
Recent Case Law & Policy Developments – 2006

Public Employment Relations Commission

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What follows is an overview of Commission case law since the April 2005 Annual Conference.

Interference with Protected Rights

The New Jersey Employer-Employee Relations Act prohibits interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act. One of these rights is being fairly represented by the majority representative in contract negotiations and grievance processing. The Commission dismissed a unit member's allegation that a local PBA violated the Act when it failed to process and pursue his grievance over alleged violations of departmental seniority. *PBA Local 187*, P.E.R.C. No. 2005-78, 31 *NJPER* 173 (¶70 2005). The PBA's interpretation of the contract was not so clearly incorrect as to fall outside the range of reasonableness and the charging party did not suggest that the union acted for discriminatory or bad faith motives.

Discrimination

The Commission found that an employer violated the Act when it relieved a police officer of certain job duties and took away his take-home vehicle in retaliation for comments he made as PBA president at a Township Committee meeting. *Jackson Tp.*, P.E.R.C. No. 2006-12, 31 *NJPER* 281 (¶110 2005). The Commission dismissed allegations concerning the PBA vice-president.

The Commission denied cross-motions for summary judgment in an unfair practice case alleging that the State violated the Act when the Public Defender terminated an attorney assistant in retaliation for engaging in protected activity – specifically, raising a health and safety issue in an e-mail to management. *State of New Jersey*, P.E.R.C. No. 2006-11, 31 *NJPER* 276 (¶109 2005). Assuming the truth of the evidence presented by the union and viewing the evidence in the light most favorable to it, the Commission concluded that the union had presented

sufficient evidence from which a reasonable factfinder could determine that the e-mail constituted protected activity and that the attorney assistant was terminated in retaliation for that activity. The matter had to proceed to hearing.

Good Faith Negotiations

The Commission granted summary judgment and found that an employer violated the Act when it repudiated an agreement to pay a \$500 bonus to unit members. *Camden Cty. Prosecutor's Office*, P.E.R.C. No. 2006-24, 31 *NJPER* 323 (¶128 2005).

The Commission granted summary judgment and found that an employer violated the Act when it discontinued a terminal leave benefit. *Bridgewater Tp.*, P.E.R.C. No. 2006-62, __ *NJPER* __ (¶__ 2006), app. pending App. Div. Dkt. No. __. The Commission emphasized that it was not holding that the unions had a contractual right to have the terminal leave benefit maintained, but was simply holding that if the Township wished to make a change, it had to first negotiate with the unions in good faith.

Work Hours

The Commission restrained binding arbitration of a grievance alleging that a school board violated the parties' agreement when it reassigned a security officer from a 10-month day shift position at the high school to a 12-month midnight district-wide position. *Jackson Tp. Bd. of Ed.*, P.E.R.C. No. 2006-8, 31 *NJPER* 249 (¶96 2005). The board responded to a budget defeat by abolishing the 10-month position and upholding a grievance seeking to have the Board reestablish the former position would have significantly interfered with its governmental policy decision to eliminate daytime security functions at the high school.

The Commission restrained binding arbitration to the extent a grievance challenged an employer's prerogative to require new shifts for lieutenants in order to implement its new command structure. *Springfield Tp.*, P.E.R.C. No. 2006-27, 31 *NJPER* 328 (¶131 2005). The Commission denied a restraint to the extent the grievance sought to enforce an alleged contractual obligation to have the union and Township develop work schedules consistent with the new command structure.

Enforcement of an agreement providing for annual non-rotating shift selections would have substantially limited governmental policymaking given the police chief's description of the problems experienced under that system. *Borough of Roselle Park*, P.E.R.C. No. 2006-43, 31 *NJPER* 396 (¶157 2005). The Commission therefore restrained binding arbitration.

The Commission declined to restrain binding arbitration of a grievance contesting a library's decision not to appoint a part-time employee to an open full-time position. *Ocean Cty. Library*, P.E.R.C. No. 2006-47, 31 *NJPER* 407 (¶161 2005). The Commission concluded that the case did not involve the governmental policy concerns present in a typical hiring or promotion decision, but involved a dispute over the mandatorily negotiable subject of work hours.

