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# Recent Case Law and Policy Developments

## April 2010 through March 2011

### Public Employment Relations Commission

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What follows is an overview of Commission case law since the April 2010 Annual Conference.

#### Unfair Practice

#### Discrimination & Interference with Protected Rights

The Commission adopted a Hearing Examiner's recommendation that the Borough did not violate the Act when it laid off eight of 13 Department of Public Works employees who were either union organizers and/or officers in the union in retaliation for their protected activity. The Commission held that even if it were to find anti-union animus, it would still dismiss the Complaint because the Borough met its burden of proving that it would have implemented the layoffs for economic reasons even absent any anti-union hostility. Borough of Haddon Heights,

P.E.R.C. No. 2010-72, 36 NJPER 117 (¶49 2010).

In a consolidated case with the Civil Service Commission, the Commission adopted an Administrative Law Judge's initial decision recommending that an unfair practice charge be dismissed. The charge alleged that the City violated the Act when it disciplined the PBA president in retaliation for protected activity. The Commission held that under the facts of this case, the City had the right to order the PBA president to provide information about allegations he set forth in a grievance regarding the department's internal affairs bureau and the City did not violate the Act when it discipline him for refusing to cooperate. City of Bridgeton, P.E.R.C. No. 2011-4, 36 NJPER 299 (¶113 2010).

In a consolidated case with the Civil Service Commission, the Commission adopted the initial decision of an

Administrative Law Judge dismissing a Complaint. The Commission found that even if made, the Mayor's alleged statement to the press that unions who made concessions during negotiations would have their names taken off layoff lists, standing alone, is insufficient to find a violation of the Act. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010).

The Commission adopted, with modification, the decision of a Hearing Examiner dismissing the Complaint issued in an unfair practice case. The charge alleged that the College violated the Act when it monitored the union president and then reorganized the College's academic departments resulting in the elimination of the union president's position. The Commission rejected the Association's exceptions and held that the College established that it would have reorganized the departments even absent the hostility to protected conduct. Cumberland Cty. College, P.E.R.C. No. 2011-65, 37 NJPER \_\_ (¶\_\_ 2011).

The Commission adopted the decision of a Hearing Examiner dismissing the Complaint issued in a consolidated unfair practice case. The unfair practice charges alleged that the employer violated the Act when it disciplined a CWA shop steward in

retaliation for filing grievances and other protected activity. The Commission rejected the CWA's exceptions and held that the employer proved it had legitimate business justifications for the discipline and that such discipline would have been imposed regardless of any protected activity. Office of the Public Defender, P.E.R.C. No. 2011-66 \_ NJPER \_ (¶\_\_ 2011)

<b>Good Faith Negotiations</b>
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The Commission clarified its order in P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009). In that decision, the Commission found that the Act was violated when UMDNJ unilaterally reduced the faculty practice or clinical components of the salary of certain faculty. The Commission held that UMDNJ had to cease refusing to negotiate over reductions in supplemental salaries and to negotiate upon request over the disputed reductions in the case. It also ordered UMDNJ to notify AAUP of any proposed reductions in supplemental salaries and to negotiate in good faith upon demand over those proposed reductions. The Commission clarified that UMDNJ must negotiate upon request over the disputed reductions including back pay. The Commission held that because

the matter involves mid-contract terms and conditions of employment, neither the Act nor the School Act require UMDNJ to participate in mid-contract impasse procedures prior to unilaterally implementing mid-contract changes to non-contractual terms and conditions of employment. The Commission declines to decide whether the School Act applies to UMDNJ. UMDNJ, P.E.R.C. No. 2010-98, 36 NJPER 245 (¶90 2010).

The Commission dismissed unfair practice charges alleging that the City's unilateral installation of cameras in the Police Department Radio Room without prior negotiations violated the Act. The parties agreed to waive a hearing examiners report and recommended decision and submit stipulations of fact to the Commission for decision without a hearing. The Commission held that a restriction on the employer's right to install the surveillance cameras would significantly interfere with the determination of governmental policy of ensuring that employees are not fighting or sleeping in the radio room where 911 calls are received and police and fire services are dispatched. City of Paterson, P.E.R.C. No. 2011-5, 36 NJPER 300 (¶114 2010).

The Commission determined the negotiability of temporary layoffs in a local

Civil Service jurisdiction stemming from an unfair practice charge alleging that the Borough violated the Act when it unilaterally furloughed Department of Public Works employees to save labor costs. The Commission held that the temporary layoff of employees in a Civil Service jurisdiction is generally mandatorily negotiable and that Civil Service regulations do not preempt negotiations. The Commission distinguished State of New Jersey (DOP), P.E.R.C. No. 92-65, 18 NJPER 50 (¶23021 1991), finding the holding in that case of a managerial prerogative to temporarily shut down the Department of Personnel applied only to its facts and that, on balance, the facts of this case support a finding that the employees' interests outweigh the employers. The Commission deferred the unfair practice charge to arbitration. Borough of Belmar and CWA, AFL-CIO, P.E.R.C. No. 2011-34, 36 NJPER 405 (¶157 2010), app. pending App. Div. Dkt. No. A-1411-10T1.

