STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PERC AFTER 40 YEARS

This paper is based on an article written by James W. Mastriani on the 25th Anniversary of the New Jersey Employer-Employee Relations Act. It was updated on the 30th Anniversary and again on the 40th Anniversary by PERC staff.

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HISTORY AND BACKGROUND

The State of New Jersey was an early player in the evolution of the public sector negotiations process. When the New Jersey Employer-Employee Relations Act was extended to public employees in 1968,[1] only the states of New York and Wisconsin had enacted similar comprehensive legislation. Since New Jersey is a highly unionized state, it was inevitable that public employees in massive numbers would seize upon the opportunity to organize and engage in the collective negotiations process.

There is some dispute over whether public sector labor legislation spawned the organization of public employees or merely confirmed the existence of an evolving trend towards formalizing the labor-management relationship. It is not necessary to engage in a "chicken or egg" analysis. The simple fact is that during the last 40 years, both in New Jersey and throughout the nation, there has been an explosion of public employee membership in labor organizations and in the promulgation of collective bargaining laws for federal, state and local employees.

While nationally, overall union membership has diminished to 12.1%, the percentage of public sector employees who are unionized is now estimated at 35.9%. There is a parallel in the growth of government employment and in public sector labor relations laws. In New Jersey, as elsewhere, legislators had to come to grips with some very basic issues. Would they transplant the private sector processes or develop a process that reflected government's unique characteristics? Should there be a right to strike? Should supervisors have protections under the law? What should the standards be for unit determination? Could there or should there be a union shop? If strikes

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[1] L. 1968, c. 303 amended and supplemented the Labor Mediation Act which was enacted in 1941, L. 1941, c. 100, and which dealt solely with the mediation of private sector impasses.

were unlawful, should there be prohibitions and penalties? In the absence of a right to strike, should there be compulsory terminal procedures such as interest arbitration? What should be the role of the legislative branch of government? What issues should lawfully be negotiable? Could labor organizations with general membership represent police officers? Should the public be given a formal role in the processes? There were few answers to these questions since there was virtually no formal labor relations experience. Ultimately each state had to make its own policy judgments. For this reason, public sector laws have been referred to as experiments or laboratories as each state developed its own system in the absence of the national uniformities created in the private sector by the National Labor Relations Act. Today over 40 states have developed their own public sector labor relations scheme.

THE COMMISSION

When the Legislature extended the Act to public sector employers and employees, it also created the New Jersey Public Employment Relations Commission. The Commission is a tripartite body composed of two members representative of public employers, two members representative of public employee organizations, and three members representative of the public. One public member is the full-time Chairman. The Legislature entrusted the Commission with accomplishing the Act's purposes and policies. The Act, as originally enacted, specifically entrusted the Commission with resolving representation disputes.

REPRESENTATION

The cornerstone of the Act is the exclusivity principle: an organization selected by a majority of employees in a negotiating unit shall be the exclusive representative of all employees in that unit. The constitutionality of collective negotiations and the exclusivity principle was confirmed in Lullo v. IAFF, 55 N.J. 419 (1970). Lullo also drew a distinction between private sector "collective bargaining" and public sector "collective negotiations" and concluded that by using the latter phrase, the New Jersey Legislature intended to recognize inherent limitations on the bargaining power of public employers and employees.

In the early days of the law, most negotiating units resulted from informal recognition. Since most of the practitioners were more experienced with the private sector, where unions often organize a single department or work site, it was not surprising that many units were narrowly defined and that some fragmentation of the employer's workforce occurred.

Section 5.3 of the Act directs that negotiations units be defined "with due regard for the community of interest among the employees concerned, but the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute." The key early indication of how PERC would interpret this section arose in a case involving the State of New Jersey and several labor organizations.[2/] The Commission found that anything less than statewide units would be inappropriate. While recognizing that a kind of community of interest did exist for similar employees at single institutions, the Commission found that these commonalities were subservient to a higher level of common interest derived from the fact that employees' terms and conditions of employment were established by centralized authority. Thus, generic statewide units were created

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2 State of New Jersey, P.E.R.C. No. 50, NJ Supp. 176 (¶50 1972).

for employees engaged in health care and rehabilitation services and for employees engaged in operations, maintenance and services, regardless of which department or agency employed them. Later, statewide units of administrative and clerical employees and supervisors were determined to be appropriate.