The Commission declined to restrain binding arbitration of a grievance alleging that certain employees had their work week changed in violation of the parties' agreement. *City of Vineland*, P.E.R.C. No. 2006-4, 31 *NJPER* 240 (¶92 2005). The employees' interest in negotiating over the length of the workday and a paid lunch break outweighed the employer's interest in determining those

issues unilaterally. The Commission also held that the Fair Labor Standards Act did not preempt the dispute.

An employer had a managerial prerogative to align the work schedules of police officers with the times when their services were most needed. *Borough of Franklin*, P.E.R.C. No. 2006-20, 31 *NJPER* 305 (¶120 2005). It also had a prerogative to make other schedule adjustments necessitated by operational reasons.

A grievance challenged a prohibition on any tour exchange or overtime assignment that resulted in a firefighter being on duty for more than 38 consecutive hours. Given the history of permitting shift swaps up to 48 hours, the absence of any particularized evidence of health or safety problems, and the usual ability of firefighters to rest during part of a 24-hour shift, the Commission held that enforcement of an alleged agreement to continue shift swaps to a maximum of 48 hours would not substantially limit any governmental policy interest. *City of Newark*, P.E.R.C. No. 2006-60, __ *NJPER* __ (¶__ 2006). Arbitration was therefore not restrained.

The Commission declined to restrain binding arbitration of a grievance challenging

the use of subcontracted custodians rather than regular custodians for scheduled events at a high school. *Old Bridge Tp. Bd. of Ed.*, P.E.R.C. No. 2005-75, 31 *NJPER* 146 (¶65 2005). The employer did not give any reasons for having to allocate the overtime opportunities to subcontracted employees rather than its own employees.

Assignments and Transfers

A school board has a managerial prerogative to decide whether to grant a teacher's request for a transfer. *Old Bridge Tp. Bd. of Ed.*, P.E.R.C. No. 2005-74, 31 *NJPER* 145 (¶64 2005). A contention that the board exercised this prerogative arbitrarily and in possible violation of the Law Against Discrimination had to be presented in another forum.

A union could negotiate over its proposal that nurses be assigned out-of-title dual assignments only two times per month, but, if the proposal was accepted, the employer could still deviate from the restriction to ensure adequate coverage in the event of an emergency. *Atlantic Cty.*, P.E.R.C. No. 2006-6, 31 *NJPER* 244 (¶94 2005). The Commission also found that greater restrictions on the right to assign out-

of-title supervisory duties were not mandatorily negotiable.

The Commission restrained binding arbitration to the extent a grievance challenged the assignment of Urban Enterprise Zone officers to a paving project outside the Zone during their regular work hours. *Town of West New York*, P.E.R.C. No. 2006-17, 31 *NJPER* 299 (¶117 2005). The Commission denied a restraint to the extent the grievance challenged the allocation of the paving detail work to those officers on an overtime basis.

The Commission restrained binding arbitration of a grievance asserting that a police records clerk was unjustly transferred from the records room to the Borough library. *Borough of Roselle Park*, P.E.R.C. No. 2006-18, 31 *NJPER* 301 (¶118 2005). The grievance challenged the employer's non-negotiable prerogative to reassign personnel to a different position in order to deliver services without disruption and in the manner it deemed most efficient.

The Commission declined to restrain binding arbitration of a grievance contesting a decision to expand the area patrolled by campus security officers to off-campus locations as part of a Downtown Crime Watch Initiative. *Camden Cty. College*, P.E.R.C. No.

2006-21, 31 *NJPER* 308 (¶121 2005). The Commission held that a grievance arbitrator could determine whether the parties' contract contemplated current employees performing those duties under current employment conditions or whether the union should have an opportunity to seek revision of the compensation/duties equation to account for the expanded duties.

