

Matters That Come Before the Public Employment Relations Commission

The New Jersey Employer-Employee Relations Act¹ established the Public Employment Relations Commission in 1968 to administer and enforce the Act's provisions governing the conduct of collective negotiations in New Jersey public employment . The seven-member Commission is appointed by the Governor with the advice and consent of the Senate to three-year terms. Two Commission members represent public employees, two represent public employers, and three represent the public. The Chairman of the Commission is one of the public members. The Commission acts by majority vote in its public meetings to decide matters brought before it by public employers, public employees and public employee organizations. The Commission employs a staff to assist it in carrying out its administrative and decision-making functions.

What follows is a brief description of the kinds of matters that come before the Commission. The first section covers the six basic types of cases that come to the Commission for decision: scope of negotiations, unfair practice, representation, interest arbitration appeals, contested transfer determinations, and payroll deduction determinations and rulemaking. The second section covers the Commission's conciliation and arbitration services.

MATTERS THAT COME BEFORE THE COMMISSION FOR DECISION

Scope of Negotiations

The Act requires good faith negotiations over terms and conditions of employment. The Act also requires negotiations over written policies setting forth grievance and disciplinary review procedures. Such procedures may provide for binding arbitration as a means of resolving disputes

¹ N.J.S.A. 34:13A-1 et seq.

over terms and conditions of employment. However, the statute did not define the phrase "terms and conditions of employment" and did not define what subjects were negotiable and what subjects were not. Over the years, the Commission and the courts have issued hundreds of decisions clarifying these issues. In the "Dunellen" trilogy of cases decided in 1973, the Supreme Court established the need to determine on a case-by-case basis the subjects that are mandatorily negotiable under the Act, as distinguished from matters of governmental policy exclusively within the prerogative of management or terms and conditions of employment set by statute or regulation.

The Act gives the Commission the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. Disputes over the scope of negotiations generally arise in one of two contexts. First, during the course of collective negotiations, one party may seek to negotiate with respect to a matter that the other party contends is not a mandatory subject of negotiations. Second, an employee organization may seek to submit a matter to binding arbitration that the employer contends is a matter of managerial prerogative and not a term or condition of employment. In this context, the employer claims that a matter of managerial prerogative is not a proper subject for negotiations and thus may not legally be included in the contract. It therefore may not legally be submitted to an arbitrator as the employer's statutory management responsibility cannot be abdicated or delegated or because a statute or regulation has preempted negotiations.

A subset of grievance cases involves increment withholdings of teaching staff members. A 1990 amendment to the Act gave the Commission jurisdiction to decide the appropriate forum for review of such increment withholdings. If the withholding is based on the evaluation of teaching performance, arbitration will be restrained and review must be conducted by the Commissioner of

Education. If the withholding is not based on the evaluation of teaching performance, arbitration will not be restrained and the withholding may be reviewed by an arbitrator. The Commission makes no judgments about the merits of the withholding, but decides only the appropriate forum for review.

When a scope dispute arises during the course of collective negotiations, the Commission issues a declaration that the disputed matter is either mandatorily negotiable or not. No further order is required.

The Commission's jurisdiction in the grievance context is similarly limited. In an early case involving the Hillside Board of Education and the Hillside Education Association, the Commission explained the nature of the limitations:

Having determined that the matters in dispute in the instant proceedings are within the scope of collective negotiations, the grievances which prompted the filing of this petition can proceed to arbitration, assuming that they are otherwise arbitrable under the parties' agreement. The latter determination is one which the Commission will not render. The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

The delineation of the separate roles for the Commission, the courts and the arbitrator soon reached the Supreme Court. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court adopted the Commission's guidelines.

If an employer raises contractual defenses, the Commission cannot address them in a scope decision. A scope decision addresses only the abstract negotiability of the matter the union seeks

to arbitrate. Any disputes over whether the subject is addressed by the contract, or whether the grievance is timely, or even whether the parties have agreed to arbitrate this type of dispute must be resolved by a court or, where appropriate, the arbitrator. Similarly, if an employer raises to a court or an arbitrator a claim that the matter sought to be arbitrated falls outside the scope of negotiations, the court or arbitrator must refer that limited issue to the Commission for determination. Thus, an employer with more than one defense may have to go to more than one forum to have all issues of arbitrability resolved.

