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# Recent Case Law and Policy Developments

## April 2009 through March 2010

### Public Employment Relations Commission

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What follows is an overview of Commission case law since the April 2009 Annual Conference.

#### Unfair Practice

#### Discrimination & Interference with Protected Rights

The State of New Jersey did not violate the Act when it reassigned a CWA shop steward. However, the employer did violate the Act when an administrator referred to the employee as a “shop steward” or “Mr. Shop Steward” in a meeting unrelated to Association business. State of New Jersey, P.E.R.C. No. 2009-57, 35 NJPER 133 (¶48 2009).

The West Paterson Board of Education violated the Act when it refused to grant

discretionary time off to custodians and secretaries in retaliation for the West Paterson Education Association's filing of grievances and the rejection of the superintendent's proposal to alter terms and conditions of employment. West Paterson Bd. of Ed., P.E.R.C. No. 2010-2, 35 NJPER 273 (¶95 2009).

The Act prohibits public employers, even in their capacity as joint employers with private entities, from interfering with the protected rights of employees to organize a union or to refrain from doing so. Black Horse Pike Reg. School Dist., P.E.R.C. No. 2010-23, 35 NJPER 371 (¶125 2009).

The Wall Township Board of Education violated the Act when it terminated an employee who tried to grieve an evaluation and enlisted the Wall Township Information

Technology Association to have the Board review the contents of the evaluation and to negotiate with the Board concerning the evaluation process. Wall Tp. Bd. of Ed., P.E.R.C. No. 2010-24, 35 NJPER 373 (¶126 2009). Based on a stipulated record, the Commission rejected the Board's assertion that since the employee was acting on her own behalf to challenge her evaluation, she was not engaged in protected activity. The Commission denied reconsideration of its decision, rejecting the Board's argument that during a transition between former and present legal counsel, the hearing in this matter was waived without its knowledge, participation or consent. P.E.R.C. No. 2010-63, 36 NJPER \_\_ (¶\_\_ 2010). The Board's former counsel was the counsel of record with the apparent authority to stipulate the facts and waive a hearing examiner's report.

<b>Good Faith Negotiations</b>
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The Commission dismissed an unfair practice charge alleging that the State of New Jersey Administrative Office of the Courts violated the Act when it unilaterally implemented a program requiring freelance interpreters (FLIs) to sign professional service agreements (PSAs) that eliminated the

possibility that the FLIs could become members of the collective negotiations unit currently representing FLIs. The Commission found that FLIs that signed PSAs are independent contractors and therefore not public employees covered by the Act. New Jersey Administrative Office of the Courts, P.E.R.C. No. 2010-1, 35 NJPER 268 (¶94 2009).

The Township of Hopewell violated the Act when it unilaterally changed terms and conditions of employment during interest arbitration proceedings by adding new conditions on last-minute leave requests. The Commission noted that the parties' most recent agreement requires approval for leave requests and the Township has a managerial prerogative to deny requests that would prevent it from meeting its minimum staffing levels. Hopewell Tp., P.E.R.C. No. 2010-10, 35 NJPER 295 (¶103 2009).

The Commission granted, in part, the Fraternal Order of Police, Newark Lodge No. 12's cross-motion for summary judgment and denied the City of Newark's motion for summary judgment in an unfair practice case filed by the FOP alleging that the City violated the Act when it failed to provide either complete or timely responses to ten

information requests made with regard to the processing of grievances. Three and four month delays in supplying information in response to two of the requests was not reasonably prompt. City of Newark, P.E.R.C. No. 2010-11, 35 NJPER 298 (¶104 2009).

The University of Medicine and Dentistry violated the Act when it refused to negotiate over reductions in faculty practice or clinical components of the salary of certain faculty represented by the American Association of University Professors. The AAUP had not clearly and unmistakably waived its right to negotiate upon request over supplemental salaries either through negotiations or acquiescence. UMDNJ, P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009).

The Morris County Sheriff's Office and the County of Morris violated the Act when, during the pendency of interest arbitration proceedings, the public employer issued a directive providing that staff who are assigned to positions normally closed on the weekend will no longer be permitted to work those positions on a holiday. Morris Cty. Sheriff's Office and Morris Cty., P.E.R.C. No. 2010-16, 35 NJPER 348 (¶117 2009), recon. den. P.E.R.C. No. 2010-52, 36 NJPER 24 (¶11

2010), app. pending App. Div. Dkt. No. A-3174-09T4.