The Commission held that the issue of whether the Township was required to negotiate prior to implementing a temporary layoff of Township employees is mandatorily negotiable. The Commission relied on its analysis in Borough of Belmar, P.E.R.C. No. 2011-34 and found that, on balance, the

employees' interests in negotiating over unilateral changes to terms and conditions of employment in this case outweigh the employer's interest in increasing its diminished surplus. The Commission deferred the unfair practice charges to arbitration. Mount Laurel Tp., P.E.R.C. No. 2011-35, 36 NJPER 409 (¶158 2010), app. pending App. Div. Dkt. No. A-1453-10T1.

The Commission dismissed the Complaint in an unfair practice case. The charge alleged that the Board violated the Act, when it unilaterally established a policy requiring employees who take leave under the federal Family and Medical Leave Act to concurrently use their accrued paid sick leave. The Commission held that the Association's refusal to negotiate the policy, citing the pending unfair practice charge, once the Board requested negotiations is a waiver of its rights to negotiate the policy. Bridgeton Bd. of Ed., P.E.R.C. No. 2011-64, 37 NJPER \_\_\_ (¶\_\_ 2011).

The Commission adopted a Hearing Examiner's recommendation that the Township violated the Act when it unilaterally changed terms and conditions of employment for certain police officers and police superior officers who engaged in off-duty employment (road jobs). The Commission held that the

Township violated its obligation to negotiate before eliminating "extra benefits" that were paid to police officers on road jobs that were in addition to those provided for in the Township's ordinance. Township of Parsippany-Troy Hills, P.E.R.C. No. 2010-79, 36 NJPER 163 (¶60 2010).

### **Motions and Procedural Matters**

The Commission denied a request to appeal a Hearing Examiner's ruling deferring an unfair practice charge to binding arbitration. The charge alleged violations of the Act by repudiating the parties' agreement when the Prosecutor laid off two employees inconsistent with the employee manual, County manual and the parties' agreement. The Commission held that extraordinary circumstances were not present to warrant granting special permission to appeal when binding arbitration is the preferred mechanism for resolving a dispute when an unfair practice charge essentially alleges a violation of the obligation to negotiate in good faith interrelated with a breach of contract claim. Passaic Cty. Prosecutor's Office, P.E.R.C. No. 2011-3, 36 NJPER 298 (¶112 2010).

The Commission denied a motion for reconsideration of P.E.R.C. No. 97-19, 22

NJPER 354 (¶27182 1986), recon. den. P.E.R.C. No. 97-92, 23 NJPER 134 (¶28066 1997), aff'd App. Div. 24 NJPER 285 (¶29134 1998). The employee argued that he was coerced into resigning by officials of the Township who were later found to be corrupt. The Commission held that the Appellate Division had affirmed its prior decision denying reconsideration of the charge and that the corruption of the individuals involved does not undermine the Commission's prior finding that the employee settled his unfair practice charge voluntarily. Old Bridge Tp., P.E.R.C. No. 2010-86, 36 NJPER 224 (¶78 2010).

The Commission denied the motions for reconsideration of I.R. Nos. 2010-20 and 2010-23. In those decisions, a Commission designee ordered the respondents to immediately pay eligible employees the salary increments they were due. The Commission found that the contract language requiring payment of the increments is clear and the designee's decision followed relevant judicial and Commission precedent. Ocean Cty., P.E.R.C. No. 2011-6, 36 NJPER 303 (¶115 2010).

<b>Representation</b>
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The Commission denied a request for review of D.R. No. 2010-14. In that decision, the Director of Representation directed a mail-ballot election among corrections officers employed by the County of Essex. The FOP sought to have the election conducted by in-person balloting. It argued that the Director misapplied the factors used to determine election methodology. The PBA opposed review. The Commission held that the FOP had not proven that it was prejudiced by the Director's determination. Essex Cty., P.E.R.C. No. 2010-75, 36 NJPER 140 (¶52 2010).

The Commission denied a request for review of D.R. No. 2010-10. In that decision, the Director ordered that RWDSU Local 108, UFCW be certified as the exclusive representative of all regularly employed non-supervisory crossing guards employed by the City. The City argued that it never stipulated to the unit and that the unit is too narrow. The Commission held that because the City did not raise any objection or file any letter contesting the unit before the Director despite being requested to do so, the request for review is denied. City of Hoboken, P.E.R.C. No. 2010-80, 36 NJPER 166 (¶61 2010).

The Commission granted a request for review of a decision of the Director of

Representation certifying the Communication Workers of America as the exclusive representative for all regularly employed blue collar employees of the Township. The Commission remanded this case to the Director for further investigation regarding the location of the organizing meeting, how the site was chosen and what transpired during the meeting. Berlin Tp., P.E.R.C. No. 2010-97, 36 NJPER 242 (¶89 2010).

The Commission adopted a Hearing Officer's Report and Recommended decision that the secretary to the Board of Fire Commissioners is not a confidential employee within the meaning of the Act, and that the District's clarification of unit petition seeking a determination of confidential status be dismissed. Old Bridge Tp. Fire Dist. 2, P.E.R.C. No. 2011-7, 36 NJPER 306 (¶116 2010).

The Commission granted the CWA's request for review and denied the FMBA's request for review of D.R. 2011-2. In that decision, the Director found that the County and CWA agreed to include Emergency Medical Technicians in the County-wide broad-based CWA negotiations unit without following the Commission's established recognition or certification procedures. The Director dismissed the representation petitions

filed by the FMBA citing the Commission's preference for broad-based units and gave CWA 90 days to file a representation petition to include the EMT title. The Commission held that the CWA unit is the appropriate unit and that the CWA does not have to file a representation petition as the EMTs appropriately accreted into the unit. Gloucester Cty., P.E.R.C. No. 2011-69, \_\_\_ NJPER \_\_ (¶\_\_\_ 2011).

