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# Recent Case Law & Policy Developments

## April 2006 through March 2007

### Public Employment Relations Commission

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What follows is an overview of Commission case law since the April 2006 Annual Conference.

#### Unfair Practice

#### Interference with Protected Rights

The New Jersey Employer-Employee Relations Act prohibits interference with the exercise of rights it grants. The Commission found that a school board violated that prohibition by threatening to transfer a union representative for speaking out about terms and conditions of employment at a public Board meeting; threatening union representatives if they continued their union activities; threatening and reprimanding a union representative for asking employees about terms and conditions of employment; ordering the removal of union bulletin board postings; discouraging a union representative from performing union-sponsored poll monitoring during her lunch period; and recommending the transfer of two union

representatives based in part on documents they authored to protest terms and conditions of employment. *Camden Bd. of Ed.*, P.E.R.C. No. 2007-19, 32 *NJPER* 328 (¶136 2006).

#### Good Faith Negotiations

The Act requires employers to negotiate before changing terms and conditions of employment. The Commission ordered an employer to negotiate with a police union over the elimination of shape-up or travel time, restore the practice of compensating patrol officers for a reasonable period of shape-up or travel time when called for emergent or immediate overtime, make whole any officer who was denied a reasonable period of shape-up or travel time for emergent or immediate overtime, and post a notice of its violations. *Middletown Tp.*, P.E.R.C. No. 2007-18, 32 *NJPER* 325 (¶135 2006), app. pending App. Div. Dkt. No. A-1513-06T3. The Commission dismissed an allegation that the employer violated the Act

by not complying with the police chief's grievance determination.

The Commission concluded that the record did not contain evidence indicating that an employer unilaterally imposed a sick leave cap, changed any pre-discipline or post-discipline procedures, or had to negotiate mid-contract in response to the union's demand. *City of Union City*, P.E.R.C. No. 2006-77, 32 *NJPER* 116 (¶55 2006). Accordingly, the Commission sustained the Hearing Examiner's decision granting a motion to dismiss at the end of the charging parties' case.

The Commission concluded that an employer did not violate the Act when it limited the number of paid convention leaves to two police officers in conformance with *N.J.S.A. 40A:14-177. Borough of Bernardsville*, P.E.R.C. No. 2007-8, 32 *NJPER* 280 (¶116 2006). The Legislature set minimums and maximums and specified one set of circumstances under which a collective negotiations agreement could exceed the maximum. That limited exception did not apply to this case, where the union sought to have three representatives rather than the two representatives authorized and required by this preemptive statute.

## Representation

The Director of Representation decides most representation cases. Each year, only a few make their way to the Commission for decision.

The Commission denied a request for an evidentiary hearing in a representation matter where the employer had not responded to the Director's notice to the parties of his intended decision and had not identified any material facts in dispute. *Burlington Cty. College*, P.E.R.C. No. 2006-65, 32 *NJPER* 77 (¶38 2006).

The Commission found that the Director properly exercised his authority in determining that a representation petition was supported by a valid showing of interest and that this showing was not subject to collateral attack. *Hudson Cty.*, P.E.R.C. No. 2006-76, 32 *NJPER* 101 (¶49 2006). Any factional dispute that arose after a consent agreement was signed was an internal union matter that did not need to be resolved before an election. That question could be decided by a court of competent jurisdiction if a dispute persisted after the election. The Appellate Division subsequently declined to stay the election. *See General Counsel's 2006 Annual Report.*

The Commission denied a request for review of the Director's decision dismissing objections to a representation election determining the majority representative of law enforcement officers employed by the State of New Jersey in specified titles. *State of New Jersey*, P.E.R.C. No. 2006-92, 32 *NJPER* 223 (¶92 2006), app. pending App. Div. Dkt. No. A-5635-05T3, stay of certification order denied. The Director had found that although the FOP received the eligibility list later than the PBA, the FOP already had the names and addresses.

### **Scope of Negotiations**

Most Commission decisions involve the scope of negotiations. Parties can seek a scope determination during the course of negotiations, when one party seeks to negotiate over a matter that the other party contends is not a required subject for negotiations, or with respect to the negotiability and legal arbitrability of a matter that a union seeks to submit to binding arbitration.

### **Work Hours**

The number of hours an employee works and fringe benefits are mandatorily negotiable terms and conditions of employment. *Boonton Bd. of Ed.*, P.E.R.C. No. 2006-98, 32 *NJPER* 239 (¶98 2006) . Accordingly, a grievance asserting that the employer violated the parties' contract when it reduced the work hours and compensation of eight teaching assistant positions from full-time to part-time and eliminated their fringe benefits could be arbitrated.