Whether the Municipal Rehabilitation and Economic Recovery Act, N.J.S.A. 52:27BBB-1 et seq. ("MRERA"), preempts negotiations over layoff procedures in a Civil Service jurisdiction was a question intertwined with a related question pending before the Superior Court. City of Camden, P.E.R.C. No. 2010-18, 35 NJPER 353 (¶119 2009), app. pending App. Div. Dkt. No. A-1167-09T2 and A-1223-09T2. If MRERA preempts the application of the Civil Service Act, then MRERA would preempt negotiations obligations under the New Jersey Employer-Employee Relations Act ("ACT"); if MRERA does not preempt the application of the Civil Service Act, then the Civil Service Act would preempt negotiations under the Act. This case involved both an unfair practice charge and a scope of negotiations petition.

Bergen County Community College had a managerial prerogative to create a smoke-free campus and was therefore not required to negotiate over a no-smoking policy banning the use of tobacco anywhere on College property. Bergen Cty. Community College, P.E.R.C. No. 2010-25, 35 NJPER

376 (¶127 2009). However, the College violated the Act when it refused to negotiate over the new disciplinary procedures in the smoking policy.

The Township of Irvington violated the Act when it refused to sign collective negotiations agreements that reflected the terms of a memorandum of agreement. Irvington Tp., P.E.R.C. No. 2010-44, 35 NJPER 458 (¶151 2009).

### **Duty of Fair Representation**

A wide range of reasonableness must be allowed a majority representative in servicing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. CWA Local 1039, P.E.R.C. No. 2009-56, 35 NJPER 132 (¶47 2009).

The Commission granted an unopposed motion for summary judgment seeking dismissal of an unfair practice charge alleging that the FOP violated the Act when it refused to provide satisfactory legal counsel or union representation throughout disciplinary proceedings that resulted in the charging party's termination. The FOP submitted a certification that the charging party was not treated differently than other members

assigned legal counsel. FOP Lodge 12, P.E.R.C. No. 2010-14, 35 NJPER 345 (¶115 2009).

An individual employee's obligation to file a timely charge against an employer might be tolled if the employee filed a grievance against the employer with the majority representative and can prove that the majority representative breached its duty of fair representation in processing that grievance. Bridgewater-Raritan Bd. of Ed., P.E.R.C. No. 2010-43, 35 NJPER 455 (¶150 2009).

### **Motions and Procedural Matters**

Filing a Superior Court lawsuit more than six months before the filing of an unfair practice charge did not toll the six-month statute of limitations for filing a charge. Sussex Cty. Community College, P.E.R.C. No. 2009-55, 35 NJPER 131 (¶46 2009).

The Commission remanded an unfair practice charge to the Director of Unfair Practices to issue a complaint where the charging party alleged that she was retaliated against for filing complaints and grievances about the workplace and that her employer refused to process her grievances. State of New Jersey (Dept. of Transportation), P.E.R.C. No. 2009-69, 35 NJPER 210 (¶74 2009).

The Commission sustained the Director of Unfair Practice's refusal to issue complaints based on unfair practice charges that claimed that the County of Hudson violated the Act when it required the charging parties to perform duties not required by their Civil Service titles; refused to process their grievances contesting work assignments; and required them to commence a Civil Service process that would allegedly negate the Commission's jurisdiction in this matter. Hudson Cty., P.E.R.C. No. 2010-15, 35 NJPER 346 (¶116 2009). The charge against AFSCME was dismissed because there were no allegations that the charging parties were adversely impacted by the way their grievances were processed and no factual allegations that AFSCME acted arbitrarily, discriminatorily or in bad faith.

A substantial likelihood of success on the merits, not simply a likelihood of success, is the standard the Commission has consistently used in considering interim relief applications in unfair practice cases. Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009).

The Commission granted reconsideration of an interim relief decision to clarify its role in interpreting contracts during consideration

of interim relief applications, but upheld the designee's order denying interim relief based upon a factual dispute as to the meaning of the parties' Managements Rights clause. Camden Cty., P.E.R.C. No. 2010-64, 36 NJPER \_\_ (¶\_\_ 2010).

<b>Representation</b>
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An evidentiary hearing was required where there was a material factual dispute as to a secretary's alleged confidential duties. Old Bridge Tp. Fire Dist. #2, P.E.R.C. No. 2009-70, 35 NJPER 212 (¶75 2009).