In 1974, the Supreme Court upheld PERC's approach towards defining broad-based appropriate units in State of New Jersey v. Professional Ass'n of N.J. Dept. of Education, 64 N.J. 231 (1974). The Commission had dismissed petitions seeking separate representation for professional nurses and professional educators employed by the State. The Commission found that while each State professional group possessed a separate community of interest, all professional employees shared a broader community of interest as professionals. The Commission reversed a Hearing Officer's recommendation that each proposed unit constituted an appropriate unit since each was regarded as a logical, functional group of professional employees. On appeal, the Court rejected the unions' argument that a unit of all 6300 professional employees would be inappropriate because the diversity of functions and occupations might preclude effective representation. The Court also expanded upon the definition of the appropriate negotiating unit. In addition to the "community of interest" standard, the Court found certain other standards to be clearly implicit. These standards include the compatibility of the joint responsibilities of the public employer and public employees to serve the public and the ability of the public employer to effectively recommend negotiating decisions. The Court also stressed that PERC's determination of appropriate units would stand absent a demonstration that the agency's decision was arbitrary.

Earlier, in West Orange Bd. of Ed. v. Wilton, 57 N.J. 417 (1971), the Supreme Court addressed standards for determining appropriate negotiating units in a case involving a dispute over

whether the Director of Elementary Education should be excluded from a consensually created unit of all supervisors and school administrators. The Legislature granted supervisors the right to organize and engage in collective negotiations, subject to certain limitations.[3] The Commission found that the statute did not prohibit combining various ranks of supervisors in the same unit; but the Court disagreed, finding that an existing conflict of interest is a significant factor in determining whether employees share a community of interest. Where a sufficient conflict of interest appears, the desire of employees to be included in the same unit is not controlling. The Court stated that "[o]bviously no man can serve two masters" and that "[i]f performance of the obligations or powers delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other included employees, the community of interest required for inclusion of such supervisor is not present." Id. at 416, 425. Indicators of a conflict include the authority to evaluate other employees in the same negotiations unit and to influence disciplinary and grievance determinations affecting them. Since Wilton, the Commission has uniformly considered the conflict of interest factor in determining the appropriate unit.

While supervisors are covered by the Act, managerial executives and confidential employees are explicitly excluded. N.J.S.A. 34:13A-5.3. In contrast to the National Labor Relations Act, the

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[3] Supervisors generally cannot be commingled with non-supervisors in a single negotiating unit or represented by an employee organization that admits non-supervisory personnel to membership. The bar on commingling, however, can be overcome by demonstrating an established practice, a prior agreement or special circumstances. This exception, to date, has been interpreted to be operative only upon a demonstration of pre-1968 negotiations activity in a commingled unit. See N.J.S.A. 34:13A-5.3.

Employer-Employee Relations Act specifically defines these terms. N.J.S.A. 34:13A-3(f) and (g). The Commission has applied these definitions on a case-by-case basis.[4]

In 1997, the New Jersey Supreme Court issued a major decision addressing the standards for excluding managerial executives and confidential employees from the coverage of the Employer-Employee Relations Act. New Jersey Turnpike Auth. v. AFSCME, Council 73, 150 N.J. 381 (1997). This decision approves, with one exception, the standards used by the Commission for evaluating managerial executive claims and approves the standards used by the Commission for evaluating confidential employee claims.

N.J.S.A. 34:13A-3(f) defines "managerial executives" as:

> (f) persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

The Supreme Court has approved these standards for applying that definition:

> A person formulates policies when he develops a particular set of objectives designed to further the mission of a segment of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [Id. at 356.]

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[4] See, e.g., State of New Jersey, P.E.R.C. No. 90-22, 15 NJPER 596 (¶20244 1989), aff'd NJPER Supp. 2d 246 (¶206 App. Div. 1991); Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd NJPER Supp.2d 186 (¶165 1988).

Those standards were set forth in Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980), but were partially modified by the Supreme Court to clarify that an employee need not have organization-wide power to be deemed a managerial executive. Compare Gloucester Cty., P.E.R.C. No. 90-36, 15 NJPER 624 (¶20261 1989) (excluding welfare reform coordinator as a managerial executive even though she did not have authority outside her own department).

N.J.S.A. 34:13A-3(g) defines "confidential employees" as:

> [E]mployees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

Turnpike Auth. affirmed these standards for applying that definition:

> We scrutinize the facts of each case to find for whom each employee works, what he [or she] does, or what he [or she] knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employee's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit.

Those standards were set forth in State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985). The Court rejected the suggestion in Wayne Tp. v. AFSCME Council 52, 220 N.J. Super. 340 (App. Div. 1987), that mere access to confidential information necessitates an employee's exclusion.

In addition to the statutory exclusions, the Supreme Court implied an exclusion for Judiciary employees based on the constitutional separation of powers.[5] However, given the Commission's

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[5] Passaic Cty. Probation Officers Ass'n v. Passaic Cty., 73 N.J. 247 (1977).

expertise, the Court authorized it to make recommendations in labor relations disputes involving Judiciary employees.[6]

In 1994, the Legislature established a statewide Judiciary system paid for by State funds and made enforceable an agreement between the Judiciary and majority representatives of Judiciary employees. N.J.S.A. 2B:11-1 et seq. That agreement empowers the Commission to resolve Judiciary labor relations cases and sets the standards for resolving such disputes.