Over the years, the language used by the Commission when deciding whether matters in dispute are within the scope of negotiations and therefore arbitrable has evolved. Certain shorthand phrases have since emerged, such as "legal arbitrability" for the negotiability issues to be decided by the Commission, and "contractual arbitrability" for the contractual issues to be decided by a court or the arbitrator. Early scope cases concluded that grievances on negotiable matters "may be submitted to arbitration if they are otherwise arbitrable under the terms of the parties' collective negotiations agreement." More recent cases recast the conclusion in a scope decision as "the subject of the grievance is mandatorily negotiable and legally arbitrable," or "the employer could legally have agreed to arbitrate this dispute." Whatever the language, because there may be outstanding issues of "contractual arbitrability" which the employer properly has not raised in the scope proceeding, and because any duty to arbitrate derives from the parties' contract, the Commission answers only the limited question, "Is the subject matter of the dispute the union seeks to arbitrate mandatorily negotiable." In grievance cases involving police and firefighters, arbitration will also be permitted if the subject matter of the dispute is permissively negotiable. Permissive subjects are subjects that are neither mandatory subjects of negotiations nor illegal topics. Disputes over whether

the contract requires arbitration and requests for enforcement of a contractual duty to arbitrate must be addressed to the Superior Court.

The guidelines set down in 1978 still govern. Parties may still have to argue before the Commission, a court or an arbitrator over whether a particular grievance may proceed to arbitration before the arbitrator has an opportunity to address the merits of the grievance. Fortunately, a great many of the issues of both legal and contractual arbitrability have been decided and guide the conduct of public employers and unions alike. Annual scope petition filings have decreased from a high of 137 to approximately 75 in recent years.

Unfair Practice

Unfair practice charges are filed when one party contends that the other has violated some obligation or interfered with some right established by the Act.

Most cases are sent to an exploratory conference where a staff agent tries to settle the case or clarify the issues. In cases where a settlement does not result, the Director of Unfair Practices and Representation reviews the charge to determine whether the allegations, if true, would constitute an unfair practice. If the Director believes they would not, a Complaint will not issue. That will end the case unless the charging party appeals to the Commission.

When a Complaint issues, the case is assigned to a Hearing Examiner. In some cases, summary judgment motions are filed that will permit the case to be decided based on the parties' written submissions. In most cases, no motions are filed and the Hearing Examiner conducts a hearing, issues a report and recommendation, and sends the case to the Commission for a final decision. If no exceptions to the Hearing Examiner's report are filed, the recommended decision

becomes a final decision. If exceptions are filed, the case comes to the full Commission, which issues a final decision.

In reaching a final administrative decision, the Commission reviews the record in the case. That includes the charge, the transcript of the hearing and exhibits, the recommended decision, and any exceptions, cross-exceptions and briefs. Any post-hearing brief or argument not specifically incorporated in exceptions or an answering brief is not considered.

The Commission generally orders parties to notify the Chairman within 20 days how they have complied with the Commission's order. In the event of noncompliance, the Commission or the prevailing party may seek enforcement in the Superior Court.

Of the approximately 450 unfair practice charges filed annually in recent years, ten required a final Commission decision.

In some cases, the charging party seeks a quick directive preserving the status quo pending a final Commission decision. This process is called "interim relief." A Commission designee is assigned the case. Interim relief will be granted only if the charging party has a substantial likelihood of success on the merits of its claim and would suffer irreparable harm if relief is not granted. Motions for reconsideration by the full Commission of a designee's interim relief decision will be granted only in exceptional circumstances. If a party is dissatisfied with an interim relief order, the normal avenue for review is in the Superior Court.

Representation

Representation cases generally concern elections to determine whether employees wish to be represented by a particular majority representative, and decisions about which negotiations unit, if any, employees belong in. Some cases concern claims that particular employees are confidential

employees or managerial executives and therefore do not belong in any unit, or supervisory and therefore belong in a separate unit from non-supervisory employees. Most cases are decided on the documents filed with the Director of Unfair Practices and Representation. If material facts are in dispute, the case is assigned to a Hearing Officer for an evidentiary hearing. The Hearing Officer issues a report and recommended decision; the parties have an opportunity to file exceptions; and the case is decided by the full Commission. Of the approximately 150 representation petitions filed annually in recent years, only a handful required a final Commission decision.

Interest Arbitration Appeals

The 1995 Police and Fire Public Interest Arbitration Reform Act² gave the Commission jurisdiction to decide appeals of interest arbitration awards issued to resolve negotiations impasses involving police officers and firefighters. Previously, the Superior Court considered challenges to interest arbitration awards.

The Reform Act, like the predecessor statute, states that an arbitrator must decide the matter after giving “due weight” to nine factors. These factors include, for example, the public interest, the financial impact of an award, the cost of living and a comparison of the salaries and employment conditions of the employees involved in the proceeding with employees performing similar functions and employees generally. The arbitrator must analyze the evidence on the factors deemed relevant to the dispute and provide a reasoned explanation for the award.