The Commission affirmed a Hearing Officer's recommendation that some State Police captains are managerial executives or confidential and some are eligible for inclusion in a negotiations unit. The Commission also held that most executive officers are eligible for inclusion in the unit with the exception of those in confidential or managerial executive positions. State of New Jersey (Div. of State Police), P.E.R.C. No. 2010-13, 35 NJPER 335 (¶114 2009), app. pending App. Div. Dkt. No. A-0907-09T1.

The Commission granted a request for review and remanded a representation matter to the Director of Representation for further investigation as to whether the a petitioning

union has an interest or claim in the representation of a new unit of Emergency Medical Services employees in Gloucester County. Gloucester Cty., P.E.R.C. No. 2010-21, 35 NJPER 363 (¶122 2009). The Commission held that if the new EMS unit was the product of regionalization or consolidation of services, further consideration will need to be given as to whether the EMS employees were appropriately accreted into an existing broad-based unit.

The Commission held that employees may revoke authorization cards prior to certification and that where sufficient cards were revoked, the Director of Representation's decision ordering of an election rather than a card check certification was a reasonable exercise of his discretion. North Bergen Tp., P.E.R.C. No. 2010-37, 35 NJPER 435 (¶143 2009). Allegations of employer misconduct would be litigated in a related unfair practice case.

**Interest Arbitration**

The Commission remanded an interest arbitration award to the arbitrator to address comparability to private and public sector employees in general, as well as the \$1 million

the arbitrator projected in savings to the employer from his award of a new salary schedule given the employer's hiring freeze. Borough of Fort Lee, P.E.R.C. No. 2009-64, 35 NJPER 149 (¶55 2009). The arbitrator issued a supplemental decision finding no basis to modify the terms of his initial award and the Commission affirmed the award. P.E.R.C. No. 2010-17, 35 NJPER 352 (¶118 2009), app. pending App. Div. Dkt. No. A-1212-09T1.

The Commission affirmed an interest arbitration award involving the Borough of Ramsey and the Policemen's Benevolent Association, Local 155. Borough of Ramsey, P.E.R.C. No. 2010-26, 35 NJPER 382 (¶128 2009). The Commission found that the arbitrator provided several reasons that constitute substantial credible evidence supporting the award and that the award was not in conflict with N.J.S.A. 34:13A-18.

The Commission vacated and remanded an interest arbitration award to the arbitrator for reconsideration and issuance of a new award that must explain which of the statutory factors were deemed relevant, satisfactorily explain why the others are not relevant, and provide an analysis of the evidence on each relevant factor. Borough of Paramus,

P.E.R.C. No. 2010-35, 35 NJPER 431 (¶141 2009). The arbitrator must also consider the total net annual economic change for each year of the agreement; accord Passaic Cty. and Passaic Cty. Sheriff, P.E.R.C. No. 2010-42, 35 NJPER 451 (¶149 2009).

**Scope of Negotiations**

**Work Hours and Schedules**

The Commission found that there were facts in dispute regarding the motivation for the creation of a police shift that an arbitrator could decide and that the Commission would retain jurisdiction and permit the employer to reactivate its petition within 30 days should the arbitrator find a contractual violation and the Township believe the remedy would substantially limit its policymaking powers. Edison Tp., P.E.R.C. No. 2010-4, 35 NJPER 281 (¶97 2009).

The Commission preliminarily denied a petition for a scope of negotiations determination finding that work schedules, in general, are mandatorily negotiable and that if the PBA submitted a final offer that included a 12-hour work schedule, the Township could reactivate its petition and supplement its

submissions with the details of the proposal. Wyckoff Tp., P.E.R.C. No. 2010-6, 35 NJPER 286 (¶99 2009).

A rank-and-file fire union could submit a proposal for a 24/72 work schedule to interest arbitration even though the superior officers are on a 10/14 schedule. City of Trenton, P.E.R.C. No. 2010-20, 35 NJPER 361 (¶121 2009).

The Commission granted, in part, a request for a restraint of binding arbitration of a grievance to the extent the grievance concerned temporary reassignments of corrections officers within a job classification and job description and did not involve a change in work hours. Union Cty., P.E.R.C. No. 2010-28, 35 NJPER 389 (¶130 2009). The Commission denied a request for a restraint to the extent the grievance involved changes in work hours.