<b>Interest Arbitration</b>
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The Commission affirmed, with modification, an interest arbitration award. The City appealed the award of a 24/72 work schedule on a trial basis and that driver's assignments be made by seniority. The Commission modified the award to provide that the FMBA has the burden of justifying the continuation of the 24/72 schedule in any post-trial period arbitration proceedings. The Commission also modified the award to remove the restrictions placed on the evidence the parties may present in the event they arbitrate a work schedule dispute at the end of the trial period. The Commission held that the arbitrator's award of driver's pay to the most senior qualified employee involves a permissively negotiable subject and there is substantial credible evidence to support that

aspect of the award. City of Trenton, P.E.R.C. No. 2010-73, 36 NJPER 130 (¶50 2010).

The Commission affirmed an interest arbitration award which the City appealed arguing that the arbitrator failed to apply and give due weight to the statutory factors and that the delay in the arbitrator's issuance of the award without reopening the record resulted in an award not based on updated financial information. The Commission held that the arbitrator's award is supported by substantial credible evidence, the arbitrator properly addressed the statutory factors and the City has not shown how the evidence, including the evidence it sought to submit if the record was reopened, require that the award be vacated or remanded for reconsideration. City of Asbury Park, P.E.R.C. No. 2011-17, 36 NJPER 323 (¶126 2010).

The Commission remanded an interest arbitration award to a new arbitrator for decision on the existing record because the interest arbitrator issued two awards that do not adequately address all the statutory factors or comply with the remand directives of the Commission set forth in P.E.R.C. No. 2010-42, 35 NJPER (¶149 2009). Passaic Cty. and

Passaic Cty. Sheriff, P.E.R.C. No. 2011-36, 36 NJPER 412 (¶159 2010).

The Town of Kearny appealed an interest arbitration award arguing that the arbitrator failed to apply and give due weight to the statutory factors and that the arbitrator should not have ordered a fifth year on the record presented. The Commission held that the arbitrator's award is supported by substantial credible evidence, the arbitrator properly addressed the statutory factors, and the Town has not shown how the evidence requires rejecting the arbitrator's award of increases similar to its own settlement pattern. Town of Kearny, P.E.R.C. No. 2011-37, 36 NJPER 413 (¶160 2010).

The Commission remanded an award to the arbitrator for clarification and issuance of a supplemental decision and award. The Commission found that the arbitrator should clarify three areas of his award relating to a \$1200 equity adjustment, eligibility for retiree health benefits and holiday pay. Atlantic Cty., P.E.R.C. No. 2011-8, 36 NJPER 307 (¶117 2010). Upon issuance of the supplemental decision and award, the Commission vacated and remanded the award to the arbitrator for issuance of a new decision that further explains the weight given to the employer's evidence on the issue of comparability for the

award of the \$1200 equity adjustment, salary guide restructuring, holiday pay/holidays, shift differentials and retiree health benefits. The arbitrator was also directed to identify what evidence he relied on to determine the County could fund the award without exceeding its lawful authority and to provide a more thorough explanation of the cost of living factor. P.E.R.C. No. 2011-56, \_\_\_ NJPER \_\_\_ (¶\_\_ 2011 ).

The Commission affirmed an interest arbitration award. The PBA appealed the award arguing that the arbitrator failed to apply and give due weight to the statutory factors and that the arbitrator's award of salary increases below the employer's financial offer was not supported by substantial credible evidence and violated N.J.S.A. 2A:24-8. The Commission held that the arbitrator's award is supported by substantial credible evidence. Borough of Bergenfield, P.E.R.C. No. 2010-74, 36 NJPER 137 (¶51 2010).

The Commission dismissed an appeal of a decision issued by an interest arbitrator clarifying language set forth in a voluntary settlement. The Commission held that the arbitrator's decision on its face was a clarification of the parties' voluntary

settlement and that, therefore, the FOP's submission is not an appeal of an interest arbitration award. Township of Mount Olive, P.E.R.C. No. 2011-21, 36 NJPER 349 (¶134 2010).

The Commission granted the County's motion for reconsideration of a decision issued by the Commission Chair dismissing an appeal of an interest arbitration award. The Commission found that extraordinary circumstances existed to reconsider the decision when the County presented evidence that it received erroneous advice from a Commission staff member regarding the appeal deadline. Hunterdon Cty. Sherriff's Office, P.E.R.C. No. 2011-67, \_\_\_ NJPER \_\_\_ (¶\_\_2011).

The Commission granted the Borough's request for special permission to appeal an interlocutory ruling of an interest arbitrator. The arbitrator ruled that he had jurisdiction to continue formal interest arbitration proceedings pursuant to his appointment through mutual selection in March 2010. The Commission held that the parties' one-year contract settlement expiring on December 31, 2010 prevented the interest arbitrator from conducting hearings for a successor contract effective January 1, 2011 as the recently amended interest arbitration statute bars



mutual selection of an arbitrator. Based on the record, the Commission did not find that the parties agreed to continue the hearing in January 2011 based on the prior statutory language. Borough of Waldwick, P.E.R.C. No. 2011-68, \_\_\_ NJPER \_\_\_ (¶\_\_2011).