The Commission is committed to resolving questions concerning representation speedily. For example, the Commission used to hold hearings on post-election objections routinely, but now objections will generally be resolved through an administrative investigation. A party filing objections must furnish affidavits or exhibits precisely and specifically showing that conduct has occurred that would warrant setting aside the election as a matter of law. N.J.A.C. 19:11-9.2(h). The Appellate Division has approved that stringent standard and the courts have generally deferred to the Commission's special expertise in conducting elections. AFSCME v. PERC, 114 N.J. Super. 463 (App. Div 1971), aff'g P.E.R.C. No. 43, NJPER Supp. 153 (¶ 43 1970); State of New Jersey, NJPER Supp.2d 123 (¶104 App. Div. 1982), aff'g P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981), P.E.R.C. No. 81-112, 7 NJPER 189 (¶12083 1981), P.E.R.C. No. 81-127, 7 NJPER 256 (¶12114 1981).

A significant development in the area of representation was a 2005 amendment to section 5.3 of the Act, N.J.S.A. 34:13A-1 et seq. The amendment authorizes an employee organization to obtain certification as the majority representative based on a card check rather than an election.

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[6] In re Judges of Passaic Cty, 100 N.J. 352 (1985).

Certification is authorized if no other organization is seeking to represent the employees and a majority of employees in the unit have signed cards authorizing such representation.

SCOPE OF NEGOTIATIONS

The most difficult, most controversial and most frequently litigated area of our public sector labor relations law deals with defining the scope of negotiations -- that is, what subjects must be negotiated, what subjects may be negotiated, and what subjects cannot be negotiated.

Borrowing a phrase from the private sector, our Legislature in section 5.3 initially required the parties to meet at reasonable times and negotiate in good faith with respect to grievances and other "terms and conditions of employment." Section 8.1 prohibited any provision of a labor agreement that would "annul or modify any statute or statutes of this State." Since the New Jersey Supreme Court decided in Burlington County Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579 (1970), that PERC lacked the statutory authority to determine unfair labor practice charges, there was virtually no administrative law guiding the parties over the scope of negotiations or any administrative procedure to resolve scope disputes. The parties therefore presumed the existence of the traditional private sector categories of mandatory, permissive and illegal and followed the private sector approach of agreeing to what was substantively agreeable and disagreeing over what was substantively disagreeable. For example, many parties creatively resolved issues involving the discipline and discharge of Civil Service employees by agreeing to a bifurcated procedure whereby the employees would decide whether to pursue Civil Service review procedures or instead waive those procedures and submit disciplinary disputes to an arbitrator. This approach was later held to be preempted by Civil Service statutes.

Lullo's hint that private sector bargaining and public sector negotiations were significantly different became reality in the Dunellen trilogy.[7] There, the New Jersey Supreme Court narrowly interpreted "terms and conditions of employment" under section 5.3 and broadly interpreted the preemptive effect of other statutes under section 8.1. Thus, the Court restricted the category of mandatory negotiations to those subjects that intimately and directly affect the employees' work and welfare, but do not significantly interfere with the public employer's determination of governmental policy. And the Court concluded that section 8.1 required it to follow the general education laws so long as the goals of the Employer-Employee Relations Act were not frustrated.

In l974, the Legislature responded to the Dunellen trilogy by amending section 8.1 to insert "pension" before "statute" and granting the Commission scope of negotiations jurisdiction. This change triggered extensive litigation, but our Supreme Court eventually agreed with the Commission that the Legislature had not changed Dunellen's basic test for determining whether a subject was mandatorily negotiable. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156 (1978). However, in State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978), the Court held that the new word "pension" in section 8.1 required modifying Dunellen's holding that employment conditions are not negotiable if covered by general statutes. Under State Supervisory, negotiations are not preempted now unless a statute or regulation speaks in the imperative and specifically sets a term and condition of employment.

Ridgefield Park is well-known for another reason: it declared that there was no permissive category of negotiations for most public employees. The Court concluded that such a category was

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[7] Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17 (1973); Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, Burlington Cty. College, 64 N.J. 10 (1973); Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1 (1973).

not legislatively authorized and suggested that it might not even be constitutionally sustainable. Thus, parties were prohibited by case law from reaching agreement on any subjects that were not mandatorily negotiable and employers were allowed to negate any such agreements they had already reached.