Public employers and majority representatives may agree that seniority can be a factor in shift selection where all qualifications are equal and managerial prerogatives are not otherwise compromised. Monmouth Cty. and Monmouth Cty. Sheriff, P.E.R.C. No. 2010-30, 35 NJPER 393 (¶132 2009). However, by specifying that seniority will apply where possible and by requiring the

employer to demonstrate "just cause" before deviating from the bidding procedure, a proposal was found to significantly interfere with the employer's prerogative to deviate from seniority bidding because of special skills or training needs.

The Commission found legally arbitrable a claim that the contract mandates that the employer grant a police officer the right to take off one day each year by using an emergency leave day in a non-emergency situation, provided that a request is made at least one week in advance, and the employer is able to maintain minimum staffing by calling in an officer on an overtime basis. Livingston Tp., P.E.R.C. No. 2010-65, 36 NJPER \_\_ (¶\_\_ 2010).

A Civil Service statute preempts accrual of vacation beyond two years. City of Hoboken, P.E.R.C. No. 2010-67, 36 NJPER \_\_ (¶\_\_ 2010).

### **Assignments and Transfers**

An employer had a managerial prerogative to implement a modified duty policy for firefighters, but a union could challenge the impact of the policy on mandatorily or permissively negotiable terms and conditions of employment, including, but

not limited to, tours of duty, work hours, duration of modified duty assignments, and utilization of personal, sick and vacation days. City of Asbury Park, P.E.R.C. No. 2009-66, 35 NJPER 157 (¶57 2009).

An arbitrator's award was found not legally arbitrable to the extent the arbitrator found that the employer violated the parties' agreement by applying a different standard in considering the grievant's request for a reassignment. Hudson Cty., P.E.R.C. No. 2009-72, 35 NJPER 221 (¶78 2009). The award was legally arbitrable to the extent the arbitrator found that the employer violated the contract when it did not follow Civil Service procedures requiring that reassignments not be used as part of a disciplinary action, except when disciplinary proceedings have been utilized.

The Commission restrained arbitration over the decision to transfer a sergeant allegedly as a result of a disciplinary action taken without due process. State of New Jersey (Div. of State Police), P.E.R.C. No. 2009-74, 35 NJPER 225 (¶80 2009). The union did not identify any specific procedural issues in its grievance, demand for arbitration, or brief.



Management has a prerogative to decide whether to replace an absent supervisor. Monmouth Cty. and Monmouth Cty. Sheriff, P.E.R.C. No. 2010-30, 35 NJPER 393 (¶132 2009).

A contract provision that would require unit employees to be assigned to all county-funded work and work on all county property where law enforcement officers are required or used was found to be not mandatorily negotiable. Ibid.

The Commission granted a partial restraint of arbitration holding that an employer has a managerial prerogative to determine the rank qualifications for a watch commander position, but the union may pursue claims that the employer should first use lieutenants on overtime to fill vacant watch commander positions and that sergeants performing that task are entitled to lieutenants pay. Edison Tp., P.E.R.C. No. 2010-39, 35 NJPER 442 (¶145 2009).

An employer has a managerial prerogative to set staffing levels and to assign dispatching duties related to a police officer's normal responsibilities. Borough of North Caldwell, P.E.R.C. No. 2010-51, 36 NJPER 10 (¶4 2010).

Where an employer permits light duty, the assignment of available light duty work to qualified employees is negotiable and legally arbitrable. Parsippany-Troy Hills Tp., P.E.R.C. No. 2010-53, 36 NJPER 25 (¶12 2010).

A grievance could legally challenge the elimination of any consultation with an affected officer and his or her medical provider as part of the consideration of the appropriateness of a light duty assignment; an employer's ability to assign police officers to other departments; the allocation of exceptions to a six-month limit on light duty assignments; and an alleged violation of the progressive discipline system. City of Rahway, P.E.R.C. No. 2010-56, 36 NJPER 38 (¶17 2010).

<b>Discipline</b>
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A grievance could not legally challenge counseling sessions and performance reports that were not designed to penalize officers for past conduct, but to notify them of performance deficiencies and to remind them to be more diligent in certain areas in the future. Edison Tp., P.E.R.C. No. 2009-60, 35 NJPER 141 (¶51 2009). The grievance could proceed to arbitration over a claim that

officers were not advised as to acceptable levels of productivity that were the basis for issuing the counseling notices.

