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# Recent Case Law and Policy Developments

## April 2008 through March 2009

### Public Employment Relations Commission

Ira W. Mintz  
General Counsel

Mary E. Hennessy-Shotter  
Deputy General Counsel

Don Horowitz  
Deputy General Counsel

Christine Lucarelli-Carneiro  
Deputy General Counsel

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What follows is an overview of Commission case law since the April 2008 Annual Conference.

#### Unfair Practice

#### Discrimination

In Kearny Bd. of Ed., P.E.R.C. No. 2008-57, 34 NJPER 88 (¶37 2008), the Commission dismissed an unfair practice charge after finding that the Kearny Board of Education proved that it would have reduced the work hours of full-time aides even absent any hostility to their filing a representation petition. The Board proved by a preponderance of the evidence that the reduction in hours was motivated by a budget defeat and the immediate need to cut the budget.

Hostility to protected activity was a motivating factor in the decision of the Newark Housing Authority to lay off all special police. Newark Housing Auth., P.E.R.C. No. 2009-18, 34 NJPER 298 (¶108 2008). However, the special police would have been laid off even absent protected activity as part of a large reduction in force. Accordingly, the Commission dismissed that portion of the unfair practice charge. The Commission found that the Authority did violate the Act when it failed to provide the union with a copy of an agreement for the provision of police services by the City of Newark.

A school board violated the Act when it transferred teachers after they appeared at a board meeting to support a teacher that the principal recommended for non-renewal;

when the principal repeatedly referred to an Association building representative as “sour juice” in front of unit members; when the principal solicited two non-tenured teachers to write letters to the Association president complaining about the Association building representative; and when the principal called a particular Association representative to act as her witness at disciplinary meetings with two unit members. East Orange Bd. of Ed., P.E.R.C. No. 2009-24, 34 NJPER 374 (¶121 2008). The Commission dismissed allegations of direct dealing regarding pay for after-school club activities. In the absence of exceptions, the Commission also found that the board violated N.J.S.A. 34:13A-25 when it transferred the building representative between work sites as punishment for her Association activities.

In Irvington Bd. of Ed., P.E.R.C. No. 2009-48, 35 NJPER \_\_\_ (¶\_\_\_ 2009), the Commission adopted, with modification, the Hearing Examiner’s recommended decision and found that the Board violated 5.4a(1) and (3) of the Act when it awarded a not effective evaluation rating to an Association building representative in retaliation for her protected activity. In the absence of cross-exceptions, the Commission adopted the recommendation

that the Board did not violate the Act by awarding two other “not effective” ratings in the same evaluation.

<b>Good Faith Negotiations</b>
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The Commission denied a request for reconsideration of a Commission designee’s decision denying interim relief. Camden Cty. College, P.E.R.C. No. 2008-67, 34 NJPER 254 (¶89 2008). The Association alleged that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it replaced the existing AmeriHealth PPO Health Plan with the New Jersey State Health Benefits Program. The parties’ agreement required the College to pay the premium for the AmeriHealth plan or an equivalent plan. The Commission agreed with the designee that the standards for interim relief had not been met and that the dispute had to proceed to a forum where evidence could be presented and the contractual question of whether the new plan is equivalent could be resolved.

Based on the undisputed facts in the police chief’s certification, the Commission granted summary judgment and found that the employer did not unilaterally change disciplinary procedures. Fairfield Tp.,

P.E.R.C. No. 2009-37, 35 NJPER 4 (¶3 2009). The Commission also found that it did not have jurisdiction to enforce N.J.S.A. 40A:14-147; and an announcement that a disciplinary hearing would not be held in public when the hearing was subsequently held in public is not an unfair practice.

### **Duty of Fair Representation**

An employee alleged that her union did not seek ratification of changes to a proposed agreement that had already been ratified. Since that allegation, if true, might constitute an unfair practice, the Commission remanded the allegation to the Director of Unfair Practices to issue a complaint. CWA Local 1084, P.E.R.C. No. 2009-36, 35 NJPER 1 (¶2 2009).