A contract provision allowing for temporary shift exchanges conditioned on the warden's approval was found mandatorily negotiable and enforceable through arbitration. *Mercer Cty.*, P.E.R.C. No. 2006-71, 32 *NJPER* 89 (¶44 2006).

A contract proposal that all training programs conducted outside the teacher workday, work year and during the summer shall be voluntary was found to be not mandatorily negotiable. *Passaic Bd. of Ed.*, P.E.R.C. No. 2006-75, 32 *NJPER* 98 (¶48 2006). The employer demonstrated that some training needed to be conducted during the summer.

An allocation of overtime provision was found not mandatorily negotiable because it provided that police officers would be given priority for all overtime work over other department employees, regardless of the nature of the work and it could be used to prevent the employer from seeking assistance from other police forces when necessary. *Brookdale Community College*, P.E.R.C. No. 2007-35, 32 *NJPER* 390 (¶161 2006). A proposed modification to the article providing for the assignment of work to off-duty employees within a specific job classification was found mandatorily negotiable.

### **Assignments and Transfers**

Public employers generally have a right to assign employees to meet the governmental policy goal of matching the best qualified employees to a particular job.

The Commission restrained arbitration to the extent a grievance claimed that a city had to assign lieutenants to the day tour and to desk duty; sergeants should be reassigned from the desk to first-line supervision; sergeants at the desk were entitled to out-of-title pay; and sergeants should be paid overtime to cover first-line supervisory functions. *City of Jersey City*, P.E.R.C. No.

2007-7, 32 *NJPER* 278 (¶115 2006). The request for a restraint was denied to the extent the union claimed that lieutenants were entitled to out-of-title pay for work performed as acting captains. On reconsideration, the Commission held that the parties could have legally agreed that sergeants performing Tour Command/Desk Officer duties would be paid at the lieutenants' rate even though those duties had been determined to be sergeants' duties. P.E.R.C. No. 2007-26, 32 *NJPER* 356 (¶149 2006). In a related case, the Commission granted summary judgment and dismissed an unfair practice charge alleging that the City violated the Act when it unilaterally changed the work assignments of police sergeants and lieutenants and refused to engage in impact negotiations. *City of Jersey City*, P.E.R.C. No. 2007-43, 33 *NJPER* 4 (¶4 2007), recon. den. P.E.R.C. No. 2007-54, \_\_\_ *NJPER* \_\_\_ (¶\_\_\_ 2007). The Commission had already held in the prior scope decision that the City had a managerial prerogative to make the changes and there were no proffered facts to support the union's assertion that the reorganization was for economic reasons.

A grievant claimed that he should have been assigned as a Senior Captain and thus paid a stipend for the assignment. The

Commission restrained arbitration, holding that where receipt of additional compensation is directly tied to an assignment to a particular position, the dominant issue is the employer's non-negotiable prerogative to assign employees to meet the governmental policy goal of matching the best qualified employees to a particular job. *City of Elizabeth*, P.E.R.C. No. 2007-11, 32 *NJPER* 309 (¶128 2006). The Commission held that this prerogative trumps a claim that the assignment must be made based on seniority.

The Commission restrained arbitration to the extent a grievance contested the substantive decisions to transfer officers from the detective to patrol division and sought their reinstatement as detectives and the return of their detective shields. *City of Elizabeth*, P.E.R.C. No. 2007-16, 32 *NJPER* 321 (¶133 2006). The Commission denied the request over claims that the police director told officers that he was disciplining them but did not tell them why or give them an opportunity to defend themselves; and that the city failed to notify the union when a unit member was served with disciplinary charges. An arbitrator may consider these mandatorily negotiable procedural issues independent of

the substantive decision to transfer the officers.

The Commission restrained arbitration of a grievance contesting the continuing assignment of two police officers to temporary undercover duty. *New Jersey Transit*, P.E.R.C. No. 2007-22, 32 *NJPER* 339 (¶141 2006). The Commission held that the dispute was not about procedures for selecting officers for temporary assignments, but about the substantive decision to assign two officers based on their individual qualifications for undercover work.

Except in an emergency, consultation before making transfers or reducing the number of fire companies in service is mandatorily negotiable. *City of Newark*, P.E.R.C. No. 2006-74, 32 *NJPER* 94 (¶47 2006). So is a provision requiring consultation with the union concerning non-firefighting duties such as community relations activities. A provision that requires that fire officers be offered any work schedule change offered to the firefighters' union is not mandatorily negotiable.