**Scope of Negotiations**

**Work Hours and Schedules**

The Commission granted a request for a restraint of binding arbitration of a grievance asserting that the Library violated the parties' collective negotiations agreement when it unilaterally changed an employee's work hours. The Commission held that, on balance, the Library's ability to deploy its personnel to meet the governmental policy goals of increased efficiency and security outweigh Local 108's interest in negotiating a work schedule preferred by the grievant. Oakland Public Library, P.E.R.C. No. 2010-71, 36 NJPER 115 (¶48 2010).

The Commission granted, in part, a request for a restraint of binding arbitration of a grievance asserting that the County violated the parties' collective negotiations agreement and/or past practice when it ordered off-duty officers to appear at headquarters prior to and after court appearances. The Commission

restrained arbitration of the portion of the grievance contesting the reporting requirement prior to court appearances, and permitted the portion of the grievance contesting the requirement to report to headquarters after court proceedings to proceed to arbitration. Hudson Cty., P.E.R.C. No. 2010-76, 36 NJPER 141 (¶53 2010).

The Commission denied a request for a restraint of binding arbitration of a grievance contending that the Township violated the parties' agreement when it issued two announcements that require a lieutenant to drop to the road sergeant position when the road sergeant is out on sick leave, but not when the sergeant is out on vacation, personal, or compensation time. The grievance further contended that the announcements deprive officers of overtime assignments and has resulted in officers being arbitrarily and improperly denied requests for time off. The Commission held that the Township has a managerial prerogative to determine that a lieutenant is qualified to fill in for an absent road sergeant, but the PBA may arbitrate its claims that the Township violated an alleged agreement to replace an absent sergeant with another sergeant on overtime and that the employer violated the agreement by restricting unit members' ability

to use contractual leave time. Nutley Tp., P.E.R.C. No. 2010-89, 36 NJPER 229 (¶81 2010).

The Commission determined the negotiability of a work schedule proposal sought to be submitted to interest arbitration for a successor agreement. A scope of negotiations petition was filed seeking a determination that the hours and days of work of Legal and Investigative, Warrants, Canine, and Bicycle Units are not mandatorily negotiable and could not be included in a successor agreement with the PBA. The Commission held that the proposals would not significantly interfere with the ability of the Sheriff to meet its governmental policy need to provide effective law enforcement services and the interest arbitrator may consider the proposals. Atlantic Cty., P.E.R.C. No. 2011-19, 36 NJPER 328 (¶128 2010).

The Commission denied the request for a restraint of binding arbitration of a grievance alleging that the Board violated agreements with the Association and past practices when it denied a physical therapist's request to "job share" a position with another physical therapist during the 2009-2010 "Extended School Year" (ESY), but hired non-district employees to ESY positions and permitted one of them to job share a position

with an in-district employee. The Commission held that the parties' dispute is mandatorily negotiable because it involves work hours and the preservation of the work of employees represented by the Association. Mercer Cty. Spec. Serv. Sch. Dist. Bd. of Ed., P.E.R.C. No. 2011-25, 36 NJPER 355 (¶138 2010).

The Commission granted, in part, the request for a restraint of binding arbitration of a grievance alleging that the Board violated the parties' collective negotiations agreement when it eliminated summer work hours and compensation for certain employees, assigned those employees additional uncompensated work during the school year, and gave negotiations unit work to non-unit employees. The grievance sought reinstatement of the summer hours, reassignment of the work back to the affected unit employees, and appropriate compensation. The Commission granted a restraint of arbitration to the extent the grievance challenges the Board's decision to eliminate summer work for ten-month employees, but otherwise denied the request for a restraint. Flemington-Raritan Reg. Bd. of Ed., P.E.R.C. No. 2011-28, 36 NJPER 363 (¶141 2010), app. pending App. Div. Dkt. No. A-1167-10T4.

The Commission denied the request for a restraint of binding arbitration of a grievance asserting that the Board imposed additional duties on teachers by requiring them to participate in a Professional Learning Community program during previously unassigned time. The Commission held that because the grievance does not contest the implementation of the program and is limited to compensation for lost unassigned time, it involves a mandatorily negotiable subject and is legally arbitrable. Egg Harbor Tp. Bd. of Ed., P.E.R.C. No. 2011-45, 36 NJPER 456 (¶176 2010).

The Commission determined that the work schedules of police officers may be submitted to interest arbitration. The Commission held that it cannot conclude from the recommendation of the Township's consultants that either the current work schedule or negotiations over a different work schedule would significantly interfere with the Township's ability to meet its governmental policy need to provide effective law enforcement services. The Commission further held that the parties may present their respective evidence in support of their work schedule proposals to the interest arbitrator who must scrutinize the wisdom of both proposals from both operational and financial

viewpoints. Township of Franklin, P.E.R.C. No. 2011-48, 36 NJPER 461 (¶179 2010), app. pending App. Div. Dkt. No. A-2313-10T1, see also Township of Franklin, P.E.R.C. No. 2011-59, \_\_ NJPER \_\_ (¶\_\_ 2010), app. pending App. Div. Dkt. No. \_\_\_\_.