A retiree is not an employee within the meaning of the Act. IAFF Local 2081, P.E.R.C. No. 2009-47, 35 NJPER \_\_ (¶\_\_ 2009). Accordingly, the Commission sustained a decision of the Director of Unfair Practices that had refused to issue a complaint based on a retired firefighter's claim that his former majority representative had refused to arbitrate a grievance on his behalf concerning the termination of health benefits for his dependents.

### **Representation**

The Commission held that under Warren Cty., P.E.R.C. No. 86-111, 12 NJPER 357 (¶46 1986), given their statutory power to arrest, weights and measures employees are police within the meaning of the Act. Burlington Cty., P.E.R.C. No. 2009-10, 34 NJPER 247 (¶85 2008), app. pending App. Div. Dkt. No. A-1394-08T1.

The Commission denied a request for review of a Director of Representation decision certifying a unit of supervisory employees. Teaneck Tp., P.E.R.C. No. 2009-25, 34 NJPER 379 (¶122 2008). The Township did not establish that it was entitled to an evidentiary hearing or that the disputed department heads were managerial executives.

A payroll/benefits coordinator was found to be a confidential employee because she has functional responsibilities and knowledge in connection with issues involved in collective negotiations of a negotiations unit affiliated with the petitioning employee organization. West Morris Reg. H.S. Bd. of Ed., P.E.R.C. No. 2009-29, 34 NJPER 434 (¶134 2008).

## Scope of Negotiations

Parties can seek a scope of negotiations 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.

N.J.A.C. 19:16-5.5(c) requires that scope petitions be filed within 14 days of the receipt of the filing of an interest arbitration petition. Accordingly, the Commission dismissed a scope of negotiations petition as untimely, but noted that both parties recognize that the placement of holiday pay into base pay is mandatorily negotiable and that only the Division of Pensions may determine whether that form of holiday pay is creditable for pension purposes. Borough of Fort Lee, P.E.R.C. No. 2008-70, 34 NJPER 261 (¶92 2008).

## Work Hours

In East Rutherford Bd. of Ed., P.E.R.C. No. 2008-59, 34 NJPER 92 (¶39 2008), the Commission determined that the

Board had a managerial prerogative to abolish 212-day secretarial positions. However, if the Board seeks to hire or reassign any secretaries into full-time positions, the terms and conditions of employment of those secretaries would be mandatorily negotiable. The Board asserted that it has already negotiated those terms and conditions of employment as reflected in the collective negotiations agreement and the Association claimed that a "grandfather clause" applies. The Commission expressed no opinion on the application of the agreement to those issues.

Absent a showing that staffing levels will drop below minimum standards, a grievance asserting that the employer limited the number of employees who may go out on vacation or other leave is legally arbitrable, even if an employer must call in an officer on overtime to maintain its desired staffing levels. Township of Weehawken, P.E.R.C. No. 2009-20, 34 NJPER 302 (¶110 2008). Whether a departmental order changed the past practice or otherwise violated the parties' contract is for the arbitrator to decide.

A grievance asserting that a school board did not give proper notice before reducing the salaries of all guidance

counselors at the same time it changed their 12-month positions to 10-month positions was legally arbitrable. Bergen Cty. Voc. Schools Bd. of Ed., P.E.R.C. No. 2009-5, 35 NJPER \_\_ (¶\_\_ 2009). Notice of a reduction-in-force is mandatorily negotiable.

The Commission denied a request for a restraint of binding arbitration of a grievance contesting a change in the work schedule of the Criminal Investigations Bureau in the police department. Edison Tp., P.E.R.C. No. 2009-51, 35 NJPER \_\_ (¶\_\_ 2009). The Township had not shown that the change in schedule would interfere with governmental policy so as to require an exception to the general negotiability of work schedules.

### **Assignments and Transfers**

Public employers generally have a managerial prerogative to assign regular job duties during normal work hours. City of Hoboken, P.E.R.C. No. 2009-12, 34 NJPER 251 (¶87 2008).