A school board can unilaterally determine the criteria for selecting teachers and select the teachers it believes most qualified for summer school teaching

positions. *Black Horse Pike Reg. Bd. of Ed.*, P.E.R.C. No. 2007-38, 32 *NJPER* 396 (¶164 2006). A provision that caps the overall number of students a teacher may be assigned interferes with the Board's freedom to determine class size and is not mandatorily negotiable.

The system for allocating mandatory on-call assignments among qualified fire investigators and the compensation to be paid for the assignments were found to be mandatorily negotiable. *Evesham Tp. Fire Dist. 1*, P.E.R.C. No. 2007-52, \_\_\_ *NJPER* \_\_\_ (¶\_\_ 2007). But the employer had a prerogative to determine which employees were qualified for such assignments and to make an involuntary assignment if not enough employees volunteered.

The Commission dismissed a petition for contested transfer determination under *N.J.S.A.* 34:13A-25, where the case involved a change of shifts, not a transfer between work sites. *Carteret Bor. Bd. of Ed.*, P.E.R.C. No. 2007-20, 32 *NJPER* 331 (¶137 2006).

<b>Discipline</b>
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The 1990 discipline amendments, *N.J.S.A.* 34:13A-22, do not preempt a contract clause providing that suspensions, except in

the case of tenure charges or criminal indictment, shall be with full pay. *Old Bridge Bd. of Ed.*, P.E.R.C. No. 2006-99, 32 *NJPER* 241 (¶99 2006). Nor is such a clause inconsistent with *N.J.S.A.* 18A:6-3.

*State v. State Troopers Fraternal Ass'n*, 134 *N.J.* 393 (1993), and Commission cases applying that decision preclude binding arbitration of the merits of major disciplinary actions against police officers. *Rutgers, The State Univ.*, P.E.R.C. No. 2007-5, 32 *NJPER* 274 (¶113 2006), app. pending App. Div. Dkt. No. A-4855-06T5.

Contractual procedures relating to when disciplinary determinations have to be made do not intrude on the exclusive jurisdiction of the Merit System Board to review the merits of major discipline in local Merit System jurisdictions. *City of Newark*, P.E.R.C. No. 2007-12, 32 *NJPER* 311 (¶129 2006).

Minor discipline is legally arbitrable in a Merit System jurisdiction. *Borough of Beach Haven*, P.E.R.C. No. 2007-51, \_\_\_ *NJPER* \_\_\_ (¶\_\_ 2007); *N.J.S.A.* 34:13A-5.3

A Corrective Action Plan predominately constituted an evaluation rather than a reprimand, so the Commission restrained arbitration over any challenge to the

accuracy of its contents or its issuance. *Freehold Reg. H.S. Bd. of Ed.*, P.E.R.C. No. 2007-30, 32 *NJPER* 363 (¶153 2006). The Commission found legally arbitrable the union's claim that the board violated the contract by not notifying the employee of parental complaints and affording her an opportunity to respond.

The Commission restrained arbitration of a grievance alleging that a school board dismissed a teacher from an athletic trainer position without just cause. *Hillsborough Tp. Bd. of Ed.*, P.E.R.C. No. 2007-48, 33 *NJPER* 26 (¶10 2006). The board had never appointed the teacher to the position. The Commission denied a restraint to the extent the grievance alleged that the board violated the contract by not first considering current employees before hiring from outside the district.

### **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. *Bergenfield Bd. of Ed.*, P.E.R.C. No. 2006-80, 32 *NJPER* 126 (¶58 2006) (engaging student interest during class and teaching techniques); *Woodbury Bd. of Ed.*, P.E.R.C. No. 2006-81, 32 *NJPER* 128 (¶59 2006) (Commission was disturbed by board's failure to comply with statutory requirement that it notify teacher of basis of withholding, but found that alleged teaching inefficiency concerns were basis for withholding; Commission denied request for restraint concerning procedural claims); *Willingboro Bd. of Ed.*, P.E.R.C. No. 2006-87, 32 *NJPER* 165 (¶74 2006) (most of the reasons, such as communicating with parents concerning academic performance, not submitting lesson plans or leaving plans for substitute teachers, and not helping students to learn, related to teaching performance); *Willingboro Bd. of Ed.*, P.E.R.C. No. 2006-88, 32 *NJPER* 166 (¶75 2006) (most of the

