decision when it entered into a contract permitting Rockaway Township and a regional school district to provide a portion of security services for a Rockaway Township event taking place within Denville. *Denville Tp.*, P.E.R.C. No. 2005-23, 30 *NJPER* 421 (¶138 2005), recon. den. P.E.R.C. No. 2005-34, 30 *NJPER* 468 (¶155 2005).

A grievance alleged that a police lieutenant violated a departmental policy when he split up two officers assigned to one patrol

car. The Commission restrained arbitration, concluding that upholding this grievance would have substantially limited management's prerogatives to determine staffing levels and to deploy officers as it deems best given the number of officers available to handle the simultaneous receipt of multiple service calls. *City of Newark*, P.E.R.C. No. 2005-29, 30 *NJPER* 447 (¶148 2005).

An employer has a prerogative to set the overtime staffing ratios of fire officers to firefighters. *North Hudson Reg. Fire and Rescue*, P.E.R.C. No. 2005-53, 31 *NJPER* ___ (¶__ 2005).

Discipline

Mid-year terminations of custodians may be submitted to binding arbitration. The pendency of a related matter before the New Jersey Division on Civil Rights matter did not make a grievance non-arbitrable. *Washington Tp. Bd. of Ed.*, P.E.R.C. No. 2004-68, 30 *NJPER* 135 (¶53 2004).

Police officers may not negotiate for binding arbitration of major discipline. *City of Union City*, P.E.R.C. No. 2004-78, 30 *NJPER* 210 (¶79 2004). The Commission restrained binding arbitration of a grievance

contesting a reduction in a police officer's salary as part of a disciplinary action. *Bedminster Tp.*, P.E.R.C. No. 2005-10, 30 *NJPER* 348 (¶112 2005).

A proposal concerning the definition of a grievance did not specifically require binding arbitration of major discipline for police officers and was found to be mandatorily negotiable. *West Milford Tp.*, P.E.R.C. No. 2004-76, 30 *NJPER* 206 (¶77 2004).

The Commission declined to restrain binding arbitration of a grievance alleging that a school board violated a collective negotiations agreement when it reassigned a custodial employee from a first shift grounds position to a third shift custodial position for unjust disciplinary reasons. *Bergen Cty. Voc. Schools Dist. Bd. of Ed.*, P.E.R.C. No. 2005-4, 30 *NJPER* 297 (¶104 2004). The Commission concluded, based on the facts and assertions in the record, that the case presented a disciplinary dispute that the parties could have legally agreed to arbitrate.

Aspects of a mid-year termination of a non-tenured special education teacher could be reviewed through binding arbitration, even though the termination was based on an evaluation of teaching performance. *Shamong*

Tp. Bd. of Ed., P.E.R.C. No. 2005-14, 30 *NJPER* 400 (¶129 2005). The Commission found that the employees' interests in seeking to obtain limited back pay for allegedly unjust terminations outweighed the employer's interests in terminating employees mid-year without neutral review or possibly having to pay an employee for the rest of the contract year. The Commission did not permit arbitration over reinstatement or back pay for any period beyond the current school year.

Parties may agree to arbitrate allegedly unjust nonrenewals involving a board's support staff employees. The Commission does not have jurisdiction to determine whether the parties agreed to arbitrate a non-renewal in a particular case. *Holmdel Tp. Bd. of Ed.*, P.E.R.C. No. 2005-50, 31 *NJPER* ____ (¶__ 2005).

A grievance alleged that the employer violated a collective negotiations agreement by denying a sheriff's officer certain procedural protections during an interrogation and by suspending her contrary to Civil Service guidelines and without just cause. The Commission granted a restraint to the extent the grievance challenged a suspension of more than five days or contested an order to take a psychological examination. The

Commission denied a restraint with respect to the procedural claims; it found that none of those claims would substantially limit the employer's right to require a fitness for duty examination or to suspend an employee it deems unfit for duty. The Commission also denied a restraint concerning the claims that the employer did not comply with Civil Service requirements that had been incorporated into the parties' agreement. *Atlantic Cty. Sheriff's Office*, P.E.R.C. No. 2005-28, 30 *NJPER* 444 (¶147 2005).