### **Discipline**

The Commission denied a request for a restraint of binding arbitration of a grievance that alleged a failure to issue disciplinary

determinations within 30 days of the hearing. City of Newark, P.E.R.C. No. 2009-2, 34 NJPER 219 (¶74 2008). Since the grievance did not contest the termination, this procedural issue was not preempted by the forfeiture statute.

A Performance Improvement Plan (“PIP”) to a patrol officer was not a reprimand and could not be challenged as unjust minor discipline in binding arbitration. Plainsboro Tp., P.E.R.C. No. 2009-26, 34 NJPER 380 (¶123 2008).

The Commission granted, in part, a request for a restraint of binding arbitration of a grievance to the extent the union sought to challenge the employer’s right to bring disciplinary charges. Plainsboro Tp., P.E.R.C. No. 2009-42, 35 NJPER \_\_ (¶\_\_ 2009). The Commission denied the request to the extent the union sought to challenge the removal of postings from the union bulletin board.

### **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 can only be reviewed by the Commissioner of Education. Wharton Borough Bd. of Ed., P.E.R.C. No. 2008-69, 34 NJPER 259 (¶91 2008) (of seven reasons cited by the superintendent, most relate to “teaching performance” as a school social worker); Mahwah Tp. Bd. of Ed., P.E.R.C. No. 2008-71, 34 NJPER 262 (¶93 2008) (alleged failure to submit required course recommendations by the deadline, incorrectly grading student examinations and curving grades in violation of school policy, and engaging in an unprofessional manner with a student in her class by confronting the student about an email); Robbinsville Tp. Bd. of Ed., P.E.R.C. No. 2009-3, 34 NJPER 220 (¶75 2008) (allegedly inappropriate remarks to students in a classroom setting); Woodbridge Tp. Bd. of Ed., P.E.R.C. No. 2009-53, 35 NJPER \_\_\_ (¶\_\_ 2009) (majority of ten reasons involved evaluation of teaching performance).

Withholdings not based predominately on the evaluation of teaching performance may be reviewed by an arbitrator. Hamburg Bd. of Ed., P.E.R.C. No. 2009-44, 35 NJPER \_\_\_ (¶\_\_ 2009) (allegations that staff member chaperoned two students to an out-of district event on her day off without district approval)

### **Sick Leave**

An employer had a managerial prerogative to require a grievant to be examined by an employer-selected physician to substantiate his illness when conflicting information regarding whether grievant would be returning to work was previously submitted. Borough of Waldwick, P.E.R.C. No. 2009-30, 34 NJPER 435 (¶135 2008).

### **Compensation and Benefits**

The Commission denied a request for a restraint of binding arbitration of a grievance asserting that three officers out on sick leave or on light duty assignments were contractually entitled to the stipends they received while on active duty. City of Newark, P.E.R.C. No. 2008-60, 34 NJPER 94 (¶40 2008). Claims that the officers should have been paid hazardous duty stipends from

the time they went out on sick leave until they returned to active duty would not substantially limit the City's policymaking powers or its ability to reassign personnel to maintain staffing levels in the firefighting division.

Overtime pay for a captain and three lieutenants who worked beyond their normal 40-hour work week was found to be a legally arbitrable compensation issue. Atlantic Cty. Prosecutor's Office, P.E.R.C. No. 2008-65, 34 NJPER 120 (¶152 2008).

In State of New Jersey, P.E.R.C. No. 2009-4, 34 NJPER 222 (¶76 2008), the Commission held that a proposal to have compensatory time or cash for overtime at the employee's option was mandatorily negotiable, subject to Department of Personnel approval.

A claim that a police officer has been performing the duties of a higher rank and is entitled to receive additional compensation is severable from the decision to assign those duties and is legally arbitrable. Borough of North Arlington., P.E.R.C. No. 2009-14, 34 NJPER 287 (¶102 2008).

The Commission permitted arbitration of a portion of a grievance seeking to have overtime for police officers assigned first to volunteers as part of an overall allocation

system. City of Trenton, P.E.R.C. No. 2009-13, 34 NJPER 285 (¶101 2008). However, to protect against any substantial limitations on the employer's managerial interests, the Commission restrains arbitration to the extent the grievance claimed that the City had to declare an emergency under N.J.S.A. 40A:14-134 before it could from an overtime allocation system. See also City of Trenton, P.E.R.C. No. 2009-31, 34 NJPER 438 (¶136 2008) (permitting arbitration over aspect of grievance claiming violation of 4-4 work schedule).