reasons such as poor lesson plans and instruction, incomplete and improper grading, inadequate knowledge of subject taught, and unsatisfactory performance ratings, related to teaching performance); *Bridgeton Bd. of Ed.*, P.E.R.C. No. 2006-100, 32 *NJPER* 197 (¶86 2006) (allegations that principal did not observe due process or communicate appropriately during student investigations involved the teaching performance of a school administrator; Commission denied a restraint of arbitration over allegations that the contract was violated when the principal was not informed of the possibility that her increment would be withheld or given written reasons for the withholding or an opportunity to appear before the board); *Dumont Bd. of Ed.*, P.E.R.C. No. 2007-17, 32 *NJPER* 232 (¶134 2006) (alleged need to improve classroom management skills and student disciplinary procedures); *Willingboro Bd. of Ed.*, P.E.R.C. No. 2007-29, 32 *NJPER* 361 (¶152 2006) (majority of reasons for withholding involved allegedly inappropriate interactions with students in class and allegedly unjustifiable refusals to meet with parents about the academic performance of their children; alleged procedural violations could be arbitrated).

Withholdings not based predominately on the evaluation of teaching performance may be reviewed by an arbitrator. *Bergenfield Bd. of Ed.*, P.E.R.C. No. 2006-69, 32 *NJPER* 83 (¶42 2006), app. pending App. Div. Dkt. No. A-004519-05T2 (alleged failure to report to assigned classes and sleeping in class as apparent result of sickness); *Camden Cty. Voc.-Tech. Bd. of Ed.*, P.E.R.C. No. 2007-47, 32 *NJPER* 24 (¶9 2007) (majority of reasons given for withholding did not relate to an evaluation of teaching performance).

### **Sick Leave**

A public employer has a managerial prerogative to verify that sick leave is not abused and to determine the number of absences and situations that trigger a doctor's note requirement. *Borough of Roselle Park*, P.E.R.C. No. 2006-85, 32 *NJPER* 162 (¶72 2006). However, an employer does not have a prerogative to unilaterally establish a progressive discipline system for violating a sick leave and absenteeism policy. Both the general concept of progressive discipline and the specific steps of a progressive discipline system are negotiable.

Determinations to impose discipline for sick leave abuse or excessive absenteeism

may be arbitrated, absent an alternate statutory appeal procedure. *New Jersey Transit*, P.E.R.C. No. 2006-91, 32 *NJPER* 175 (¶78 2006). Discrimination and retaliation allegations in a sick leave grievance may also be arbitrated.

While an employer has a prerogative in the abstract to conduct conferences with employees about their sick leave use, arbitration will be permitted when the record indicates that counseling conferences were in fact a form of discipline imposed for a sick leave violation already found. *New Jersey Transit*, P.E.R.C. No. 2006-89, 32 *NJPER* 168 (¶76 2006), *recon. den.*, P.E.R.C. No. 2007-1, 32 *NJPER* 267 (¶109 2006). In this case, an arbitrator had already found that counseling was being used as an automatic form of discipline even if negotiated sick leave benefits were being properly used. The contention that the arbitration award was being ignored and employees were still being improperly disciplined could be reviewed through arbitration.

Public employers have a non-negotiable managerial prerogative to require employees to be tested for fitness before they are allowed to return to work. *New Jersey Transit*, P.E.R.C. No. 2007-15, 32

*NJPER* 317 (¶132 2006). The Commission therefore restrained arbitration over the claim that the police officers should have been returned to their previous positions before they completed their firearms re-qualifications.

A sick leave provision permitting the restoration of sick leave days used in the limited instances where the employer itself excluded employees from school was found to be mandatorily negotiable. *Passaic Bd. of Ed.*, P.E.R.C. No. 2006-75, 32 *NJPER* 98 (¶48 2006).

### Vacation Leave

Where approving two or more vacation requests would not compromise minimum staffing levels, a limit on granting emergency vacation leave to one officer per shift is at least permissively negotiable and may be arbitrated. *Old Bridge Tp.*, P.E.R.C. No. 2007-32, 32 *NJPER* 368 (¶155 2006).

Balancing the employees' interest in taking vacations when they desire, and a school board's interest in providing uninterrupted educational services to its students, the Commission concluded that a board had a right to issue a policy generally denying teachers' vacation requests while

classes are in session, subject to exceptions on a case-by-case basis. *East Orange Bd. of Ed.*, P.E.R.C. No. 2007-3, 32 *NJPER* 270 (¶111 2006). The standards for exceptions would be mandatorily negotiable and a claim that a denial was arbitrary would be legally arbitrable. The Commission also held that the board did not have a prerogative to insist unilaterally on forfeiture of vacation days not taken by a certain date. The Commission granted the board's request for a restraint of binding arbitration to the extent the grievance sought to routinely permit teacher vacations while classes are in session.