The Commission restrained binding arbitration of a grievance contesting a sergeant's transfer and the corresponding change in his working conditions. *City of Jersey City*, P.E.R.C. No. 2006-29, 31 *NJPER* 331 (¶133 2005). A transfer based on the assessment of an employee's skills is not subject to binding arbitration simply because it has a concomitant effect on working conditions. *See also City of Jersey City*, P.E.R.C. No. 2006-31, 31 *NJPER* 349 (¶138 2005) (restraining arbitration of grievance challenging decision not to grant reassignment request).

The Commission restrained binding arbitration of a grievance contesting a change in the schedule for closing fire companies so that it corresponded with the work schedule of firefighters rather than the work schedule of fire officers. *City of Newark*, P.E.R.C. No.

2006-30, 31 *NJPER* 347 (¶137 2005). As a result, fire officers had to report to a different fire house once every eight-day cycle. The Commission concluded that a fire officer's occasional reassignment to another company did not appear to change any negotiable employment condition. Neither the Commission nor an arbitrator could second-guess the City's belief that reassigning individual fire captains rather than groups of firefighters would be more efficient and leads to more seamless accountability.

Bidding for assignment to a new uniformed patrol unit was not legally arbitrable because it would have substantially limited the employer's prerogative to select team members based on management's assessment of employee qualifications. *New Jersey Transit Corp.*, P.E.R.C. No. 2006-36, 31 *NJPER* 358 (¶143 2005).

A notice period of 90 days before permanent or long-term reassignments was found mandatorily negotiable since it would not prevent the City from reassigning firefighters to fill positions that had unexpectedly become vacant. *City of Newark*, P.E.R.C. No. 2006-44, 31 *NJPER* 399 (¶158 2005).

The Commission restrained arbitration of a grievance contesting the replacement of extra-duty assignments at a State motor vehicle facility with on-duty police officers. *City of Salem*, P.E.R.C. No. 2006-46, 31 *NJPER* 405 (¶160 2005). How on-duty police officers will be deployed is a governmental policy decision reserved to management.

The Commission restrained arbitration over a claim that New Jersey Transit violated the contract by removing police officers from a Field Training Program, but not over a claim that NJT was contractually required to explain why officers were removed. *New Jersey Transit Corp.*, P.E.R.C. No. 2006-54, 32 *NJPER* 18 (¶9 2006).

An agreement allegedly required a fire department, absent an emergency, to fill temporary vacancies with an officer of at least equal rank. *City of Newark*, P.E.R.C. No. 2006-61, ___ *NJPER* ___ (¶___ 2006). A grievance claiming a violation of such an agreement was legally arbitrable.

Discipline

Parties in police jurisdictions cannot negotiate to have an arbitrator review major disciplinary actions. Nor can they negotiate to

reduce the effect of major disciplinary penalties by deeming them removed for purposes of deciding future disciplinary actions. *City of Hoboken*, P.E.R.C. No. 2005-70, 31 *NJPER* 139 (¶60 2005); *see also Millburn Tp.*, P.E.R.C. No. 2006-10, 31 *NJPER* 275 (¶108 2005) (restraining arbitration of major discipline in civil service jurisdiction).

The Chairman, acting pursuant to authority delegated by the full Commission, restrained binding arbitration over a police sergeant's demotion/reassignment, but allowed arbitration over a minor disciplinary action. *Mt. Laurel Tp.*, P.E.R.C. No. 2006-48, 32 *NJPER* 23 (¶11 2005); *see N.J.S.A. 34:13A-5.3*.

Although *N.J.S.A. 34:13A-25* prohibits disciplinary transfers of school employees between work sites, a teacher who was transferred to another work site because he could not get along with others was not transferred for disciplinary reasons and his contested transfer determination petition was dismissed. *Old Bridge Tp. Bd. of Ed.*, P.E.R.C. No. 2005-64, 31 *NJPER* 116 (¶49 2005), app. pending App. Div. Dkt. No. A-5245-04T5. The Board had sought to place the teacher in a position where he could

continue to perform well without having conflicts with fellow employees.

The Commission dismissed a petition for contested transfer determination where the petitioner had since retired. *Woodbury Bd. of Ed.*, P.E.R.C. No. 2006-25, 31 *NJPER* 325 (¶129 2005). The petition was moot since the remedy in contested transfer matters is to return the employee to the former work site.