### **Health Benefits**

Because the level of health benefits is mandatorily negotiable, the Commission declined to restrain binding arbitration of a grievance seeking reimbursement of additional co-pay costs for NJPLUS and HMO visits under the State Health Benefits Program. Borough of East Rutherford, P.E.R.C. No. 2009-15, 34 NJPER 289 (¶103 2008), app. pending App. Div. Dkt. No. A-1260-08T2. The Borough may refile its petition should the arbitrator find a contractual violation and a dispute arise over the negotiability of any remedy issued.

A contract clause providing for school board-paid prescription and dental coverage was found not mandatorily negotiable to the extent it applies to a retiree who elects State-paid coverage under the State Health Benefits Program/School Employees Health Benefits Program. Lumberton Tp. Bd. of Ed., P.E.R.C. No. 2009-21, 34 NJPER 303 (¶111 2008). The clause was found mandatorily negotiable to the extent it applies to a retiree who does not elect State-paid coverage.

After finding that repudiation of an agreement to improve benefits can constitute irreparable harm, the Commission granted reconsideration of an interim relief decision and ordered a county prosecutor to provide access to an improved dental plan. Camden Cty. and Camden Cty. Prosecutor, P.E.R.C. No. 2009-27, 34 NJPER 383 (¶124 2008).

The Commission denied a restraint of binding arbitration of a grievance asserting that the parties' collective negotiations agreement required a city to pay the cost of increased maximum out-of-pocket expenses for employees moved from the Traditional Plan to the NJ Direct Plan of the State Health Benefits Program. City of Bayonne, P.E.R.C. No. 2009-40, 35 NJPER 12 (¶7 2009). Relying on its decision in Rockaway Tp.,

P.E.R.C. No. 2009-1, 34 NJPER 278 (¶96 2007), the Commission held that the grievance concerns the legally arbitrable issue of health benefit levels. If the arbitrator finds a contractual violation and a dispute arise over the negotiability of any remedy issued, the City may re-file its scope petition within 30 days. See also Borough of River Edge, P.E.R.C. No. 2009-49, 35 NJPER \_\_ (¶\_\_ 2009) (permitting arbitration where union alleged increased out-of-pocket expenses; most doctors not in new plan; longer wait to see specialist; and limited assistance from Borough).

**Promotions**

The Commission restrained arbitration over a demand that a detective be elevated to Detective First Grade, but not over a claim that the employer changed personnel procedures pertaining to advancement to Detective First Grade. Barnegat Tp., P.E.R.C. No. 2009-43, 35 NJPER \_\_ (¶\_\_ 2009).

**Layoffs**

A public employer has a managerial prerogative to decide whether or not to lay off public employees, but procedural issues such

as notice of layoff are mandatorily negotiable. Passaic Cty. (Preakness Healthcare Center, P.E.R.C. No. 2008-63, 34 NJPER 117 (¶50 2008).

Absent preemptive statutes or regulations, parties may negotiate provisions relating seniority to determinations of which satisfactory employees will be laid off, recalled, bumped or re-employed. Barnegat Tp., P.E.R.C. No. 2009-22, 34 NJPER 305 (¶112 2008). An arbitrator could determine whether an employee was entitled to bump into a lower title.

N.J.S.A. 2A:158-15, which states that assistant prosecutors hold their appointments at the pleasure of the prosecutor, does not preempt a prosecutor's discretion to agree through collective negotiations to use seniority to decide the order of layoffs. Passaic Cty. Prosecutor's Office, P.E.R.C. No. 2009-33, 34 NJPER 440 (¶138 2008).

N.J.S.A. 2A:157-10, which contains the authority of a prosecutor to appoint investigators, does not address layoff procedures and is therefore not preemptive as to whether a prosecutor could agree through collective negotiations to use seniority to decide the order of layoffs. Passaic Cty.