So long as minimum staffing levels are not compromised, an employer may legally agree to permit employees to make last minute vacation requests even if granting them require the use of overtime to ensure coverage. *Camden Cty. Municipal Util. Auth.*, P.E.R.C. No. 2007-2, 32 *NJPER* 268 (¶110 2006).

### **Compensation and Benefits**

An employee's placement on a negotiated salary guide is normally mandatorily negotiable. *Manalapan-Englishtown Ed. Ass'n*, P.E.R.C. No. 2007-42, 33 *NJPER* 3 (¶3 2007), app. pending App.

Div. Dkt. No. \_\_\_. Arguments about whether a contract provides credit for teaching experience can be made to the arbitrator.

A proposal concerning initial salary guide placement for new investigators was found mandatorily negotiable. *Essex Cty. Pros. Office*, P.E.R.C. No. 2007-13, 32 *NJPER* 313 (¶130 2006). However, a proposal to create a Senior Investigator/Detective position would interfere with a public employer's prerogative to establish a new job title and to determine what duties would be performed by the employees holding that title.

Department of Personnel statutes do not preempt arbitration over longevity payments nor an agreement over longevity for provisional employees. *City of Newark*, P.E.R.C. No. 2007-24, 32 *NJPER* 342 (¶143 2006), app. pending App. Div. Dkt. No. A-2008-06T3.

Extra compensation for guidance counselors assigned to classroom teaching duties and assigned additional students is mandatorily negotiable. *Watchung Hills Reg. Bd. of Ed.*, P.E.R.C. No. 2007-39, 32 *NJPER* 399 (¶165 2006).

The Commission restrained arbitration to the extent a grievance claimed that

Bilingual Probation Officers were entitled to the title and pay of Master Probation Officer and that the assignments of bilingual probation officers should be changed. *New Jersey State Judiciary*, P.E.R.C. No. 2007-49, 33 *NJPER* 28 (¶11 2007). However, the Commission denied a restraint over the claim that probation officers performing bilingual duties were required to do more work than regular probation officers and should be given a stipend for that extra work.

The Commission denied a request for a restraint of binding arbitration of a grievance asserting that an employer violated an agreement to move attorneys who were on a 35 hour per week pay scale to a 37.5 hour per week pay scale without changing their work schedule or increasing their work hours. *City of Newark*, P.E.R.C. No. 2006-95, 32 *NJPER* 229 (¶95 2006). While the City had a managerial prerogative to determine the hours and days during which its services would be operated and the staffing levels to provide such services, these prerogatives did not take away the employees' right to negotiate over work hours.

## Health Benefits

The State Health Benefits Program specifically grants an employer the discretion to provide retiree health benefits and a union an opportunity to negotiate the apportionment of premium payments between the employer and retiree. *Evesham Municipal Util. Auth.*, P.E.R.C. No. 2006-78, 32 *NJPER* 120 (¶156 2006), app. pending App. Div. Dkt. No. A-005006-05T2.

A proposal to provide employer-paid medical coverage to officers who retire because of job-related disabilities is not preempted by the Police and Firemen's Retirement System statute, specifically *N.J.S.A.* 43:16A-7, or the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.* *Essex Cty. Sheriff/Essex Cty.*, P.E.R.C. No. 2006-86, 32 *NJPER* 164 (¶73 2006).

Neither the New Jersey Family Leave Act nor the federal Family and Medical Leave Act (FMLA) requires employees who took leaves to reimburse an employer for health care premiums if they do not return to work. Accordingly, any discretion an employer may have to seek reimbursement must be exercised consistent with its negotiations obligation under the Employer-Employee Relations Act.

*Hillsborough Tp. Bd. of Ed.*, P.E.R.C. No. 2006-97, 32 *NJPER* 232 (¶97 2006).

An employer's discretion to pay the full cost of health insurance coverage under Medicare Part B for retirees is not preempted and may be exercised through negotiations. *Middletown Tp.*, P.E.R.C. No. 2006-102, 32 *NJPER* 244 (¶101 2006). A union could legally seek to enforce alleged contractual obligations on behalf of retired employees as well as current employees because it has a cognizable interest in ensuring that the terms of its collective negotiations agreements are honored.