Increment Withholdings

Withholding an increment is generally a form of discipline, but not all increment withholdings can go to binding arbitration. Since the 1990 amendments to the PERC Act, *N.J.S.A. 34:13A-22 et seq.*, the Commission has been empowered to determine the proper forum for reviewing increment withholding disputes involving teaching staff members. *Scotch Plains-Fanwood Bd. of Ed.*, P.E.R.C. No. 91-67, 17 *NJPER* 144 (¶22057 1991), sets out the analysis the Commission uses in making such determinations.

Withholdings based predominately on the evaluation of teaching performance cannot be reviewed by an arbitrator and can only be reviewed by the Commissioner of Education. Withholdings not based predominately on the

evaluation of teaching performance may be reviewed by an arbitrator.

Given three observation/evaluation reports and one letter from the principal noting alleged deficiencies in classroom management and a reprimand that alleged both performance deficiencies and insubordination, the Commission held that a withholding was based predominately on teaching performance and could not be arbitrated. *Orange Tp. Bd. of Ed.*, P.E.R.C. No. 2005-65, 31 *NJPER* 118 (¶50 2005).

A withholding was based predominately on an evaluation of teaching performance where alleged deficiencies stemmed from the teaching staff member's interaction with students in her media center classroom. *Middlesex Bd. of Ed.*, P.E.R.C. No. 2005-80, 31 *NJPER* 177 (¶72 2005).

The Commission declined to restrain arbitration of a grievance contesting the withholding of a school nurse's salary increment. *Orange Tp. Bd. of Ed.*, P.E.R.C. No. 2006-14, 31 *NJPER* 291 (¶114 2005). The withholding was triggered by the nurse's calling the police, behavior the principal deemed outside her responsibility, and therefore did not predominately involve the

performance of nursing duties reserved by education law statutes to certificated nurses.

Whether or not a school board violated alleged contractual obligations to use progressive discipline goes to the merits of whether an increment withholding should be sustained and is outside the Commission's forum selection function. *Readington Tp. Bd. of Ed.*, P.E.R.C. No. 2006-5, 31 *NJPER* 242 (¶93 2005).

Procedures associated with the withholding of increments are mandatorily negotiable, so long as the procedures do not significantly interfere with the substantive right to withhold a teaching staff member's increment. *Englewood Bd. of Ed.*, P.E.R.C. No. 2006-32, 31 *NJPER* 352 (¶139 2005); *Englewood Bd. of Ed.*, P.E.R.C. No. 2006-33, 31 *NJPER* 353 (¶140 2005); *Englewood Bd. of Ed.*, P.E.R.C. No. 2006-34, 31 *NJPER* 355 (¶141 2005); *Englewood Bd. of Ed.*, P.E.R.C. No. 2006-35, 31 *NJPER* 356 (¶142 2005). In these four cases, the Board allegedly violated a contractual requirement to give the teacher written notice of alleged deficiencies and an opportunity to correct them.

The Commission concluded that a withholding was predominately based on an evaluation of teaching performance given a

teacher's alleged failure to communicate with parents concerning their children's academic performance and other alleged deficiencies. *Washington Tp. Bd. of Ed.*, P.E.R.C. No. 2005-81, 31 *NJPER* 179 (¶73 2005). The Commission declined to restrain binding arbitration over the Association's claims concerning contractually mandated notice and evaluation procedures.

Sick Leave and Other Leaves of Absence

In school districts, the use of paid sick leave days for child bearing purposes is limited to the 30-day presumptive period of disability before and after childbirth unless disability is proven by medical certification. *Board of Ed. of the Chatham School Dist.*, P.E.R.C. No. 2006-16, 31 *NJPER* 296 (¶116 2005).

When absence exceeds the annual and accumulated sick leave allotment, a school board may grant extended sick leave, but *N.J.S.A.* 18A:30-6 mandates that it must do so on a case-by-case basis rather than by a negotiated rule. The Commission therefore held that contractual extended sick leave provisions were not mandatory negotiable.