An employer has a prerogative to require a written acknowledgment of receipt of training materials, but not a certification of understanding, where that certification could be used against employees should a dispute arise over their failure to comply with a procedure, rule or regulation. Edison Tp., P.E.R.C. No. 2009-61, 35 NJPER 143 (¶52 2009).

The Commission granted a request for a restraint of binding arbitration to the extent a grievance challenged a decision to bring major rather than minor discipline. City of Newark, P.E.R.C. No. 2010-19, 35 NJPER 358 (¶120 2009). The Commission denied the request to the extent the grievance asserted that the discipline should not have been brought before a trial board and that the composition of the trial board violated the contract. See also City of Newark, P.E.R.C. No. 2010-62, 36 NJPER \_\_ (¶\_\_ 2010).

A contract provision barring the use of polygraph and voice print tests in non-criminal investigations was found to be mandatorily negotiable. Monmouth Cty. and

Monmouth Cty. Sheriff, P.E.R.C. No. 2010-30, 35 NJPER 393 (¶132 2009).

Procedural protections during disciplinary proceedings such as notice of allegations, an opportunity to respond, and a written determination resulting from an investigation are mandatorily negotiable subjects. UMDNJ, P.E.R.C. No. 2010-45, 35 NJPER 461 (¶152 2009). Should a case arise in which UMDNJ finds a need to deviate from any negotiated procedural protections, the Commission will consider the parties' specific concerns under the particular facts and circumstances of that case.

Police officers may not arbitrate the merits of a major disciplinary dispute. Accordingly, the Commission held that a New Jersey Transit police officer could not submit his termination to "traditional" binding grievance arbitration. NJIT, P.E.R.C. No. 2010-48, 35 NJPER 474 (¶158 2009). The FOP also argued that the officer was entitled to arbitrate the termination under the police disciplinary arbitration statute, N.J.S.A. 40A:14-210(1). The Commission rejected NJIT's argument that it was not covered by that statute, but also found that the FOP had not filed a proper request for a panel of disciplinary arbitrators.

A police officer cannot arbitrate a transfer regardless of whether it is for disciplinary reasons. Hudson Cty., P.E.R.C. No. 2010-57, 36 NJPER 40 (¶18 2010).

The Commission found mandatorily negotiable a contract provision that provides that after an officer has maintained a "clean" attendance record for a period of time, prior disciplinary infractions related to sick leave misuse and attendance issues will be given lesser weight as part of a progressive discipline system. Monmouth Cty., P.E.R.C. No. 2010-58, 36 NJPER 42 (¶19 2010).

The Commission found mandatorily negotiable a contract provision that prohibits discipline for pattern setting when an employee's allotted sick leave days have not been exhausted. Ibid. An employee can still be disciplined if he or she takes sick leave but is not verifiably sick or if the employee in some other manner abuses sick leave.

**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. Atlantic City Bd. of Ed., P.E.R.C. No. 2009-67, 35 NJPER 158 (¶58 2009) (unsatisfactory evaluation ratings in knowledge of subject matter and teaching techniques); Atlantic City Bd. of Ed., P.E.R.C. No. 2009-68, 35 NJPER 159 (¶59 2009) (some reasons for withholding may not have related to teaching performance, for example, sleeping at faculty meetings or failing to conform to the dress code, but the majority of the reasons did); Rumson-Fair Haven Reg. Bd. of Ed., P.E.R.C. No. 2009-73, 35 NJPER 222 (¶79 2009) (some non-teaching performance issues were raised, such as being late for hall duty and posting fundraising information without approval, but the predominate concerns involve instructional planning, enthusiasm in band practices, and efforts to increase class enrollment); Marlboro Tp. Bd. of Ed., P.E.R.C. No. 2010-5, 35

NJPER 284 (¶98 2009) (withholding based on teacher's reference to a student as "Squirrel Boy"); Linden Bd. of Ed., P.E.R.C. No. 2010-27, 35 NJPER 386 (¶129 2009) (withholding related to the way teacher interacted with a disruptive student and the student's parent in the hallway); Bethlehem Tp. Bd. of Ed., P.E.R.C. No. 2010-29, 35 NJPER 392 (¶131 2009) (withholding based on teacher's allegedly harsh and negative interactions with her students); Montgomery Tp. Bd. of Ed., P.E.R.C. No. 2010-59, 36 NJPER 44 (¶20 2010) (withholding based on staff member's allegedly inappropriate and unprofessional conduct during a student's IEP meeting). Withholdings not based predominately on the evaluation of teaching performance may be reviewed by an arbitrator.