A contract proposal under Departmental Investigations dealing with officers' constitutional rights was found not mandatorily negotiable because it did not intimately and directly affect employee work and welfare and dealt with criminal, not departmental, investigations. *West Milford Tp.*, P.E.R.C. No. 2004-76, 30 *NJPER* 206 (¶77 2004). A proposal under Departmental Investigations concerning a 45-day cap on the time limit for bringing any charges against an officer was found not mandatorily negotiable to the extent it would prohibit the filing of complaints by private individuals after 45 days. *Ibid.*

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. Withholdings not based predominately on the evaluation of teaching performance may be reviewed by an arbitrator. The Commission declined to restrain binding arbitration of a grievance contesting the withholding of a culinary arts teacher's salary increment. *Bergen Cty. Voc. and Tech. Schools Dist.*, P.E.R.C. No. 2004-73, 30 *NJPER* 145 (¶58 2004). The alleged actions that resulted in the withholding occurred during a stipended extracurricular assignment when the teacher

was chaperoning a cruise to the Bahamas. The Commission concluded that the withholding did not involve any aspect of teaching or classroom conduct and was not based on an evaluation of teaching performance.

Sick Leave and Other Leaves of Absence

An employer had a managerial prerogative to require employees who had exceeded 15 days of sick leave in a 12-month period to provide doctors' notes for any future sick leave. *New Jersey State Judiciary (Ocean Vicinage)*, P.E.R.C. No. 2005-24, 30 *NJPER* 436 (¶143 2005).

The Commission denied a request for a restraint of binding arbitration of a grievance challenging a requirement that all doctors' certificates verifying sick leave indicate the condition for which the employee was treated and the application of that requirement to an individual firefighter. *City of Trenton*, P.E.R.C. No. 2005-20, 30 *NJPER* 413 (¶135 2005). The Commission balanced the employees' strong privacy interest in protecting against inquiries into their medical conditions and the employer's strong interest in seeking to verify illness when necessary to ensure compliance with sick leave rules, to

protect against sick leave abuse, and to ensure that employees are fit for duty. The Commission also permitted a broader challenge to the establishment of this aspect of the verification policy, but held that the arbitral remedy sought was overbroad in that it would prevent the employer from ever seeking those medical details to combat sick leave abuse, ensure that returning employees are fit for duty, or comply with other contractual or statutory obligations.

Although an employer had a prerogative to verify that sick leave was not being abused, the Commission concluded that arbitration of a grievance challenging the issuance of letter reprimands that discussed an officer's absenteeism would not substantially limit the employer's policy goal of monitoring and verifying employee use of sick leave. *Town of Guttenberg*, P.E.R.C. No. 2005-37, 31 *NJPER* ___ (¶__ 2005).

N.J.S.A. 18A:30-6 mandates that a school board make its extended sick leave determinations on a case-by-case basis rather than by a negotiated rule. Therefore, a catastrophic illness provision was found not mandatorily negotiable. *Waldwick Bd. of Ed.*, P.E.R.C. No. 2004-61, 30 *NJPER* 104 (¶41 2004), *aff'd* 31 *NJPER* __ (¶__ 2005).

The Commission declined to restrain binding arbitration of a grievance asserting that an employer violated an agreement when it denied the vacation day requests of six corrections officers. The Commission concluded that the employer had not shown a basis for concluding that upholding the grievance would jeopardize its minimum staffing requirements. *State of New Jersey*, P.E.R.C. No. 2004-77, 30 *NJPER* 208 (¶78 2004).

Where a grievance asserted that the employer improperly denied paid military leave to a correction officer, the Commission rejected the employer's argument that the grievance was preempted by a statute granting military leave for permanent employees or full-time employees. *State of New Jersey (Dept. of Corrections)*, P.E.R.C. No. 2005-27, 30 *NJPER* 442 (¶146 2005). The parties' disagreement over whether the officer was a "permanent" employee could not be resolved in a scope of negotiations proceeding.

A grievance alleged that the police chief violated the parties' contract when he limited the use of accumulated leave time to one officer per shift and then denied a request for a vacation day. The Commission granted a restraint of binding arbitration to the extent

the grievance, if sustained, would automatically entitle two officers per shift to take leaves even if the employer could not meet its minimum staffing levels through other methods such as offering overtime compensation to a replacement employee. *Camden Cty.*, P.E.R.C. No. 2005-35, 30 *NJPER* 468 (¶156 2005). The request for a restraint was otherwise denied.

A grievance alleged that the employer violated the parties' contract when it placed an employee who had been injured on the job on various leaves instead of allowing him to return to work. The Commission restrained binding arbitration to the extent the grievance sought to have the employee returned to certain positions, but permitted arbitration to the extent the grievance claimed that the employer agreed to permit similarly situated employees to return to work. *Passaic Cty.*, P.E.R.C. No. 2005-41, 31 *NJPER* ____ (¶____ 2005).