Ridgefield Park had a substantial impact on practitioners. Many contracts contained provisions that were non-mandatory and that were now deemed illegal subjects. Management insisted on their removal and unions insisted on their retention. In some cases, the provisions remained in the agreement and management waited until the existence of a dispute to challenge their enforceability. In other cases, the provisions were simply removed. Other parties turned to more creative solutions. Some provisions were removed from the text of the contract and placed in an appendix with the understanding that they were now unenforceable. Some parties agreed to their continuation, but insisted upon their exclusion from the arbitration clause. In certain instances unions demanded a "resurrection" clause -- a provision automatically restoring these non-mandatory provisions if Ridgefield Park was legislatively overridden. It was not uncommon for employers to file scope of negotiations petitions seeking declarations that substantial portions of contracts were not mandatorily negotiable.

Two years later, Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980), recast Dunellen's basic negotiability formula into a balancing test: a proposal's effect on the employees' work and welfare must be balanced against a proposal's interference with the employer's prerogatives. The Supreme Court stated that "a viable bargaining process in the public sector has also been recognized by the Legislature in order to produce stability and further the public interest in efficiency"; negotiations are required when, on balance, that policy

is preeminent. But when the dominant issue is a governmental policy goal, negotiations over that issue, including its impact, are not required. Under the Dunellen trilogy, negotiability determinations had generally been made by category; under Woodstown-Pilesgrove, negotiability determinations are to be based on the circumstances of each case.

The subject of permissive negotiations was revisited in Paterson Police PBA v. City of Paterson, 87 N.J. 78 (1981). In the 1977 interest arbitration statute covering police officers and firefighters, N.J.S.A. 34:13A-14 et seq., the Legislature had referred to a permissive category of negotiations. After finding legislative authorization for such a category, Paterson found constitutional authorization as well. But the Court rejected private sector standards for determining permissive negotiability and substituted this narrow test: an issue is not permissively negotiable if an agreement would place "substantial limitations on government's policymaking powers." So far few subjects have been found to be permissively negotiable.

Local l95, IFPTE v. State, 88 N.J. 393, 404-405 (l982), consolidated the balancing test and preemption standards into one three-part test:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

With some statutory exceptions, this formulation remains the test for resolving negotiability questions. Local 195 itself applied the balancing test and held that subcontracting was not mandatorily negotiable.

In 1982, the Legislature amended section 5.3 to make disciplinary disputes and review procedures mandatorily negotiable. The discipline amendment overruled two 1981 decisions which, to the surprise of many in the labor relations community, had held that disciplinary disputes were never negotiable or arbitrable.[8] Under the discipline amendment, employees may negotiate for contractual protection against unjust discharges and other discipline, and employers may agree to submit a disciplinary dispute to binding arbitration if the employee has no alternate statutory appeal for contesting that discipline.[9]

The cases the discipline amendment overruled marked the extreme swing of the pendulum towards non-negotiability. The enactment of the discipline amendment began a swing back towards expanding the scope of negotiations. Since then, other case law and legislative developments have continued that trend.

The discipline amendment negates any suggestion that a public employer has a prerogative to discharge employees without cause or some form of neutral review. Some court decisions had stated that decisions to "dismiss" public employees are not negotiable,[10] but those statements are too

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8 Jersey City and Jersey City POBA, 179 N.J. Super. 137 (App. Div. 1981), certif. den. 89 N.J. 433 (l982); State v. Local 195, IFPTE, 179 N.J. Super. 146 (App. Div. 1981), certif. den. 89 N.J. 433 (1982).

9 CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984); Bergen Cty. Law Enforcement Group v. Bergen Cty., 191 N.J. Super. 319 (App. Div. 1983).

10 Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 16 (1983).

broad given the discipline amendment and other cases recognizing the fundamental importance of job security to employees.[11] In 1985, the Supreme Court implicitly recognized this point when it held that contractual tenure provisions protecting custodians against unjust discharge are mandatorily negotiable.[12]

The history of the negotiability of disciplinary disputes grew even more convoluted in 1993 when the Supreme Court held that the discipline amendment did not apply to State troopers or any other police officers and also questioned whether it applied to any disciplinary disputes involving employees covered by Civil Service or other tenure laws. State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993). Compare New Jersey Turnpike Auth. v. New Jersey Turnpike Supervisors Ass'n, 143 N.J. 185 (1996) (permitting arbitration over three-day suspension of toll plaza supervisor accused of sexual harassment). Most police officers could still obtain review of major discipline through Civil Service or a statute permitting Superior Court review, but others could not, and arbitration of minor discipline in Civil Service jurisdictions was now in question. The Legislature responded by once again amending N.J.S.A. 34:13A-5.3, this time to make clear that public employers could agree to arbitrate minor disciplinary disputes involving any public employees except State troopers. L. 1996, c. 115, §4, eff. Jan. 9, 1997. This statute, as construed in Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997), defines minor discipline as a suspension or fine of five days or less unless the employee has been suspended or fined an aggregate of 15 or more days or received three minor suspensions or fines in one calendar year. This definition permits Civil

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11 Woolley v. Hoffman-LaRoche, Inc., 99 N.J. 284 (1985).