Where a reduction in benefits and the increases in out-of-pocket expenditures were substantial and the ability to go to out-of-network providers was eliminated, the Commission reconsidered an interim relief decision and ordered an employer to create a fund to reimburse employees for any expenses under the new medical plan that were covered by the prior medical plan. *Franklin Tp.*, P.E.R.C. No. 2006-103, 32 *NJPER* 246 (¶102 2006). The Township also had the option of restoring the former plan.

The cost of dependent coverage is mandatorily negotiable unless preempted by statute or regulation. *Berkeley Tp.*, P.E.R.C.

No. 2007-25, 32 *NJPER* 344 (¶144 2006), app. pending App. Div. Dkt. No. A-1895-06T2. A SHBP regulation, *N.J.S.A.* 17:5-3, requires uniformity in dependent coverage and thus did not give the Township the discretion to pay different proportions of the cost of dependent coverage depending on the employee's date of hire or years of service. However, the State Health Benefits Commission has proposed repealing its uniformity regulation.

### Promotions

The Commission held that the State did not have to negotiate over requiring a bachelor's degree for promotion to State Police captain. *State of New Jersey (Div. of State Police)*, P.E.R.C. No. 2006-68, 32 *NJPER* 81 (¶41 2006). The Commission also found that the union's allegation that the degree attainment date discriminates on the basis of age was not legally arbitrable and had to be presented in another forum.

A city had a managerial prerogative to determine who would be promoted to detective and when officers would begin performing detective duties. *City of Jersey City*, P.E.R.C. No. 2006-72, 32 *NJPER* 91 (¶45 2006).

An employer did not show that its policy goal of improving the continuity of supervision would be substantially limited if the PBA were given the opportunity to prove to an arbitrator that an officer's request for temporary shift exchanges on three Thursdays in one month was arbitrarily denied. *Ocean Tp.*, P.E.R.C. No. 2006-73, 32 *NJPER* 93 (¶46 2006).

The Commission granted a restraint of arbitration to the extent grievances challenged an employer's decision to permanently promote an employee other than the grievants and its decision to have foremen conduct interviews and make recommendations. *City of Summit*, P.E.R.C. No. 2006-94, 32 *NJPER* 227 (¶94 2006). The Commission denied a restraint over procedural issues related to the promotion. *See also Middlesex Bor.*, P.E.R.C. No. 2006-93, 32 *NJPER* 225 (¶93 2006) (posting and notice issues are arbitrable); *New Jersey Institute of Technology*, P.E.R.C. No. 2007-4, 32 *NJPER* 272 (¶112 2006); *Rutgers, The State Univ.*, P.E.R.C. No. 2007-36, 32 *NJPER* 392 (¶162 2006); *Borough of Sea Bright*, P.E.R.C. No. 2007-31, 32 *NJPER* 367 (¶154 2006) (explanation of factors employer relied on in deciding not to promote employee is arbitrable procedural issue).

A grievance alleged that an employer violated the contract by appointing an employee as acting foreperson for more than 30 working days, by not permanently promoting that employee or removing him from the acting position after that period expired, and by not appointing and compensating another employee. The Commission held that the grievance could be arbitrated to the extent it claimed that the employer must remove the employee from the acting position, but not to the extent it sought a permanent promotion or compensation for another employee not given the position. *Rutgers, The State Univ.*, P.E.R.C. No. 2007-37, 32 *NJPER* 394 (¶163 2006).

#### **Miscellaneous Scope Decisions**

The Commission found legally arbitrable a grievance asserting a violation of a procedural requirement that New Jersey Transit meet with ATU if it intended to bid new work and to supply the union with the information supplied to all interested bidders. *New Jersey Transit*, P.E.R.C. No. 2006-70, 32 *NJPER* 87 (¶43 2006).

A contract provision concerning retirement entitlements for past Borough employees was found not mandatorily

negotiable because it addressed benefits of employees who had already retired as well as the benefits of employees who would retire, and it supplemented pension benefits in violation of the prohibition announced in *Fair Lawn Ed. Ass'n v. Fair Lawn Bd. of Ed.*, 79 N.J. 574 (1979). *Borough of Ringwood*, P.E.R.C. No. 2006-96, 32 *NJPER* 232 (¶96 2006).

A union could arbitrate a grievance alleging that eight workplace problems violated the parties' collective negotiations agreement. *Atlantic Cty. Superintendent of Elections*, P.E.R.C. No. 2007-6, 32 *NJPER* 275 (¶114 2006). The Commission restrained arbitration to the extent, if any, the grievance sought to require the employer to make a particular assignment.