The Commission denied a restraint of binding arbitration of a grievance and granted a motion for summary judgment in a related unfair practice case. The Commission held that the reduction of work hours in a Civil Service jurisdiction is mandatorily negotiable. The Commission distinguished State of New Jersey (DEP), P.E.R.C. No. 95-115, 21 NJPER 267 (¶26172 1995), aff'd 285 N.J. Super. 541 (App. Div. 1995), certif. den. 143 N.J. 519 (1996), finding the holding in that case applied only to State employees. The Commission further found that the Borough violated N.J.S.A. 34:13A-5.4a(1) and (5) when it unilaterally reduced the work hours of three employees. Borough of Keyport, P.E.R.C. No. 2011-20, 36 NJPER 343 (¶133 2010), req for stay grant. in pt., den. in pt., P.E.R.C. No. 2011-46, 36 NJPER 457 (¶177 2010) app. pending App. Div. Dkt. No. A-0581-10T1, see also P.E.R.C No. 2011-46.

<b>Assignments and Transfers</b>
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The Commission granted, in part, the County of Union's request for a restraint of binding arbitration of a grievance contesting the County's refusal to negotiate the impact of its decision to enter into a contract with Essex County for inmate transport to and security at East Orange General Hospital. The Commission restrained arbitration to the extent the grievance challenged the County's decision to enter into the agreement with Essex County. The Commission declined to restrain arbitration regarding the County's alleged refusal to negotiate the impact of the agreement. Union Cty., P.E.R.C. No. 2010-82, 36 NJPER 183 (¶67 2010).

The Commission dismissed a contested transfer petition alleging a transfer between work sites for predominately disciplinary reasons. The Commission held that the transfer was not predominately disciplinary where the Board asserted non-disciplinary reasons to defuse what its administrators believed was a tense situation between two teachers that was adversely affecting both students and staff. Asbury Park Bd. of Ed., P.E.R.C. No. 2010-87, 36 NJPER 225 (¶79 2010).

The Commission granted, in part, a request for a restraint of binding arbitration of a grievance asserting that off-duty Patrol

Division Officers had been improperly denied overtime opportunities due to the use of on-duty Traffic and Communications Bureau officers to cover vacancies in the Patrol Division. The grievance further alleged that officers had been improperly denied use of leave time because the Township was redeploying Traffic and Communications Bureau officers only for unscheduled absences, and was not counting three particular officers toward minimum staffing requirements for scheduled absences. The Commission restrained arbitration to the extent the PBA claimed that officers were being deprived of overtime opportunities due to the Township's using Traffic and Communications Bureau officers to cover vacancies in the Patrol Division because the employer had a managerial prerogative to temporarily reassign employees during their regularly scheduled work hours. The Commission held that the PBA's claims that the Township was restricting unit members' ability to use contractual leave time relate to the negotiable and legally arbitrable issue of the use of contractual leave time. Wayne Tp., P.E.R.C. No. 2011-9, 36 NJPER 308 (¶118 2010).

The Commission granted the request for a restraint of binding arbitration of a

grievance challenging a directive of the Chief of Police that an officer may no longer be assigned to work special detail assignments at the Town's schools based upon an incident that attracted media attention. The Commission held that the grievance is contesting the Chief's assessment of the officer's qualifications for the school assignments and is therefore not legally arbitrable. Town of Hammonton, P.E.R.C. No. 2011-50, 37 NJPER \_\_ (¶\_\_ 2010).

The Commission denied a request for a restraint of binding arbitration of a grievance asserting that the City violated the parties' collective negotiations agreement when it eliminated the detective stipend for officers reassigned from detective to patrol. The Commission held that whether the stipend is linked to the detective assignment or the particular duties is a question of contract interpretation reserved to an arbitrator. City of Newark, P.E.R.C. No. 2011-53, 37 NJPER \_\_ (¶\_\_ 2010).

The Commission granted the request for a restraint of binding arbitration of a grievance asserting that the Borough violated the parties' collective negotiations agreement when it did not replace an officer to meet the five-officer minimum staffing level. The Commission held that the Borough has a non-

negotiable managerial prerogative to determine staffing levels and whether overtime will be worked. The Commission noted that the PBA did not assert facts to support its argument that the Borough unilaterally changed work schedules. Borough of Hawthorne, P.E.R.C. No. 2011-61, 37 NJPER \_\_ (¶\_\_ 2011).

The Commission denied the request for a restraint of binding arbitration of a grievance contending that the Township violated the parties' collective negotiations agreement when it denied officers' requests for out-of-rank pay. The Commission held that the grievance involved compensation which is a mandatorily negotiable issue. The Township's defense that the officer's were not assigned to work in higher ranks related to the merits of the grievance and could be presented to the grievance arbitrator. West Caldwell Tp., P.E.R.C. No. 2011-63, 37 NJPER \_\_ (¶\_\_ 2011).

The Commission determined the negotiability of a proposal submitted to interest arbitration for inclusion in a successor agreement entitled "Promotion and Transfers." The proposal set forth promotion would be made by seniority when all other qualifications are equal and the posting of a notice for transfer vacancies. The

Commission held that the proposal was mandatorily negotiable and not preempted by Civil Service regulations. Mount Laurel Fire Dist. No. 1, P.E.R.C. No. 2010-96, 36 NJPER 241 (¶88 2010).