Fort Lee Bd. of Ed., P.E.R.C. No. 2006-37, 31 *NJPER* 360 (¶144 2005).

Compensation and Benefits

A union could arbitrate an alleged contractual obligation to compensate an employee for higher-title work that he maintained he performed. The existence of Department of Personnel promotional or classification issues did not make the compensation claim non-arbitrable as long as the grievance did not challenge the employer's prerogative to make a promotional decision. *Passaic Valley Water Comm'n*, P.E.R.C. No. 2005-66, 31 *NJPER* 121 (¶51 2005), app. pending App. Div. Dkt. No. A-005195-04T1.

Applying the broader scope of negotiations applicable to New Jersey Transit Bus Operations under *N.J.S.A. 27:25-1 et seq.*, the Commission permitted arbitration of grievances claiming that certain clerks were entitled to be placed at a higher salary classification given their current duties and employment conditions. *New Jersey Transit Bus Operations, Inc.*, P.E.R.C. No. 2005-82, 31 *NJPER* 184 (¶74 2005). The grievances would be legally arbitrable in the private sector and enforcement of those claims would not substantially impair NJTBO's ability to

carry out its statutory mission. A proposal to increase pension benefits for current retirees is not mandatorily negotiable, even in the private sector. *New Jersey Transit Bus Operations, Inc.*, P.E.R.C. No. 2006-45, 31 *NJPER* 402 (¶159 2005).

A grievance contending that faculty members were deprived of due compensation when the College cancelled certain on-line courses was found to be legally arbitrable. *Gloucester Cty. College*, P.E.R.C. No. 2006-7, 31 *NJPER* 247 (¶95 2005). The Commission concluded that the College had an indisputable right to cancel courses, but its financial interest in not paying full or partial payment for cancelled courses did not outweigh the faculty's interest in enforcing an alleged agreement for some compensation for courses assigned and subsequently cancelled.

The Commission declined to restrain arbitration of a grievance seeking higher pay for sergeants assigned the work of lieutenants. *Springfield Tp.*, P.E.R.C. No. 2006-15, 31 *NJPER* 294 (¶115 2005). The employer could argue to the arbitrator that the sergeant was in fact performing duties normally assigned to sergeants and not distinctively assigned to lieutenants.

The Commission restrained arbitration over the removal of a teacher from a 12-month Curiosity Coach position that it had eliminated and the claim to continuing compensation for that abolished position. *Asbury Park Bd. of Ed.*, P.E.R.C. No. 2006-52, 32 *NJPER* 14 (¶7 2006).

A union could arbitrate a grievance challenging a change in pay periods. *Irvington Tp.*, P.E.R.C. No. 2005-76, 31 *NJPER* 148 (¶66 2005). The timing of paychecks is mandatorily negotiable and an arbitrator could decide whether the contract authorized the employer to make the change.

A cost-of-living provision increasing retiree benefits was found not mandatorily negotiable because it supplemented State-established pension benefits. *Harding Tp.*, P.E.R.C. No. 2005-85, 31 *NJPER* 192 (¶77 2005). The benefit was linked to future increases in the cost of living, not previously earned, but deferred, compensation; was payable to retirees; and was not otherwise authorized by statute.

A proposal seeking to make Easter Sunday a paid holiday for all negotiations unit employees was found mandatorily negotiable. *Oxford Tp.*, P.E.R.C. No. 2006-28, 31 *NJPER* 330 (¶132 2005). The proposed addition to

the list of holidays did not violate the First Amendment because it was not limited to religious employees.

Representation

Monmouth University does not come within the statutory definition of a public employer so the Commission had no jurisdiction over representation or unfair practice disputes involving its police officers. *Monmouth Univ.*, P.E.R.C. No. 2005-72, 31 *NJPER* 142 (¶62 2005), app. pending App. Div. Dkt. No. A-005635-04T2.