Prosecutor's Office, P.E.R.C. No. 2009-34, 34 NJPER 444 (¶139 2008).

Civil Service statutes and regulations did not preempt an arbitrator's finding that the employer violated pre-layoff procedures, where the arbitrator limited the award to back pay for the remainder of the 12-month period the employee could have remained in his provisional title. Hudson Cty., P.E.R.C. No. 2009-38, 35 NJPER 6 (¶4 2009).

### **Health and Safety**

The Commission restrained arbitration to the extent a grievance challenged the Judiciary's decision to assist other agencies in an arrest outside a probation building; but permitted arbitration of alleged severable safety issues. New Jersey State Judiciary, P.E.R.C. No. 2008-68, 34 NJPER 255 (¶90 2008).

A health and safety grievance alleging that the yard towers at the Mercer County Correction Center violated the contractual safety and health clause and State regulations was found to be a legally arbitrable health and safety issue. Mercer Cty., P.E.R.C. No. 2009-11, 34 NJPER 248 (¶86 2008).

A contract clause that required the employer to assign two employees to the

operation of salt and plow trucks, to do any street work where danger exists, and in other instances when the Township would normally call in two employees for overtime work, was found not mandatorily negotiable. Maplewood Tp., P.E.R.C. No. 2009-54, 35 NJPER \_\_ (¶\_\_ 2009). The union's safety concerns would have to be addressed through other means besides a contractual clause determining how many employees will be used to operate a vehicle or assigned to a job.

### **Miscellaneous Scope Decisions**

The Commission concluded that Rutgers, the State University could have legally bound itself to limit the distribution of grievance materials at a preliminary stage of the grievance procedure. Rutgers, The State Univ., P.E.R.C. No. 2008-62, 34 NJPER 114 (¶49 2008). However, the University can refile its scope petition if the arbitrator finds a contractual violation and issues an award that the University believes would significantly interfere with its ability to address alleged discrimination or harassment or correct any systemic problems jeopardizing the integrity of the evaluation process.

Negative comments in an evaluation that are all evaluative may not be challenged

in binding arbitration. Monmouth Cty. Sheriff's Office, P.E.R.C. No. 2008-64, 34 NJPER 119 (¶51 2008). However, any disciplinary action resulting from the evaluation may be challenged in an appropriate forum.

The Commission permitted arbitration of a grievance that asserted that the employer violated a contractual respect and dignity clause when its Human Resources Division Manager sent an e-mail to unit employees that was allegedly critical of an e-mail sent by a union officer. New Jersey State Judiciary, P.E.R.C. No. 2009-1, 34 NJPER 216 (¶73 2008).

Where an employer permits light duty, the assignment of available light duty work to qualified police officers concerns a subject that is at least permissively negotiable and legally arbitrable. Little Falls Tp., P.E.R.C. No. 2009-5, 34 NJPER 224 (¶77 2008).

A union could not arbitrate a claim that a police lieutenant's final employment status should be changed from a termination to a disability pension absent prior action by the Civil Service Commission or a court of competent jurisdiction. City of Newark,

P.E.R.C. No. 2009-39, 35 NJPER 11 (¶6 2009).

The Commission declined to restrain arbitration of a grievance contesting an employer's use of a new Employee Accident Form for all new Workers' Compensation claims. City of Newark, P.E.R.C. No. 2009-41, 35 NJPER \_\_ (¶\_\_ 2009). The new form asked questions about participation in athletic, recreational or sporting activities and chiropractic care. The City did not show how using an old form would substantially limit its governmental policy making powers.

The Commission denied a petition to quash a subpoena in a scope of negotiations proceeding. Linden Bd. of Ed., P.E.R.C. No. 2009-52, 35 NJPER \_\_ (¶\_\_ 2009). The subpoena sought discovery of a document prepared by the Board's counsel to the superintendent related to the increment withholding of a teacher. The Commission held that when the superintendent placed the document in the teacher's personnel file and gave a copy to the teacher, he waived any attorney-client privilege.