The Commission denied the Township's motion for reconsideration of P.E.R.C. No. 2010-039. In that decision, the Commission granted, in part, the township's request for a restraint of binding arbitration of a grievance contending that the Township violated the parties' collective negotiations agreement when it issued a policy permitting the senior sergeant on duty to serve as the Watch Commander rather than call in a lieutenant on an overtime basis to fill the post and that by unilaterally changing the replacement procedure for the post, the Township wrongfully eliminated overtime opportunities for lieutenants and acting lieutenant's pay for sergeants serving as Watch Commander. The Commission reiterated that the Township has a managerial prerogative to determine the rank qualification for the Watch Commander positions and restrains arbitration of that aspect of the grievance. The Commission did not restrain arbitration over the alleged agreement that the Township should first offer vacant Watch Commander positions to lieutenants on overtime and that sergeants

performing that task are entitled to lieutenant's pay is permissively negotiable. Township of Edison, P.E.R.C. No. 2010-81, 36 NJPER 167 (¶62 2010).

The Commission restrained arbitration of a grievance alleging that the employer violated the parties' collective negotiations agreement and the "Compensation Plan for Judiciary Employees in the Case Professional Unit" by failing to fill vacancies in the Master Probation Officer title. The Commission held that the employer has a managerial prerogative to determine staffing levels and any enforcement of the Compensation Plan must be sought in another forum. State of New Jersey Judiciary and Probation Association of New Jersey, P.E.R.C. No. 2011-38, 36 NJPER 417 (¶161 2010), app. pending App. Div. Dkt. No. A-1747-10T3.

The Commission adopted a Hearing Examiner's recommendation that a contested transfer petition be dismissed. The petition alleged that a school psychologist was transferred in violation of N.J.S.A. 34:13A-25 for disciplinary reasons in retaliation for the psychologist's refusing to evaluate a student for special needs placement and the subsequent filing of a complaint against the Board with the Department of Education. The Hearing Examiner found that the Board

transferred the psychologist to best serve the needs of the District's children with behavioral disabilities. The Commission adopted the Hearing Examiner's recommendation noting that her determinations were based on witness credibility which the Commission will not disturb unless the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent evidence in the record. Galloway Tp. Bd. of Ed., P.E.R.C. No. 2011-15, 36 NJPER 319 (¶124 2010).

### **Discipline**

The Commission granted, in part, a request for a restraint of binding arbitration of a grievance asserting that the City violated the parties' collective negotiations agreement when it gave a police lieutenant a six-day suspension for an infraction that warranted minor discipline. The Commission granted the request and restrained arbitration to the extent the grievance challenges the decision to bring major discipline. The Commission denied the request over the Association's allegations concerning the convening and composition of the Trial Board. City of Newark, P.E.R.C. No. 2010-84, 36 NJPER 187 (¶69 2010).

The Commission denied a request for a restraint of binding arbitration of a grievance alleging that a 30-year Township employee was discharged without just cause. The Commission held that there is a factual dispute over the employee's physical condition that involves the mandatorily negotiable issue of whether the employee meets the employer's physical requirements for the position. Evesham Tp., P.E.R.C. No. 2011-14, 36 NJPER 318 (¶123 2010).

The Commission denied the request for a restraint of binding arbitration of a grievance asserting that there was not just cause to terminate an investigator. The Commission held that the grievance is not preempted by N.J.S.A. 19:32-2 or 40A:9-25 because the County is a Civil Service jurisdiction and disciplinary review procedures were negotiated by the parties. Office of the Passaic Cty. Supt/Elec., P.E.R.C. No. 2011-31, 36 NJPER 369 (¶144 2010).

The Commission granted a request for a restraint of binding arbitration of a grievance challenging a five-day suspension plus a fine. The Commission held that because the discipline constitutes major discipline in a Civil Service jurisdiction, any appeal must be made to the Civil Service Commission.

Mount Holly Tp., P.E.R.C. No. 2011-42, 36 NJPER 425 (¶165 2010).

The Commission denied the request of Bergen Community College for a restraint of advisory arbitration of a grievance filed by Bergen Community College Support Staff Association. The grievance challenged the termination of a public safety officer. The Commission will only consider a request to restraint advisory arbitration if a preemption claim is raised. Bergen Community College, P.E.R.C. No. 2011-29, 36 NJPER 365 (¶142 2010)

The Commission denied an appeal from the decision of the Director of Arbitration dismissing its request for appointment of an arbitrator from the Special Disciplinary Arbitration Panel. The Commission held that the FOP's request was untimely as it was filed outside the 20-day limitations period set forth in N.J.S.A. 40A:14-210(b). New Jersey Institute of Technology, P.E.R.C. No. 2011-16, 36 NJPER 322 (¶125 2010), app. pending App. Div. Dkt. No. A-6247-09T3.