Motions for Reconsideration

The Commission denied reconsideration of its remedial order in *Piscataway Tp.*, P.E.R.C. No. 2005-79, 31 *NJPER* 176 (¶71 2005), denying recon. of P.E.R.C. No. 2005-55, 31 *NJPER* 102 (¶44 2005), app. pending App. Div. Dkt. No. A-6488-04T1. The Commission ordered the employer to rescind two procedures in a unilaterally adopted promotion policy, but it rejected the PBA's request that all promotions made pursuant to that policy be rescinded. The PBA had not shown that the results of the promotional process would have been any

different had its position on these two issues been adopted.

The Commission denied a motion for reconsideration of a designee's interim relief decision that had restrained the employer from implementing a new work schedule. *Little Falls Tp.*, P.E.R.C. No. 2006-41, 31 *NJPER* 394 (¶155 2005). The designee's decision effectively preserved the status quo, i.e., a work schedule that had been in place for over 20 years, until the completion of the unfair practice proceedings. The Township had not asserted any harm to it or the public interest in temporarily maintaining the status quo.

Health Benefits

It does not contravene *N.J.S.A.* 34:13A-18 for an interest arbitrator to consider a proposed change in dependent coverage so long as the change in benefits does not take effect until the uniformity requirements of the State Health Benefits Program (SHBP) have been met. *Borough of Belmar*, P.E.R.C. No. 2005-67, 31 *NJPER* 123 (¶52 2005).

Overruling prior case law, the Commission held that interest arbitrators may consider proposals that seek to change a non-SHBP employer's obligation to pay retiree

health insurance premiums for the negotiations unit involved in the proceeding. *Borough of Emerson*, P.E.R.C. No. 2005-68, 31 *NJPER* 125 (¶53 2005). The Commission's holding was grounded in its understanding that the requirement in *N.J.S.A.* 40A:10-23 of "uniform conditions" for retiree health benefits is satisfied if the benefits are uniform within a negotiations unit. However, where a statutory scheme requires identical treatment for all employees of a public employer, a benefit change must be made contingent upon the other employees receiving the benefit.

The Commission declined to restrain arbitration of a grievance asserting that the employer prematurely terminated the retiree health benefits of a supervisor who had retired during the term of an earlier collective negotiations agreement. *New Jersey Turnpike Auth.*, P.E.R.C. No. 2006-13, 31 *NJPER* 284 (¶111 2005). A union may enforce a contract on behalf of a retired employee since it has an interest in ensuring that the terms of its contract are honored.

Motions and Procedural Matters

A dispute over the reason for a termination precludes summary judgment.

Middlesex Cty. Educational Services Comm'n, P.E.R.C. No. 2005-63, 31 *NJPER* 115 (¶48 2005). Dismissal of a separate complaint filed before the Division on Civil Rights did not require dismissal of the unfair practice charge. *Ibid*; see also *City of Paterson*, P.E.R.C. No. 2006-50, 32 *NJPER* 11 (¶5 2006) (summary judgment denied because dispute over installation of surveillance cameras in work areas in the police station was case of first impression and material facts were disputed); *UMDNJ*, P.E.R.C. No. 2006-51, 32 *NJPER* 12 (¶6 2006) (disputed material facts precluded summary judgment decision on whether employer violated the Act when it unilaterally eliminated or reduced the clinical component of an employee's salary).

The Commission will not generally exercise its scope of negotiations jurisdiction absent a demand for arbitration or a dispute during collective negotiations. *Borough of Bernardsville*, P.E.R.C. No. 2005-69, 31 *NJPER* 127 (¶54 2005); *Town of West New York*, P.E.R.C. No. 2006-42, 31 *NJPER* 395 (¶156 2005), mot. for recon. pending. The Commission's authority does not extend to issuing advisory opinions in scope of negotiations matters in the absence of an actual, as opposed to a potential, controversy.

The Commission will dismiss a motion for summary judgment where the allegations are not supported by certifications or affidavits. *Wayne Tp.*, P.E.R.C. No. 2005-73, 31 *NJPER* 144 (¶63 2005); *PBA Local 136*, P.E.R.C. No. 2006-22, 31 *NJPER* 321 (¶126 2005), recon. granted and Complaint dismissed P.E.R.C. No. 2006-40, 31 *NJPER* 393 (¶154 2005). An argument that the allegations in a charge are facially insufficient to support a claim of discrimination is in essence an appeal of the Director of Unfair Practice's decision to issue a Complaint; such an appeal cannot be considered as part of a motion for summary judgment. *Ibid*.