The Commission restrained arbitration of a grievance challenging the State-Operated School District of Paterson Board of Education's failure to vote on the decision to withhold the increments of two teaching staff members. Paterson State-Operated School Dist., P.E.R.C. No. 2010-54, 36 NJPER 27 (¶13 2010). State statutes vest authority in the State district superintendent to withhold increments.

## Sick Leave and Attendance

N.J.S.A. 18A:30-6 precludes contracts from placing any limits on a school board's discretion to grant a request for extended sick leave on a case-by-case basis. Neptune Tp. Bd. of Ed., P.E.R.C. No. 2009-59, 35 NJPER 140 (¶50 2009).

Contract language requiring a doctor's note only after four days is not mandatorily negotiable and a school board did not have to negotiate over its continued inclusion in the contract. Carteret Bd. of Ed., P.E.R.C. No. 2009-71, 35 NJPER 213 (¶76 2009).

While a new paid family leave statute may permit use of sick leave for certain family illness, a school district contract may not permit sick leave to be used for family members not covered by the new statute. Ibid.

Where some aspects of a new attendance policy either involve or trigger an obligation to negotiate over mandatorily negotiable subjects, the Commission permitted arbitration over a claim that the employer was contractually obligated to negotiate. Borough of Cliffside Park, P.E.R.C. No. 2010-61, 36 NJPER \_\_ (¶\_\_ 2010).

## Compensation and Benefits

A dispute over whether teachers were placed on the proper steps of the negotiated salary guide was found legally arbitrable and could proceed to binding arbitration. Fair Haven Bd. of Ed., P.E.R.C. No. 2009-65, 35 NJPER 154 (¶156 2009).

Negotiations in a school district over a mileage reimbursement rate greater than that provided in the State Appropriations Act ("SAA"), currently 31 cents, was preempted by the express terms of a Department of Education regulation. N.J.A.C. 6A:23A-7.9(4)(c)(i) and (1). Paterson State-Operated School Dist., P.E.R.C. No. 2009-58, 35 NJPER 136 (¶49 2009); see also Hardyston Tp. Bd. of Ed., P.E.R.C. No. 2010-8, 35 NJPER 291 (¶101 2009).

Whether an employee was authorized to perform higher-level duties and receive higher pay are issues to be determined by the arbitrator. Hamilton Tp., P.E.R.C. No. 2010-46, 35 NJPER 470 (¶156 2009).

An arbitrator may determine if officers in the police academy are included in a negotiations unit and, if so, the rate of compensation to which they are entitled. Hudson Cty., P.E.R.C. No. 2010-47, 35 NJPER 472 (¶157 2009).

Tuition waivers for the children of employees are mandatorily negotiable; the discretion granted to boards of education under N.J.S.A. 18A:38-3 to grant tuition waivers can be exercised through the collective negotiations process; an association could seek a declaration from an arbitrator that the board violated the contract by "expelling" a student because the board had not approved a tuition waiver; and the association could seek a ruling that the contract's Professional Courtesy provision includes tuition waivers for special education students placed in the employee's district consistent with an IEP developed by the child's home district. Quinton Bd. of Ed., P.E.R.C. No. 2010-50, 36 NJPER 8 (¶3 2010). The appropriate educational placement for the child is not a question for the arbitrator.

The Commission permitted arbitration over a claim that an employer violated the contract when it reduced the pay of two police officers after transferring them from the detective division to the patrol division. Bloomfield Tp., P.E.R.C. No. 2010-55, 36 NJPER 29 (¶14 2010). The compensation claim was severable from the transfer decision.

The Commission declined to restrain arbitration to the extent a grievance sought to have an employer seek a determination from the Internal Revenue Service about the taxable status of the use of employer vehicles for commutation purposes and/or seek an exemption under Internal Revenue Service rules. New Jersey Turnpike Auth., P.E.R.C. No. 2010-68, 36 NJPER \_\_ (¶\_\_ 2010).

### **Health Benefits**

A grievance arbitrator had the legal authority to decide the contractual level of health benefits and whether that benefit level was breached. The question of whether a school board can reimburse employees for differences between the contractual level of benefits and the level of benefits set by the School Employees Health Benefits Commission is a question for that agency. Rockaway Bor. Bd. of Ed., P.E.R.C. No. 2010-9, 35 NJPER 293 (¶102 2009); see also City of Elizabeth, P.E.R.C. No. 2010-66, 36 NJPER \_\_ (¶\_\_ 2010) (contract provided for salary reopener in the event of legislative changes covering health benefits).