An employer had a managerial prerogative to require a correction officer who could not work overtime due to a medical condition to go on medical leave. *Middlesex Cty.*, P.E.R.C. No. 2005-44, 30 *NJPER* 508 (¶173 2005). The employer had a right to determine that an employee could not remain

on duty unless capable of working more than eight hours when needed to do so.

Compensation

A proposal to increase the paid work hours of investigators from 37 1/2 to 40 hours per week was found mandatorily negotiable. *Morris Cty. Prosecutor's Office*, P.E.R.C. No. 2004-75, 30 *NJPER* 204 (¶76 2004).

The Commission concluded that arbitration of a grievance seeking overtime compensation for police officers temporarily assigned to a special shift would not substantially limit the Township's governmental policymaking powers. *Saddle Brook Tp.*, P.E.R.C. No. 2005-11, 30 *NJPER* 350 (¶113 2005).

A dispute over whether the school nurse was covered by a contractual recognition clause did not present a negotiability issue. *Sussex Cty. Voc. School Bd. of Ed.*, P.E.R.C. No. 2005-17, 30 *NJPER* 407 (¶132 2005). The Commission therefore declined to restrain binding arbitration over a grievance seeking payment of a stipend for services provided to charter school students.

N.J.A.C. 4A:3-4.9 controls salary guide placement in connection with promotions in State service. The Commission

concluded that any appeal from a Department of Personnel action interpreting that regulation must be made to the Merit System Board or in court. *State of New Jersey (Dept. of Corrections)*, P.E.R.C. No. 2005-22, 30 *NJPER* 420 (¶137 2005).

An employer has a prerogative to decide which employees will be trained, how they will be trained, and how long they will be trained. *See Wayne Tp.*, P.E.R.C. No. 98-85, 24 *NJPER* 71, 73 (¶29040 1997). A proposal to permit employees to attend Police Training Commission courses, to be paid by the employer, was found to be mandatorily negotiable to the extent it concerned course work separate from and in addition to the employer's mandatory training courses. *City of Orange Tp.*, P.E.R.C. No. 2005-31, 30 *NJPER* 457 (¶151 2005).

A proposal to have overtime paid by separate check was not shown to intimately and directly affect employee work and welfare and was therefore not mandatorily negotiable. *Ibid.*

A proposal concerning ammunition for weapons practice was found to be mandatorily negotiable because employees have an interest in having the employer supply and pay for ammunition necessary to maintain required

weapons training and certification. *West Milford Tp.*, P.E.R.C. No. 2004-76, 30 *NJPER* 206 (¶77 2004).

Representation

Citing its long-established practice of favoring broad-based units, its opposition to undue fragmentation, and its refusal to certify negotiations units that exclude regular part-time employees, the Commission held that the desire of the full-time aides to organize did not overcome the presumption that a separate unit of only full-time employees was not the appropriate unit. *Kearny Bd. of Ed.*, P.E.R.C. No. 2005-42, 30 *NJPER* 504 (¶171 2005).

The Director of Representation has the discretion to consider the circumstances of each particular case and to choose between a continued administrative investigation or a hearing as the best means to develop the record, serve administrative efficiency, and effectuate the policy of resolving representation disputes speedily. *State of New Jersey*, P.E.R.C. No. 2005-62, 31 *NJPER* __ (¶__ 2005). The Director also had the discretion to appoint a chief hearing officer and assign multiple hearing officers, including ad hoc hearing officers, to reach a speedier conclusion.

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. *Burlington Cty*, P.E.R.C. No. 2004-59, 30 *NJPER* 102 (¶39 2004) (reconsideration denied).

Health Benefits

A portion of a health benefits provision that required the union's consent to a change in carrier was found not mandatorily negotiable. *City of Union City*, P.E.R.C. No. 2004-78, 30 *NJPER* 210 (¶79 2004).

N.J.S.A. 40A:10-23 requires that retiree health benefits be provided "under uniform conditions." A grievance asserted that the employer violated the contract when it refused to pay the health insurance premiums of police officers who retired with 25 years of creditable service for pension purposes but without 25 years of service with the City. The Commission concluded that the parties could have legally agreed to have a grievance arbitrator determine what

contractual agreement they made concerning health insurance premiums and whether the employer violated the agreement. *City of Paterson*, P.E.R.C. No. 2004-84, 30 *NJPER* 233 (¶87 2004). The employer could raise any alleged violations of the uniformity requirement of *N.J.S.A.* 40A:10-23 in the Superior Court.