### **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 forth 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. City of Paterson, P.E.R.C. No. 2011-11, 36 NJPER 312 (¶120 2010)(poor performance as reflected in evaluative documents); Red Bank Bd. of Ed., P.E.R.C. No. 2010-90, 36 NJPER 231 (¶82 2010)(inappropriate comments made by teacher); Little Silver Bd. of Ed., P.E.R.C. No. 2011-12, 36 NJPER 314 (¶121 2010)(failing to conduct group sessions with students, failing to continue group lunch sessions, and not exploring group options to deal with students with particular needs); Old Tappan Bd. of Ed., P.E.R.C. No. 2011-39, 36 NJPER 419 (¶162 2010)(concerns about timeliness and tardiness); City of Paterson, P.E.R.C. No. 2010-93, 36 NJPER 236 (¶85 2010)(failure to complete Individualized Education programs in a timely manner, incomplete IEPs, IEPs bearing the name of the



wrong student, incomplete child study logs, and incomplete child study team flow charts); Paterson State-Operated School District, P.E.R.C. No. 2010-83, 36 NJPER 186 (¶68 2010)(poor classroom management, incident reportable to New Jersey Division of Youth and Family Services, performance evaluation reflecting “Needs “Improvement” in the areas of skill in the use of a Variety of Methods, I.E. Problem; Classroom Organization and Management; Social Control; Professional Relationships, Achievements and Traits; and Effectiveness in Relating to Students); and Ridgewood Bd. of Ed., P.E.R.C. No. 2011-27, 36 NJPER 359 (¶140 2010) (inappropriate interactions with students, including disciplinary methods that are purported to be harsh or humiliating). Withholdings not based predominately on the evaluation of teaching performance may be reviewed by an arbitrator.

### **Sick Leave and Attendance**

The Commission granted a request for a restraint of binding arbitration of a grievance alleging that the Township violated a past practice when it conducted a home visit to verify the sick leave of an employee who was on leave for more than five days. The

Commission held that prohibiting the Township from conducting a home visit simply because the employee was out for five or more consecutive days would substantially limit the employer’s ability to determine if sick leave abuse was occurring. Maplewood Tp., P.E.R.C. No. 2011-22, 36 NJPER 350 (¶135 2010).

### **Compensation and Benefits**

The Commission denied a request for a restraint of binding arbitration of a grievance seeking compensation for employees no longer permitted to use Board vehicles for commutation purposes. The Commission found that no statute or regulation preempted the mandatorily negotiable issue of offsetting compensation. Buena Reg. Bd. of Ed., P.E.R.C. No. 2010-77, 36 NJPER 144 (¶54 2010).

The Commission granted, in part, a request for a restraint of binding arbitration of a grievance contesting a detective’s loss of the use of a County vehicle and seeks offsetting compensation for the loss. The Commission restrained arbitration to the extent the grievance seeks reassignment of a vehicle and denies the request on the offsetting compensation issue. Union Cty. Prosecutor’s

Office, P.E.R.C. No. 2010-91, 36 NJPER 233 (¶83 2010).

The Commission denied a request for a restraint of binding arbitration of a grievance challenging a teacher's placement on the salary guide. The Board alleged the teacher's placement was an error and that it has a managerial prerogative to recoup the salary overpaid to her. The Commission held that placement on the salary guide is a mandatorily negotiable compensation issue. Hanover Park Reg. Bd. of Ed., P.E.R.C. No. 2010-92, 36 NJPER 235 (¶84 2010).

The Commission denied a request for a restraint of binding arbitration of a grievance asserting that the Board underpaid a teacher who was on unpaid leave for the last three days that teachers were required to work during the 2008-2009 school year. The Commission held that the grievance concerned a mandatorily negotiable compensation issue. Pohatcong Bd. of Ed., P.E.R.C. No. 2011-13, 36 NJPER 316 (¶122 2010).

The Commission denied the request for a restraint of binding arbitration of a grievance asserting that an employee did not receive additional compensation when her appointment to Supervising Code Enforcement Officer became permanent

through the Civil Service Commission. The Commission held that the subject matter of the grievance is mandatorily negotiable and not preempted by N.J.S.A. 52:27D-188.30(a). City of Bridgeton, P.E.R.C. No. 2011-24, 36 NJPER 353 (¶137 2010).

The Commission denied the request for a restraint of binding arbitration of a grievance alleging that the Board violated the parties' collective negotiations agreement when it decreased the length of the 213-day work year for employees working the Extended School Year (ESY) and reduced their compensation accordingly. The Commission held that the per diem rate for summer work is not preempted by N.J.S.A. 18A:30-6 and the grievance concerns the mandatorily negotiable subjects of work year and compensation. Mercer Cty. Spec. Serv. Sch. Dist. Bd. of Ed., P.E.R.C. No. 2011-26, 36 NJPER 357 (¶139 2010).

The Commission granted, in part, requests for restraints of binding arbitration of grievances seeking payment for accumulated vacation time in a Civil Service jurisdiction. The Commission granted the requests to the extent the grievances sought to have the employee accumulate more vacation time than allowed by Civil Service regulations and denies the requests to the extent the grievance

seek compensation for unused vacation days. Mt. Holly Tp., P.E.R.C. No. 2011-41, 36 NJPER 423 (¶164 2010).

The Commission granted the request for a restraint of binding arbitration of a grievance alleging that the City inappropriately denied an employee, who participated in a donated leave program, payment for his unused vacation time at retirement. The Commission held that Civil Service regulations preempt the grievant's claim. City of Hoboken, P.E.R.C. No. 2011-44, 36 NJPER 454 (¶175 2010).

The Commission determined the negotiability of the subject of an unfair practice charge which alleged that the Township violated the Act when it required an employee to complete a Family Medical Leave Act medical certification form when the employee wanted to use paid leave rather than take FMLA leave. The Commission held that where the parties have not reached an agreement requiring the use of paid leave concurrently with FMLA leave and where an employee has declined to take FMLA leave, the employer has neither a managerial prerogative nor a preemptive right to require employees to complete the form. Township of Parsippany-Troy Hills and Parsippany Public Employees Local No. 1, P.E.R.C. No. 2011-

18, 36 NJPER 326 (127 2010), app. pending App. Div. Dkt. No. A-0471-10T2.