The Commission permitted arbitration of a grievance asserting that a school board violated its contractual commitment to ensure safe working conditions when it assigned "greeter duty" to teachers and secretaries. *Washington Tp. Bd. of Ed.*, P.E.R.C. No. 2007-14, 32 *NJPER* 315 (¶131 2006). The Commission recognized the board's position that the dispute predominantly involved a challenge to the its decision to assign teachers to duties it asserted were related to the safety

and well being of students and that a school board has a prerogative to regularly assign duties to teachers so long as the duties are incidental to their primary responsibilities. However, the Board's contention more properly concerned the question of what remedy might be appropriate if the arbitrator found a violation of the contract's safety provision.

A college need not negotiate over who will advise its management team. *Essex Cty. College*, P.E.R.C. No. 2007-46, 33 *NJPER* 19 (¶8 2007).

The Commission declined to restrain arbitration over uniformity, notice and selective enforcement challenges to an unwritten dress code for probation officers. *State of New Jersey Judiciary (Cumberland Vicinage)*, P.E.R.C. No. 2007-50, 33 *NJPER* 30 (¶12 2007). The Commission did not determine whether the employer had a managerial prerogative to prohibit the wearing of jeans, sneakers, baseball caps or sports jerseys while working because the record was insufficient to allow a balancing of the parties' interests.

## Motions and Procedural Matters

A mere breach of contract is not an unfair practice. Therefore, an unfair practice will not be found unless an employer has repudiated a collective negotiations agreement. Summary judgment is not appropriate where material facts are in dispute and the parties' supporting certifications paint two different pictures. *City of Jersey City*, P.E.R.C. No. 2006-66, 32 *NJPER* 78 (¶39 2006), recon. den. P.E.R.C. No. 2006-83, 32 *NJPER* 159 (¶70 2006).

Even where there were no material facts in dispute, the Commission could not discern how payment in accordance with an arbitration award differed from payment under the police chief's grievance responses and repudiated the contract. It therefore denied summary judgment. *City of Englewood*, P.E.R.C. No. 2006-67, 32 *NJPER* 80 (¶40 2006).

The Commission will not intrude on a Hearing Examiner's evidentiary rulings mid-hearing absent extraordinary circumstances. *Rutgers, The State Univ.*, P.E.R.C. No. 2006-82, 32 *NJPER* 158 (¶69 2006).

Whether employees agreed to be transferred pursuant to their requests or for

disciplinary reasons had to be decided after a hearing. *East Orange Bd. of Ed.*, P.E.R.C. No. 2006-101, 32 *NJPER* 243 (¶100 2006).

An unfair practice charge alleged that the employer violated the Act when it unilaterally assigned police officers the responsibility to fuel their patrol cars. The Commission concluded that the employer had not met its burden of proving that it was entitled to relief as a matter of law and denied summary judgment. *West Orange Tp.*, P.E.R.C. No. 2007-21, 32 *NJPER* 331 (¶138 2006). At the plenary hearing, the burden will be on the union to prove that the disputed duties are not incidental to or contemplated within a police officer's job description and normal duties.

The Commission denied cross-motions for summary judgment over allegations that New Jersey Transit violated the Act when it unilaterally transmitted major discipline cases to the Office of Administrative Law for hearing. *New Jersey Transit*, P.E.R.C. No. 2007-22, 32 *NJPER* 339 (¶141 2006). The Commission found that no statute or regulation preempted negotiations over the pre-disciplinary notice issues raised by the FOP, but the Commission could not find that

NJT refused to negotiate in good faith over the notice issues raised by the FOP.

The Commission denied cross-motions for summary judgment where a union had not shown that the employer repudiated the grievance procedure and where the Commission could not discern what the contractual salary provision meant, what the past practice had been, or whether the employer had changed its position on what it was required to do under the provision. *Camden Cty. Pros.*, P.E.R.C. No. 2007-27, 32 *NJPER* 358 (¶150 2006).

A public employer's representative may commit an employer to sign a negotiated agreement and a public employer may be deemed to have bound itself to a memorandum of agreement unless it has reserved a right to ratify the agreement by formal vote. Summary judgment was denied where there were substantial material facts in dispute concerning whether it did so. *Borough of Palmyra*, P.E.R.C. No. 2007-45, 33 *NJPER* 7 (¶6 2007).