12 Wright v. East Orange Bd. of Ed., 99 N.J. 112 (1985).

Service employees to negotiate for neutral review of disciplinary determinations that cannot be appealed as of right to the Civil Service Commission.

Because Woodstown-Pilesgrove and In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J, 292 (1979), stated that the "impact" of managerial decisions is not negotiable, some practitioners had believed that no issues that are related in any way to a managerial prerogative can ever be negotiable. However, the Commission continued to hold that issues that are severable from the exercise of a managerial prerogative may still be mandatorily negotiable. For example, a public employer has a prerogative to reduce its vehicle fleet and thus to stop permitting employees to use vehicles to commute, but it must negotiate the severable issue of offsetting compensation for the loss of that economic benefit.[13] And a public employer has a prerogative to require employees on sick leave to produce doctor's notes, but it must negotiate over the severable issue of who pays for the doctor's visit.[14] The Commission's severability doctrine accommodated the parties' interests and promoted the purposes of the Act by barring negotiations over a prerogative and its necessary impact while permitting negotiations over severable compensation claims.

An Appellate Division panel then concluded that Maywood spoke too broadly when it stated that "impact" issues are not negotiable. Piscataway Tp. Bd. of Ed. v. Piscataway Tp. Ed. Ass'n, 307 N.J. Super. 263 (App. Div. 1998), certif. den. 156 N.J. 385 (1998) . Under Woodstown-Pilesgrove, an "impact" issue is mandatorily negotiable if negotiations over that issue would not significantly interfere with the exercise of the prerogative. Piscataway specifically held that a school board's

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[13] Morris Cty., P.E.R.C. No. 83-31, 8 NJPER 561 (¶13259 1982), aff'd 10 NJPER 103 (¶15052 App. Div. 1984), certif. den. 97 N.J. 672 (1984).

[14] City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 1240, IAFF, 198 N.J. Super. 382 (App. Div. 1985).

prerogative to change the school calendar because of excessive snow days did not automatically mean that all issues related to that decision are non-negotiable. The Court remanded the case to the Commission to determine whether any particular "impact" issues are negotiable under the Woodstown-Pilesgrove balancing test.

Language in two Appellate Division decisions[15] suggested that work schedules for police officers were never negotiable. But in 1987, the Appellate Division agreed with the Commission that this language was too broad and that work schedules for uniformed employees are mandatorily negotiable unless the facts of a particular case demonstrate a governmental policy need to act unilaterally.[16] The Commission has issued many decisions accommodating the interests of police officers and firefighters in negotiating over their work hours and the interests of public employers in achieving such governmental policy goals as effective supervision and training, improved responses to emergencies, and having officers with special skills perform special tasks.

For a comprehensive analysis of the negotiability of a work schedule proposal in an interest arbitration setting, see Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997). There, the Commission held that a firefighters' work schedule proposal could be submitted to interest arbitration. The proposal called for one 24-hour day on duty, followed by three days off.

In 1990, the Employer-Employee Relations Act was again amended, this time to expand the scope of negotiations for school board employees. N.J.S.A. 34:l3A-22 et seq. Under N.J.S.A. 34:l3A-23, "[a]ll aspects of assignment to, retention in, dismissal from, and any terms and conditions

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15 Irvington PBA Local 29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980); Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984)

16 In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987).

of employment concerning extracurricular activities shall be deemed mandatory subjects for collective negotiations" except the establishment of qualifications. This section overrules the actual holding of Teaneck that extracurricular non-reappointments are never negotiable. Under N.J.S.A. 34:l3A-26, "[d]isputes involving the withholding of an employee's increment . . . for predominately disciplinary reasons" shall be subject to binding arbitration. This section overrules the holding of Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 3ll (l979), that teachers may never contest withholdings through binding arbitration.[17]

In Edison Tp. Bd. of Ed. v. Edison Tp. Principals and Supervisors Ass'n, 304 N.J. Super. 459 (App. Div. 1997), an Appellate Division panel agreed that an increment withholding based on a principal's allegedly excessive absenteeism had to be arbitrated. Unless a withholding is predominately based on an evaluation of actual teaching performance, it must be arbitrated.

In Randolph Tp. Bd. of Ed and Randolph Tp. Ed. Ass'n, P.E.R.C. No. 99-45, 25 NJPER 14 (¶30005 1998), the Commission held that the 1990 amendments made all increment withholdings from non-professional school board employees subject to binding arbitration under N.J.S.A. 34:13A-29. The Appellate Division, however, disagreed. 328 N.J. Super. 540 (App. Div. 2000). The Court's opinion requires the Commission to determine whether a support staff withholding was predominately evaluative or disciplinary to determine whether binding arbitration is mandated by statute. Parties remain free to agree to binding arbitration of all increment withholdings for non-professional school board employees. Flemington-Raritan Reg. Bd. of Ed., P.E.R.C. No. 2003-64, 29 NJPER 113 (¶34 2003).