Procedures

A petition challenging the negotiability of an issue sought to be submitted to interest arbitration must normally be filed within 14 days of receipt of the notice of filing of the interest arbitration petition. *N.J.A.C.* 19:17-5.5(c). In *Wyckoff Tp.*, P.E.R.C. No. 2004-63, 30 *NJPER* 107 (¶43 2004), the Commission concluded that the Township had not shown good cause or unusual circumstances to relax the timelines. *See also Lower Tp.*, P.E.R.C. No. 2005-30, 30 *NJPER* 449 (¶150 2005) (dismissing petition filed nearly six months after filing of interest arbitration petition).

The PBA filed an unfair practice charge challenging a directive requiring police officers to report for duty before any assigned training and to return to their assigned duties if the training ended before the end of the officer's regular shift. The employer filed a

scope of negotiations petition. In the absence of a demand for arbitration, or a dispute that had arisen during the course of successor contract negotiations, the Commission declined to exercise its scope jurisdiction. *Borough of Bernardsville*, P.E.R.C. No. 2004-67, 30 *NJPER* 135 (¶52 2004), recon. den. P.E.R.C. No. 2004-82, 30 *NJPER* 230 (¶85 2004). The parties could address the scope of negotiations issue in the unfair practice proceeding. *See also Teaneck Bd. of Ed.*, P.E.R.C. No. 2005-40, 30 *NJPER* 483 (¶162 2005) (dismissing scope petition in absence of a dispute arising during negotiations or a demand for arbitration).

Noting that the movant was not the charging party, the Commission denied a motion to reopen a case dismissed in 1992 . *Northwest Bergen Cty. Utilities Auth.*, P.E.R.C. No. 2005-46, 31 *NJPER* ___ (¶___ 2005).

The Commission will not intrude into issues of discovery or evidentiary relevance mid-hearing absent extraordinary circumstances. *Rutgers, The State Univ.*, P.E.R.C. No. 2005-47, 31 *NJPER* ___ (¶___ 2005).

The Commission denied a union's request for special permission to appeal the

decision of the Director of Unfair Practices deferring its unfair practice charge to binding arbitration. *Hillsborough Tp. Bd. of Ed.*, P.E.R.C. No. 2005-1, 30 *NJPER* 293 (¶101 2004). The Commission noted that binding arbitration is the preferred mechanism for resolving an unfair practice charge essentially alleging a violation of *N.J.S.A. 5.4(a)(5)* interrelated with an alleged breach of contract. Should an arbitrator reach a result repugnant to the Act, the union may seek to reopen the charge.

The undisputed material facts in a summary judgment motion must be in a supporting record submitted by way of certifications or affidavits made on personal knowledge. *PBA Local 187*, P.E.R.C. No. 2005-61, 31 *NJPER* ___ (¶___ 2005).

Evaluations

A school board has a managerial prerogative to observe and evaluate employees. The Commission therefore restrained binding arbitration of any challenge to the accuracy of the ratings or contents of a mid-year formative evaluation. *Washington Tp. Bd. of Ed.*, P.E.R.C. No. 2004-62, 30 *NJPER* 105 (¶42 2004). Where the Association's brief asserted that there were

procedural claims that could be arbitrated and the Board did not file a reply brief contesting that assertion or seeking to block arbitration of the specific claims identified in the request for relief, the Commission did not consider the negotiability of those claims.

The Commission restrained binding arbitration of a grievance contesting performance notices received by three police officers. *Washington Tp.*, P.E.R.C. No. 2005-15, 30 *NJPER* 404 (¶130 2005). The Commission concluded that an employer had a nonnegotiable right to use motor vehicle contacts as an evaluation criterion.

Promotions

A grievance contested the promotion of a less senior employee to a senior secretary position. The Commission concluded that the employer had a managerial prerogative to determine which employee was best qualified for a permanent promotion and restrained binding arbitration to the extent the union asserted that the senior employee should have been granted the promotion. *New Jersey Turnpike Auth.*, P.E.R.C. No. 2004-69, 30 *NJPER* 137 (¶54 2004). The Commission denied a restraint of arbitration to the extent the union asserted that the senior employee

should have been granted a trial period. *See City of Vineland*, P.E.R.C. No. 91-57, 17 *NJPER* 58 (¶22025 1990).

The order in which an employer would administer the written and oral components of the promotional process, and whether to have the results of a written examination withheld until all other aspects of the process are completed were found to be mandatorily negotiable. *Piscataway Tp.*, P.E.R.C. No. 2004-72, 30 *NJPER* 143 (¶57 2004), *aff'd* 31 *NJPER* ___ (¶__ App. Div. 2004). However, the employer violated its duty to negotiate in good faith when it unilaterally adopted these two promotional procedures. *Piscataway Tp.*, P.E.R.C. No. 2005-55, 31 *NJPER* ___ (¶__ 2005). The Commission rejected the union's request that all promotions made pursuant to the unilaterally adopted policy be rescinded. Nothing in the parties' submissions suggested that the results of the promotional process would have been different had the union's positions on these two issues been incorporated in the promotional policy.