**Motions and Procedural Matters**

In North Hudson Reg. Fire and Rescue, P.E.R.C. No. 2008-61, 34 NJPER 113

(¶48 2008), the Commission denied a motion for reconsideration of an interim relief decision where the designee had found a dispute over material facts based on the certifications filed in support of and opposition to the application for interim relief.

The Commission denied cross-motions for summary judgment in consolidated unfair practice cases where there was a factual dispute over what the governing body knew or should have known about the police department's policies on off-duty employment that may be relevant to the ultimate legal question of whether the Township violated its obligation to negotiate in good faith when it unilaterally rescinded department policies. Township of Parsippany-Troy Hills, P.E.R.C. No. 2008-66, 34 NJPER 253 (¶88 2008).

The Commission granted a motion for summary judgment and dismissed an unfair practice charge filed against PBA Local 351-A (SOA). P.E.R.C. No. 2009-7, 34 NJPER 243 (¶82 2008). The SOA submitted certifications in support of its motion. The charging party objected to the motion and requested a hearing on the charges. However, the charging party did not submit a rebuttal to the SOA's certification and/or brief or a

certification setting forth specific facts and showing that there was a genuine issue for hearing.

The Commission affirmed a motion to dismiss an unfair practice charge for lack of prosecution, but without the sanctions recommended by the Hearing Examiner. Hudson Cty., P.E.R.C. No. 2009-8, 34 NJPER 244 (¶83 2008).

Because an allegation was made that the majority representative provided legal counsel at departmental and OAL hearings to other unit members, and because that allegation, if true, might constitute an unfair practice, the Commission remanded a case to the Director for issuance of a Complaint on that allegation. FOP Lodge 12, P.E.R.C. No. 2009-9, 34 NJPER 246 (¶84 2008).

The Commission found that an unfair practice charge was timely filed within six months of the date the charging party became aware that her reassignment was permanent. State of New Jersey (Dept. of Transportation), P.E.R.C. No. 2009-16, 34 NJPER 291 (¶104 2008). The Commission remanded the charge to the Director of Unfair Practices to afford the charging party one last opportunity to amend the charge to clarify her allegations that her reassignment was in retaliation for

complaints, whether the complaints constitute protected activity, and whether the State refused to accept her grievances.

The Commission declined to consider an aspect of a summary judgment motion because it was really an appeal of the issuance of a complaint that must be made by special permission to appeal within five days of service of the Complaint pursuant to N.J.A.C. 19:14-2.3(c). State of New Jersey, P.E.R.C. No. 2009-32, 34 NJPER 439 (¶137 2008).

The Commission denied an employer's motion for summary judgment where there were material facts in dispute as to timeliness issues; the charging alleged that his position was eliminated in retaliation for protected activity; and where his activity on a Lifeguard Pension Commission was protected by the Act. City of Ocean City, P.E.R.C. No. 2009-45, 35 NJPER \_\_ (¶\_\_ 2009).

### **Interest Arbitration**

The Commission concluded that an interest arbitrator did not adequately explain his reasons for awarding a health benefit change under the statutory factors and vacated and remanded the case to the arbitrator to provide a reasoned explanation for his award. Borough of Pompton Lakes, P.E.R.C. No.

2008-58, 34 NJPER 90 (¶38 2008). In his decision on remand, the arbitrator adequately explained his reasons for awarding the health benefit change under the subsection 16g factors and the Commission affirmed the award. P.E.R.C. No. 2009-23, 34 NJPER 371 (¶120 2008).

The Commission Chairman denied an application for special permission to appeal an interlocutory ruling of an interest arbitrator. Borough of Paramus, P.E.R.C. No. 2009-28, 34 NJPER 384 (¶125 2008). The arbitrator ruled that the formal arbitration proceeding would be limited to the issues listed on the interest arbitration petition, which included wages, but not an employee contribution to medical benefits. The Chairman found that within the framework of the interest arbitration statute and regulations, the arbitrator carefully considered the employer's arguments and did not abuse his discretion in rejecting those arguments. The Chairman noted that the net economic effect of a wage giveback as a contribution toward medical benefits is the same as a lower across-the-board wage increase and that the union had no objection to the employer's adjusting its wage proposal accordingly.