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[17] If the reasons for a withholding relate predominately to an evaluation of teaching performance, the withholding must still be appealed to the Commissioner of Education. N.J.S.A. 34:13A-27.

N.J.S.A. 34:13A-24 permits a negotiated schedule of offenses and penalties for minor discipline to displace the need to file tenure charges when reducing compensation, and N.J.S.A. 34:13A-25 prohibits disciplinary transfers between work sites.

Having fairly and reasonably applied the Legislature's directives and the Court's precedents, the Commission has earned and received deference from the courts. In Hunterdon Cty. and CWA, 116 N.J. 322, 328-329 (1980), the Supreme Court recognized the Commission's "broad authority and wide discretion in a highly specialized area of public life" and confirmed the same narrow standard of review in a scope case as applies in a representation case: the agency's decision will stand unless it is clearly demonstrated to be arbitrary. And in 1991, the Supreme Court endorsed the Commission's standards for resolving negotiability disputes involving bus drivers covered by the Public Transportation Act.[18] This decision, although legally applicable to only a narrow group of employees, demonstrates the Court's confidence in the Commission's resolution of scope of negotiation cases.

Initially, lobbying efforts to expand the scope of negotiations were conducted solely by labor organizations, but management eventually also joined in that effort. The joint interest stems from the observation that while statutory preemption caps certain terms and conditions of employment, it also guarantees the continuation of benefits outside the collective negotiations process. There have been numerous bills introduced to make mandatorily negotiable some benefits now guaranteed by law, including vacations, personal and sick leaves of absence, and paid health insurance coverage. Continued interest in this approach could result in an expanded scope of negotiations.

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[18] In re N.J. Transit Bus Operations, 125 N.J. 41 (1991).

UNFAIR PRACTICES

The 1974 amendment to the Act also granted PERC the authority to prevent unfair practices, adjudicate unfair practice charges, and issue remedial orders. The expansion of PERC's authority in scope of negotiations disputes and unfair labor practices necessitated dramatic changes in PERC's staff and budget. Prior to the amendments, the agency staff was small. In 1973, only six professionals were employed. And, before the 1974 amendments, the Commission staff had great experience in handling mediation and representation cases, but no experience in addressing unfair practice and scope of negotiations issues. The staff therefore had to be expanded and realigned. For example, anticipated court challenges required an expansion of the General Counsel staff. And the special expertise required to perform new functions and a vastly increased caseload required dividing the staff into conciliation and adjudication divisions. Generalists had to become specialists.

The Act's unfair practice provisions are found in N.J.S.A. 34:13A-5.4. Subsection 5.4(a) prohibits certain unfair practices by employers, their representatives or agents; subsection 5.4(b) prohibits certain unfair practices by employee organizations, their representatives, or agents. These subsections are patterned on sections 8(a) and 8(b) of the National Labor Relations Act and thus the substantive case law on unfair practices in the New Jersey public sector has tracked the case law on unfair practices in the private sector. There is, however, one major procedural difference between NLRB proceedings and PERC proceedings. The NLRB investigates a charge to determine whether there is probable cause to uphold it and, if there is, the NLRB's General Counsel prosecutes it. In PERC proceedings, the charging party must prosecute the Complaint that the Commission will issue when a charge's allegations, if true, would establish an unfair practice. The Commission thus sits as a neutral adjudicator of unfair practice charges, not an investigator or prosecutor.

N.J.S.A. 34:13A-5.4(a)(1) prohibits public employers from "[i]nterfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by this act." Those rights, in turn, are found in section 5.3. In particular, that section grants employees the right to form, join and assist any employee organization without fear of penalty or reprisal, the right to refrain from any such activity, and the right to have the majority representative negotiate on their behalf without discrimination and without regard to employee organization membership. The test for determining whether subsection 5.4(a)(1) has been violated is an objective one: an employer violates this provision if its actions tend to interfere with an employee's rights and lack a legitimate and substantial business justification.[19] An illustration is found in Union Tp., P.E.R.C. No. 2008-20, 33 NJPER 255 (¶95 2007), where the Commission held that an employer's surveillance of the police union members tended to interfere with protected rights. No finding of hostility was required.

Another example of a right protected by N.J.S.A. 34:13A-5.4(a)(1) is the right to request union representation when an employee reasonably believes that an investigatory interview may lead to disciplinary action. See UMDNJ and CIR, 144 N.J. 511 (1996) (approving Commission cases applying Weingarten v. NLRB, 420 U.S. 251 (1975)).