The Commission has established a standard of review consistent with pre-Reform Act case law. It will not vacate an award unless the appellant demonstrates that: (1) the arbitrator failed to give "due weight" to the subsection 16g factors judged relevant to the resolution of the specific

² L. 1995, c. 425

dispute; (2) the award is not supported by substantial credible evidence in the record as a whole; or (3) the arbitrator violated the standards in the Arbitration Act³, which provide that an award may be set aside on such grounds as bias or the refusal to hear evidence. The New Jersey Supreme Court has approved the Commission's standard of review.

Commission decisions recognize that fashioning a conventional award is not a precise mathematical process and that the Act entrusts the arbitrator with weighing the evidence and arriving at an award. However, the Commission has held that an arbitrator should state what statutory factors he or she considered most important in arriving at the award, explain why they were given significant weight, and explain how other evidence or factors were weighed and considered in arriving at a final award. Once an arbitrator has done so, a party appealing an award must offer a particularized challenge to the arbitrator's analysis and conclusions.

Of the approximately 25 interest arbitration awards issued annually, only a handful have been appealed to the Commission each year.

Contested Transfer Determinations

The 1990 amendment to the Act prohibits transfers of school board employees between work sites for disciplinary reasons. When there is a dispute over whether a particular transfer was disciplinary, the employee or majority representative may file a contested transfer petition. Many of these cases are settled at an exploratory conference. If the case does not settle, it is decided by the Commission after review of the parties' briefs. If there is a factual dispute, the case is instead assigned to a Hearing Examiner and processed under the unfair practice procedures. Less than ten contested transfer petitions are filed each year and one or two require a final Commission decision.

³ N.J.S.A. 2A:24-8 and -9

Payroll Deduction Determination

In 2003, the Act was amended to permit a majority representatives to file a petition seeking an order requiring the employer to deduct representation fees from paychecks of non-members, provided certain statutory conditions are met. These cases are handled by a Commission designee, but an aggrieved party may file a request for full Commission review.

Appeals from Commission Decisions and Enforcement of Commission Orders

As with any final administrative agency determination, Commission decisions may be appealed to the Superior Court, Appellate Division within 45 days of the Commission decision. The General Counsel or Deputy General Counsel will generally participate in an appeal. There are approximately 15 appeals filed each year.

If a party refused to comply with a Commission order, the General Counsel may begin an enforcement action in the trial division of the Superior Court. The Court will not review the merits of the Commission's order in enforcement actions.

Rulemaking

The Commission periodically adopts and readopts rules governing practice before the agency. Rulemaking proposals are approved by the Commission for publication in the New Jersey Register. They are then subject to a public comment period before final adoption by the Commission.

CONCILIATION AND ARBITRATION

Although mediation, fact-finding, conciliation and grievance arbitration matters do not come to the Commission for decision, they play a critical role in the resolution of collective negotiations impasses and the settlement of labor-management disputes.

When negotiations between employers and employee representatives reach an impasse, PERC may appoint neutral mediators, fact-finders and conciliators to assist the parties in reaching a voluntary agreement. These individuals may be either agency staff or selected from a panel of qualified arbitrators and mediators administered by the agency. There are about 200 requests for mediators filed each year.

In addition to the power to appoint mediators and fact finders as noted above, PERC has the authority to appoint interest arbitrators to assist the parties in police and firefighter negotiations in reaching a voluntary agreement. Members of PERC's special panel of interest arbitrators are appointed for three-year renewable terms. If a voluntary settlement is not reached, the appointed arbitrator will issue a written award setting terms and conditions of employment. Under a 1995 amendment to the Act, arbitrators will issue what is called a conventional arbitration award on all unsettled issues, unless the parties agree to another procedure such as fair and final arbitration under which the arbitrator must select the final offer of one of the parties. In conventional arbitration, the arbitrator is not required to adopt the final offer of either party. As described earlier in this paper, the 1995 amendment also gave the Commission jurisdiction to decide appeals of interest arbitration awards. Approximately 100 interest arbitration petitions have been filed annually in recent years. Most disputes are settled by the parties with the assistance of the arbitrator. In fact, only about 25 awards are issued each year and only a handful of awards each year have been appealed to the Commission.

Finally, the Commission assigns grievance arbitrators in over 700 cases each year to assist in the resolution of unresolved grievances. A list of arbitrators is sent to both parties who select the arbitrators they prefer. The Director of Conciliation and Arbitration then assigns an arbitrator giving

recognition to the parties' preferences. Grievance arbitrators will normally attempt to assist the parties in reaching a mutually-agreeable settlement of the grievance. In cases where a settlement is not possible, the grievance arbitrator issues an award. Actions to vacate or confirm arbitration awards must be filed in the Superior Court.