Special permission to appeal the mid-hearing rulings of a hearing examiner will be granted only in extraordinary circumstances. The Commission found no such extraordinary circumstances in *City of Union City*, P.E.R.C. No. 2005-86, 31 *NJPER* 194 (¶78 2005), *Rutgers, The State Univ.*, P.E.R.C. No. 2006-1, 31 *NJPER* 235 (¶89 2005), or *Borough of Bernardsville*, P.E.R.C. No. 2006-63, ___ *NJPER* ___ (¶__ 2006).

While challenges to changes in terms and conditions of employment may be resolved by deferring to grievance arbitration awards, the larger question of whether the

employer violated the Act by issuing a policy manual that allegedly changed or established negotiable terms and conditions of employment could not be decided on a motion for summary judgment. *Township of Parsippany-Troy Hills*, P.E.R.C. No. 2006-55, 32 *NJPER* 20 (¶10 2006). In addition, whether a superior officer was acting as a Township's representative or agent when he allegedly polled unit members about their position on a pending grievance arbitration was a fact-sensitive question best answered after an evidentiary hearing.

The Commission will ordinarily dismiss a petition seeking a restraint of advisory arbitration. However, it will entertain a petition alleging that the subject of the grievance is preempted since it would be illegal for the parties to implement an advisory award violating a statute or regulation. *Cumberland Cty. College*, P.E.R.C. No. 2006-57, ___ *NJPER* ___ (¶___ 2006); *Cumberland Cty. College*, P.E.R.C. No. 2006-58, ___ *NJPER* ___ (¶___ 2006). The Commission rejected an argument that the New Jersey Higher Education Restructuring Act eliminated application of the New Jersey Employer-Employee Relations Act to county colleges.

Promotions

Public employers have a non-negotiable right to fill vacancies and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs. Therefore, the decision to appoint the candidate with the highest ranking in skill and ability is not subject to binding arbitration. *Edison Tp. Bd. of Ed.*, P.E.R.C. No. 2005-71, 31 *NJPER* 140 (¶61 2005). The composition of a promotion interview committee is also not subject to binding arbitration.

The Commission restrained arbitration of a grievance contesting the permanent appointment of an employee with less seniority than the grievant. *Gloucester City*, P.E.R.C. No. 2006-3, 31 *NJPER* 238 (¶91 2005). The Commission concluded that the grievance was preempted by the civil service "rule of three." Any appeal of the promotional decision had to be made to the Merit System Board.

In general, a public employer has a right to fill vacancies from among all available candidates, although procedurally it may agree to consider current employees before considering non-employees. *City of Vineland*,

P.E.R.C. No. 2006-19, 31 *NJPER* 303 (¶119 2005).

State of New Jersey, P.E.R.C. No. 2006-49, 32 *NJPER* 10 (¶4 2006).

Representation Fees

The Commission ordered the State of New Jersey and New Jersey State Corrections Officers/FOP Lodge 200 to cease collecting and receiving representation fees without first complying with all statutory and regulatory requirements for the collection of such fees. *State of New Jersey*, P.E.R.C. No. 2006-2, 31 *NJPER* 236 (¶90 2005). The Commission also ordered the State and the FOP to refund the representation fees collected before the FOP had a demand and return system in place. *Ibid.*

A majority representative must provide each nonmember an annual notice explaining the basis of a representation fee. *N.J.A.C.* 19:17-3.3 requires that each nonmember be afforded a period of at least 30 days after receiving that explanation to determine whether to file an objection. The Commission ordered the FOP to refund to the named charging parties the representation fees collected before the expiration of the 30-day period. *State of New Jersey*, P.E.R.C. No. 2006-26, 31 *NJPER* 325 (¶130 2005); *see also*

Miscellaneous

The Commission restrained arbitration of a grievance contesting a directive requiring all police units to activate their overhead lights from dusk to dawn. *City of Newark*, P.E.R.C. No. 2005-83, 31 *NJPER* 188 (¶75 2005). Public employers have broad discretion to manage police departments and a strong governmental policy interest in deciding how best to deliver public safety services to protect their citizens. Any impact on police officer safety was speculative and subordinate to the decision about how to deliver police services.