### **Promotions**

Challenges to the exercise of the prerogative to promote are not legally arbitrable. Ocean Cty. Utilities Auth., P.E.R.C. No. 2010-7, 35 NJPER 287 (¶100 2009). A claim that a promotion decision was unconstitutionally motivated does not transform a non-negotiable promotion decision into a negotiable and arbitrable one.

Whether a grievant was eligible for promotion while out on workers' compensation was an issue that could be considered by an arbitrator. Stafford Tp., P.E.R.C. No. 2010-41, 35 NJPER 446 (¶147 2009).

### **Layoffs**

A claim that layoffs by departmental seniority violated the contract was preempted by the Civil Service definition of the layoff unit. Town of Hammonton, P.E.R.C. No. 2010-69, 36 NJPER \_\_ (¶\_\_ 2010). More generally, the Commission has restrained binding arbitration of grievances involving the demotional/layoff rights of permanent Civil Service employees with statutory appeal rights.

## Miscellaneous Scope Decisions

The direct placement of communications in school mail boxes is a mandatorily negotiable issue, but not the use of inter-school mail facilities unrelated to school district business. Paterson State-Operated School Dist., P.E.R.C. No. 2009-58, 35 NJPER 136 (¶49 2009). A school board has a managerial prerogative to decide how students spend their class time; to assign duties incidental to a teacher's primary tasks, such as lunchroom supervision and related clerical duties as well completing attendance registers; and to employ or not employ aides. Ibid.

The decision whether a teacher should have a teacher's edition of a textbook is also predominately one of educational policy; however, should a teacher's edition of a textbook be required, the cost of that purchase would be mandatorily negotiable. Ibid.

Requiring a school nurse in each building involves minimum staffing levels, a subject that is not mandatorily negotiable. Ibid.

A school board had to negotiate over its proposal to remove the words "blue jeans" from the list of clothing that could be purchased by custodial/maintenance employees because of employee safety interests in being permitted to negotiate over

being able to wear jeans. Carteret Bd. of Ed., P.E.R.C. No. 2009-71, 35 NJPER 213 (¶76 2009).

Notice and procedural requirements before a school board can place materials in the personnel file of a teacher after severance were found to be mandatorily negotiable. Ibid.

Once parties have agreed that funeral leave can be used only for specific purposes, the employer has a managerial prerogative to verify that a leave was in fact used for those purposes. Ibid.

Although parties may agree on the scope of a recognition clause, any dispute over an employee's confidential status that cannot be resolved between the parties can be resolved through clarification of unit proceedings before the Commission. Thus, a school board could not be required to continue a limitation on the number of confidential employees in a successor agreement. Ibid.

An arbitrator may determine if a Chief Financial Officer is included in a negotiations unit based on the contract's recognition clause and, if so, whether he is entitled to claimed overtime compensation. City of Hoboken, P.E.R.C. No. 2010-40, 35 NJPER 445 (¶146 2009).

The Commission restrained arbitration of a grievance challenging the unilateral implementation of a work rule prohibiting employees from using any recording devices while on duty. North Hudson Reg. Fire & Rescue, P.E.R.C. No. 2010-3, 35 NJPER 279 (¶96 2009). The Commission found that, on balance, the employer had identified specific concerns that established that negotiations over the policy would substantially limit its policy making power.

A public employer may decide that it is beneficial to devote part of the work day to training, but it cannot be required to do so. Monmouth Cty. and Monmouth Cty. Sheriff, P.E.R.C. No. 2010-30, 35 NJPER 393 (¶132 2009).

A public college has a managerial prerogative to determine curriculum and the type of classes to be offered. Burlington Cty. College., P.E.R.C. No. 2010-38, 35 NJPER 439 (¶144 2009).

The duty to prepare and submit a self-evaluation and list of goal objectives is not mandatorily negotiable; the obligation of a faculty member to prepare such a document relates primarily to non-negotiable evaluation criteria. Ibid.

Whether the parties have agreed to include a reopener clause in their last agreement is a question outside the Commission's scope of negotiations jurisdiction. City of Hoboken, P.E.R.C. No. 2010-67, 36 NJPER \_\_ (¶\_\_ 2010).