Miscellaneous

The Commission determined that portions of a revised patent policy pertaining to distribution of income to inventors were

mandatorily negotiable. *Rutgers, The State Univ.*, P.E.R.C. No. 2004-64, 30 *NJPER* 109 (¶44 2004), app. pending App. Div. Dkt. No. A-004837-03T1. Portions of the policy pertaining to distribution of royalty income to departments and research units were not negotiable.

The Commission found that the policy goal of maintaining a balance between tenured and non-tenured faculty did not authorize a county college to designate, or the parties to agree, that a position was ineligible for statutory tenure if its duties are determined to fall within the ambit of a statutory tenure scheme. *Burlington Cty. College*, P.E.R.C. No. 2004-71, 30 *NJPER* 141 (¶56 2004). Accordingly, language in the parties' contract designating a position as "not in a tenure track" was held not mandatorily negotiable.

A proposal concerning the definition of a grievance that did not specifically permit binding arbitration of grievances involving non-negotiable prerogatives was found mandatorily negotiable. *Borough of Northvale*, P.E.R.C. No. 2004-79, 30 *NJPER* 213 (¶80 2004). Should the union seek to arbitrate such grievances, the employer may petition for a restraint of arbitration.

In a joint order, the Commission and the Merit System Board adopted an Administrative Law Judge's recommendation and made enforceable the terms and conditions of a settlement agreement. *State of New Jersey (Dept. of Community Affairs)*, P.E.R.C. No. 2004-81, 30 *NJPER* 227 (¶84 2004). The charging party/appellant refused to sign the written agreement and sought to have the hearings continued. The ALJ had found that the parties entered into the settlement agreement voluntarily and freely with the advice of counsel and without any fraud.

School boards and majority representatives may negotiate seniority provisions for secretaries, but a negotiated seniority provision cannot conflict with the tenure laws by subordinating the rights of tenured employees to the interests of non-tenured employees. *West Windsor-Plainsboro Reg. School Dist. Bd. of Ed.*, P.E.R.C. No. 2004-85, 30 *NJPER* 235 (¶88 2004).

A proposal to maintain a 24/72 hour work schedule for firefighters was found to be mandatorily negotiable. *City of Gloucester City*, P.E.R.C. No. 2005-38, 30 *NJPER* 479 (¶160 2005).

Procedures associated with police officer drug testing are mandatorily negotiable in general. The Commission held that an arbitrator could decide whether an employer's policy prohibits or permits testing officers while they are at home and on sick leave. *City of Newark*, P.E.R.C. No. 2005-43, 30 *NJPER* 506 (¶172 2005). The Commission did not believe that the City's policymaking authority would be substantially limited if an arbitrator concluded that the employer made and violated an agreement to provide employees with notice of the conditions under which they would be subject to random drug testing.

The Commission found mandatorily negotiable and not in conflict with Attorney General Guidelines sections of an article on departmental investigations of employee misconduct, including: providing employees under investigation with the names of complainants and all witnesses, participation in line-ups, release of confidential information that might be pertinent to an officer's defense, and an officer's right to request union representation at an investigatory interview. *City of Paterson*, P.E.R.C. No. 2005-32, 30 *NJPER* 463 (¶153 2005). The Commission found not mandatorily negotiable a portion of

an article allowing on-duty officers to conduct union solicitations of business establishments.

The Commission concluded that a PBA local could not negotiate over terms and conditions of employment of non-unit employees including special police, but found a PBA proposal concerning the hiring of special police officers was mandatorily negotiable to the extent it could be applied to preserve the terms and conditions of employment of regular police officers. *Stafford Tp.*, P.E.R.C. No. 2005-51, 31 *NJPER* ___ (¶__ 2005).

The Commission sustained a decision of the Director of Unfair Practices refusing to issue a Complaint based on a charge alleging that the employer terminated the charging party in violation of the Act and that the majority representative, ATU, failed to properly represent him in challenging his termination. *New Jersey Transit*, P.E.R.C. No. 2005-3, 30 *NJPER* 295 (¶103 2004). In his appeal, the charging party contended that his arbitration decision was tainted by fraud, collusion, unfairness and serious procedural irregularities. The Commission concluded that an adverse arbitration ruling alone does not support an inference that the ruling was a product of fraud or collusion.