The Commission restrained arbitration of a grievance contesting a directive requiring all police officers assigned to walking posts and traffic control to wear reflective vests. *City of Newark*, P.E.R.C. No. 2005-84, 31 *NJPER* 190 (¶76 2005). The Commission concluded that the grievance primarily involved the City's governmental policy decision to modify the uniform of certain officers, in part for the operational reasons of improving traffic control and increasing officer visibility and in part because

the City believed the vests would decrease the likelihood that officers would be injured on duty and would thus reduce its workers' compensation costs.

The Commission declined to restrain arbitration of the portion of grievance asserting that documents had been improperly excluded or removed from the grievant's personnel file. *City of Jersey City*, P.E.R.C. No. 2006-31, 31 *NJPER* 349 (¶138 2005).

The Commission restrained arbitration of a grievance challenging a training requirement that probation officers who carry oleoresin capsicum (OC), popularly called pepper spray, be exposed to the spray. *State of New Jersey Judiciary*, P.E.R.C. No. 2006-38, 31 *NJPER* 361 (¶145 2005). The Commission concluded that an employer's prerogative to determine what training is required to ensure that officers can do their jobs effectively outweighed the officers' health and safety interests in not being sprayed. The probation officers could opt out of OC exposure and ask for alternate protection measures if they elected not to carry OC spray. The Commission rejected a school board's contention that its police officers were not covered by the interest arbitration statute. *Cherry Hill Bd. of Ed.*,

P.E.R.C. No. 2006-39, 31 *NJPER* 364 (¶146 2005), app. pending App. Div. Dkt. No. A-.

A proposal concerning the issuance of radios to firefighters on duty and a proposal for broadcasting heat indexes and wind chill factors to firefighters were found to be mandatorily negotiable. *City of Newark*, P.E.R.C. No. 2006-44, 31 *NJPER* 399 (¶158 2005). A contract article addressing the weather conditions for conducting outside drills was found not mandatorily negotiable because it unduly restricted the City's right to assign certain outside activities in adverse weather conditions.

Applying the broader scope of negotiations applicable to New Jersey Transit Bus Operations under *N.J.S.A. 27:25-1 et seq.*, the Commission found that a subcontracting proposal was not mandatorily negotiable absent language that exempts situations that would preclude NJTBO from fulfilling its statutory mission. *New Jersey Transit Bus Operations, Inc.*, P.E.R.C. No. 2006-45, 31 *NJPER* 402 (¶159 2005). A proposal to limit the hiring of part-time operators to 10% of the full-time workforce at each location was found to be mandatorily negotiable, but NJTBO can challenge the enforcement of such a provision if it can demonstrate under a

particular set of facts that compliance would prevent it from delivering its services.

The PBA filed a grievance alleging that the employer had adopted rules and regulations and personnel policies and procedures without negotiations and an arbitration award concluded that, although the employer had a right to issue a policies manual, it did not have a right to abrogate the union's right to negotiate terms and conditions of employment. *Borough of Longport*, P.E.R.C. No. 2006-53, 32 *NJPER* 16 (¶8 2006). The Commission held that the parties' dispute was legally arbitrable.

A grievance asserted that the closing of several posts on two days in the Mercer County Corrections Center violated the parties' contractual safety provision. The Commission held that grievances alleging that the employer violated contractual commitments to provide a safe workplace are legally arbitrable even though staffing levels are non-negotiable. *Mercer Cty.*, P.E.R.C. No. 2006-59, ___ *NJPER* ___ (¶___ 2006). Any award could not order an increase in staffing since the determination of staffing levels is a managerial prerogative. Challenges to any remedy must be raised in post-arbitration proceedings.