N.J.S.A. 34:13A-5.4(a)(3) prohibits employers from "[d]iscriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act." In re Bridgewater Tp., 95 N.J. 235 (1984), sets forth a two-step test for assessing alleged violations of this subsection. First, the Commission determines whether the charging party has proved that hostility towards protected

[19] Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983).

activity was a substantial or motivating factor in the personnel action that prompted the charge. If it hasn't, the Complaint is dismissed. If it has, the Commission reaches the second step of its analysis: has the employer proved that it would have taken the same course of action absent the illegal motive? If the employer carries this burden of proof, no violation will be found. In Bridgewater itself, a violation was found when a union supporter was discriminatorily transferred and demoted. In contrast, no violation was found in Teaneck Tp., P.E.R.C. No. 81-142, 7 NJPER 351 (¶12158 1981), where an employee was fined and suspended. A classic example of an unfair practice under this subsection is firing an employee who tries to organize a union.[20]

N.J.S.A. 34:13A-5.4(a)(5) prohibits a public employer from "[r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

One type of violation occurs when the totality of circumstances indicates a pre-determined intention to avoid an agreement rather than an open mind and a sincere desire to reach an agreement. State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976) (no violation). An employer, however, may engage in "hard bargaining" and may not be forced to accept any particular proposal.

A refusal to negotiate in good faith includes not only an intention to avoid reaching an agreement, but also a repudiation of a contract already reached. Bridgewater Tp., P.E.R.C. No. 95-28, 20 NJPER 399 (¶25202 1994), aff'd 21 NJPER 401 (¶26245 App. Div. 1995). Repudiation of a grievance procedure also violates this provision. City of Newark, P.E.R.C. No. 2008-34, 33

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[20] Mantua Tp., P.E.R.C. No. 84-151, 10 NJPER 433 (¶15194 1984).

NJPER 316 (¶120 2007), recon. den. P.E.R.C. No. 2008-53, 34 NJPER 71 (¶29 2008) (rescinding grievance settlement).

A second type of violation occurs when this provision of section 5.3 is violated: "[p]roposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established." Our Supreme Court elaborated upon this statutory obligation in Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). This rule protects the right of employees through the majority representative to have a say over their employment conditions. Despite this rule, however, no violation will be found if the employer establishes that it had a contractual right to change an employment condition or that the majority representative waived its right to negotiate.[21]

The holding of Galloway required the school board to continue to pay increments during successor contract negotiations. That holding was based on N.J.S.A. 18A:29-4.1, an education statute later amended and then construed by the Supreme Court to prohibit paying increments to teachers during negotiations after a three-year contract has expired. Neptune Tp. Bd. of Ed. v. Neptune Tp. Ed. Ass'n, 144 N.J. 16 (1996).

Significant litigation has stemmed from the second type of violation. The New Jersey Supreme Court reversed the Appellate Division and Commission decisions in City of Jersey City, P.E.R.C. No. 96-89, 22 NJPER 251 (¶27131 1996), aff'd 23 NJPER 325 (¶28148 App. Div. 1997), rev'd 154 N.J. 555 (1998). The Commission held that the City violated the Act when, without negotiations, it shifted work performed by police officers within a negotiations unit to civilian employees outside that unit. The Commission applied the unit work doctrine and found that the

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[21] Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978).

reorganization, waiver, and shared work exceptions applied to several positions but not the ones later appealed. Finding that the City was motivated by operational concerns, the Supreme Court held that the City had a managerial prerogative to civilianize the positions as part of a reorganization increasing the number of officers on the streets. The Court's opinion preserves the unit work doctrine, but requires that the interests of employees and employers be balanced in each civilianization case involving that doctrine.

The New Jersey Supreme Court affirmed the Commission and the Appellate Division in Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000). The Commission held that the employer was required to negotiate before changing its practice concerning salary guide placement of newly hired but experienced police officers. The Appellate Division agreed with the agency's decision, quoting this language with approval:

> The Township had an obligation to negotiate over starting salaries. It unilaterally established a policy of placing officers with police academy training and at least one year of municipal police department experience at step three of the salary guide. The PBA did not object to that practice. The only time that the PBA was aware of a deviation from that practice, it filed an unfair practice charge. Thus, the PBA cannot be said to have acquiesced to any deviations from the practice. Under these facts, we conclude that the Township had an obligation to negotiate with the PBA before setting Gonzalez' salary below step three.
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> We reiterate that the Township is not bound to maintain its practice. It is simply required to negotiate before changing it . . . . If conditions have changed and the Township believes that the practice should be discontinued, it is free to take that position in negotiations.

The Appellate Division also accepted the Commission's distinction between breach-of-contract claims outside the agency's jurisdiction and unilateral change claims within its jurisdiction. The Supreme Court affirmed, substantially for the reasons expressed by the Appellate Division.