### Health Benefits

The Commission denied a request for a restraint of binding arbitration of a grievance challenging the application of P.L. 2010, c. 2 and the Township's deduction of an amount equal to 1.5% of base salary towards the cost of medical insurance benefits. Edison Tp. and International Association of Fire Fighters, Local No. 1197, P.E.R.C. No. 2011-49, 36 NJPER 462 (¶180 2010), app. pending App. Div. Dkt. No. A-1959-10T4. The Commission then issued a stay of its decision of P.E.R.C. No. 2011-49 pending appeal finding a likelihood of success on the merits of the appeal because the International Association of Fire Fighters Local 1197 had filed for interest arbitration which is only available upon expiration of the parties' agreement pursuant to N.J.S.A. 34:13A-16(b)(2).

The Commission denied a motion for summary judgment filed in consolidated unfair practice cases. The charges alleged that the Township violated the Act when it ceased providing traditional health insurance and reduced the provider network contrary to the parties' agreement. The Township argued

that negotiations over fundamental changes to the State Health Benefits Program are preempted by N.J.S.A. 52:14-17.25 et seq. The Commission held that the Township cannot be ordered to continue the SHBP Traditional Plan, but an arbitrator may determine whether the Township was contractually obligated to maintain a level of health benefits and defers the charges to arbitration. Township of Maplewood, P.E.R.C. No. 2010-88, 36 NJPER 227 (¶80 2010).

The Commission dismissed a Complaint based on an unfair practice charge alleging that the District violated the Act when it unilaterally diminished health insurance coverage. The Commission granted summary judgment for the District, finding that the parties' contract provides for benefits at the level set by the State Health Benefits Program (SHBP) and that the District did not repudiate the contract when it enrolled in the School Employees Health Benefits Program, which had the same level of benefits as the SHBP. State-Operated Sch. Dist. of the City of Paterson, P.E.R.C. No. 2011-43, 36 NJPER 452 (¶174 2010).

<b>Promotions</b>
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The Commission granted, in part, the request for a restraint of binding arbitration of a grievance asserting that the Authority violated the parties' collective negotiations agreement when it failed to fill a promotional position with one of three currently-employed applicants and advertised it outside the Authority. The Commission restrained arbitration to the extent the grievance challenged the denial of a promotion and permitted arbitration to the extent the grievance seeks statements of the specific reasons why the employees were deemed unqualified for promotion. Ocean Cty. Utilities Auth., P.E.R.C. No. 2011-30, 36 NJPER 367 (¶143 2010).

<b>Miscellaneous Scope Decisions</b>
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The Commission denied a request for a restraint of binding arbitration of a grievance contesting the Board's decision to stop permitting employees' children from attending district schools tuition free. The Commission held that the Board's authority to grant or deny tuition waivers is not preempted by N.J.S.A. 18A:38-1; the Board's policy protects its concerns regarding class size; and whether the parties' agreement provides for the arbitration of policy decisions is a question for the arbitrator. Winslow Tp. Bd.

of Ed., P.E.R.C. No. 2010-94, 36 NJPER 238 (¶86 2010).

The Commission granted a restraint of binding arbitration of a grievance asserting that the Borough violated the parties' collective negotiations agreement when it changed an evaluation procedure. The Commission restrained arbitration because the particular deviation from the alleged past practice was prompted by the police chief's finding of a conflict of interest. Borough of Tinton Falls, P.E.R.C. No. 2011-023, 36 NJPER 352 (¶136 2010).

The Commission found that the Board violated the Act when it sought to enforce a final collective negotiations agreement with the Association that included changes in a seniority provision that was not included in the parties' memorandum of agreement. Washington Tp. Bd. of Ed., P.E.R.C. No. 2011-32, 36 NJPER 401 (¶155 2010).

The Commission determined the negotiability of a proposal submitted to interest arbitration for inclusion in a successor agreement entitled "Successors and Assigns". The proposal addresses what happens after a possible dissolution of the fire district, and the Commission held that the proposal on its face is mandatorily negotiable absent specific facts about a possible merger or consolidation.

Mount Laurel Fire District No. 1, P.E.R.C. No. 2010-95, 36 NJPER 239 (¶87 2010).

## Addendum

### **Recent Case Law and Policy Developments April 2010 through March 2011**

In Bloomfield Tp. Bd. Of Ed., P.E.R.C. No. 2011-55, \_\_ NJPER \_\_ (¶ \_\_ \_\_) the Commission granted the Board's motion for reconsideration of I.R. 2011-12. In that decision, a Commission designee granted an application for interim relief that accompanied an unfair practice charge filed by the Bloomfield Education Association. The designee stayed implementation of his order pending the parties' opportunity to seek reconsideration by the full Commission. The charge alleged that the Board violated the Act by refusing to pay salary increments following the expiration of the parties' one-year collective negotiations agreement. The Commission granted reconsideration holding that this case met the extraordinary circumstances and exceptional importance tests finding that the substantial hardship to the Board in paying increments it cannot recoup outweighs the hardship to the employees in not receiving the increments.