The Commission granted an appeal of a decision of the Director of Unfair Practices dismissing an unfair practice charge as untimely. *Maplewood Tp.*, P.E.R.C. No. 2007-28, 32 *NJPER* 360 (¶151 2006). The

Commission concluded that if the facts were as alleged, the PBA had every reason to believe that there was no dispute and no reason to file an unfair practice charge earlier.

The Commission denied an appeal of a decision of the Director of Unfair Practices dismissing a charge as untimely. *New Jersey Transit Corp.*, P.E.R.C. No. 2007-53, \_\_\_ *NJPER* \_\_\_ (¶\_\_\_ 2007). The alleged repudiation of the grievance procedure was a single act that took place more than six months before the filing of the charge. *See also Montclair Bd. of Ed.*, P.E.R.C. No. 2007-55, \_\_\_ *NJPER* \_\_\_ (¶\_\_\_ 2007) (allegations untimely).

The Commission granted an appeal of a decision of the Director of Unfair Practices refusing to issue a Complaint on an unfair practice charge. *Ocean Tp.*, P.E.R.C. No. 2007-44, 33 *NJPER* 5 (¶5 2007). The Director had found that the Township had a managerial prerogative to eliminate a steady midnight shift and that an amendment alleging that the change was in retaliation for protected activity was untimely. The Commission held that the amendment related back to the original charge and was therefore timely. The Commission also held that the amended charge alleged facts that challenged the

Township's assertion that it had acted pursuant to a managerial prerogative and that a hearing was necessary to revolve this factual dispute. Finally, the Commission held that it could not be determined at this early stage of the administrative process whether the parties' contract authorized the elimination of the shift.

The Commission refused to dismiss a union's unfair practice charge after a United States District Court dismissed a lawsuit filed by an employee represented by the union. *State of New Jersey (Dept. of Military and Veterans Affairs)*, P.E.R.C. No. 2007-41, 33 *NJPER* 2 (¶2 2007). The union was not a part of the federal lawsuit and the allegations in the unfair practice charge were not litigated before the court.

### **Representation Fees**

A public employer need not deduct representation fees from a new unit member until the majority representative has notified the employer that a nonmember joining the negotiations unit has received an adequate explanation of the basis for the fee and a period of at least 30 days to request review of the amount of the fee. *Morris Cty.*, P.E.R.C. No. 2007-40, 33 *NJPER* 1 (¶1 2007).

### **Interest Arbitration**

The Commission dismissed an interest arbitration petition where the parties had entered into a binding Memorandum of Agreement. *City of Newark*, P.E.R.C. No. 2006-84, 32 *NJPER* 159 (¶71 2006).

Assistant Prosecutors are not covered by the Police and Fire Public Interest Arbitration Reform Act. *Camden Cty. Assistant Prosecutors*, P.E.R.C. No. 2007-9, 32 *NJPER* 283 (¶117 2006), app. pending App. Div. Dkt. No. A-6631-05T5. The statute permits interest arbitration for employees "performing police services" and lists an extensive, although not exhaustive, list of job titles in which employees have direct, front-line responsibility for enforcement of laws, detection of legal violations, or custody of offenders. Assistant prosecutors are not included. The Commission also found that *N.J.S.A. 2A:158-1 et seq.* does not specify the assistant prosecutors' duties or powers, reiterate the statutory language setting forth the prosecutor's powers, or give them the police powers conferred on prosecutor's detectives and investigators. *See also Union Cty. Assistant Prosecutors*, P.E.R.C. No.

2007-10, 32 *NJPER* 286 (¶118 2006), app. pending App. Div. Dkt. No. A-000593-06T5.

Newark Housing Authority police officers perform police services and are entitled to interest arbitration. *Newark Housing Auth.*, P.E.R.C. No. 2006-79, 32 *NJPER* 122 (¶57 2006).

The Commission affirmed an interest arbitrator's award. The employer appealed asserting that the arbitrator gave undue weight to evidence of the employer's internal settlement patterns. *Somerset Cty. Sheriff*, P.E.R.C. No. 2007-33, 32 *NJPER* 372 (¶156 2006), app. pending App. Div. Dkt. No. A-1899-06T3. The employer also asserted that the arbitrator did not properly calculate the total net economic changes for each year of the agreement. The Commission concluded that the employer had not presented a basis for disturbing the arbitrator's judgment, discretion and labor relations expertise and that the arbitrator had satisfied his obligations under *N.J.S.A.* 34:13A-16d(2) to determine that the total net annual economic changes for each year of the agreement are reasonable.