Subsection 5.4(b)(1) prohibits employee organizations from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act." The most common type of alleged violation under this subsection is a claim that a majority representative has violated the duty of fair representation it owes the employees it represents. Such a violation will be found if the charging party proves that the majority representative's conduct was arbitrary, discriminatory, or in bad faith.[22] But case law also establishes that the majority representative has a wide range of discretion in conducting negotiations and resolving grievances.

This discussion of unfair practices has focused on the more common type of alleged violations and has not been meant to be exhaustive. Whatever the alleged violation, however, the courts have accepted the Commission's expertise in analyzing unfair practice cases and its discretion in selecting remedies. Bridgewater and Hunterdon thus stress that reviewing courts should defer to the Commission's findings of fact if supported by the record and its conclusions of law if not arbitrary. And Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secs., 78 N.J. 1 (1978), accords the Commission great discretion in choosing remedies -- including reinstatement and back pay -- designed to make the victims of unfair practices whole.

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[22] Saginario v. Attorney General, 87 N.J. 480 (1981); Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982).

REPRESENTATION FEES

As enacted in 1968, the Act contained no agency shop or "fair share" provisions. Because section 5.3 protects the rights of employees to refrain from assisting unions, the Supreme Court held illegal clauses requiring all members of a negotiating unit to pay their "fair share" of a majority representative's expenditures on their behalf.[23] But in 1979 the Legislature added N.J.S.A. 34:13A-5.5 through 5.9 to the Act. These provisions allow a majority representative to negotiate the right to receive a "representation fee in lieu of dues" from non-members in its negotiating unit, provided it offers all unit employees "membership on an equal basis." This representation fee legislation capped the fee at 85 percent of union member dues, mandated procedures to protect non-members' rights, and created the Public Employment Relations Commission Appeal Board. That Board is a tripartite body charged with resolving disputes between majority representatives and non-members who pay representation fees over the amount of the fee.

The legislation was immediately attacked in both federal and state court on constitutional grounds. It withstood those challenges.[24]

In Boonton, the Supreme Court agreed with the Commission that the Appeal Board has sole jurisdiction over challenges to the amount of representation fees. The Board has resolved many such

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[23] N.J. Turnpike Employees Union v. N.J. Turnpike Auth., 64 N.J. 579 (1974), aff'g 123 N.J. Super. 461 (App. Div. 1973).

[24] Robinson v. N.J., 547 F. Supp. 1297 (D.N.J. 1982), supp. opinion 565 F. Supp. 942 (D.N.J. 1983), rev'd and rem'd 741 F.2d 598 (3rd Cir. 1984), cert. den. 469 U.S. 1228 (l985),; Robinson v. N.J., 806 F.2d 442 (3rd Cir. 1986), cert. den. 481 U.S. 1070 (l987); Boonton Bd. of Ed. v. Kramer, 99 N.J. 523 (1985), cert. den. 106 S. Ct. 1388 (1986).

challenges.[25] It has also addressed the types of activities that a representation fee can subsidize.[26] Both the Appeal Board and the Commission have dealt with the procedures necessary to protect the rights of non-members not to subsidize activities unrelated to collective negotiations or contract administration.[27] And the Commission has exercised its unfair practice jurisdiction to ensure that membership is offered on an equal basis to non-members required to pay representation fees.[28]

The vast majority of Appeal Board cases have been settled. The Appellate Division has affirmed the Appeal Board's policy of holding that a union's offer of a full refund of representation fees moots any other issues in an Appeal Board petition.[29]

Effective August 1, 2002, sections 5.5 and 5.6 of the Act were amended to provide that a majority representative can obtain the right to collect representation fees from non-members even absent a negotiated agreement. If no agreement is reached, the majority representative can now petition the Commission to investigate whether a majority of negotiations unit employees are

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[25] See, e.g., Talamini v. Cliffside Park Ed. Ass'n, A.B.D. No. 86-6, 12 NJPER 187 (¶17070 1986); Mallamud and Rutgers Coun. of AAUP Chapters, A.B.D. No. 86-9, l2 NJPER 324 (¶17126 l986), app. dism. as moot, NJPER Supp.2d 180 (¶157 App. Div. 1987); Stracker v. Local 195, IFPTE, A.B.D. No. 86-10, 12 NJPER 333 (¶17128 1986).

[26] Charney v. East Windsor Reg. Supportive Staff Ass'n, A.B.D. No. 86-1, 11 NJPER 680 (¶16235 1985); Mallamud.

[27] Boonton; Bacon and District 65, UAW, P.E.R.C. No. 87-72, 13 NJPER 57 (¶18025 1986), aff'd NJPER Supp. 2d 196 (¶173 App. Div. 1988), certif. den. 114 N.J. 308 (1988); Daly v. High Bridge Teachers' Ass'n, A.B.D. No. 89-1, 14 NJPER 700 (¶19300 1988).

[28] See, e.g., Bergen Cty., P.E.R.C. No. 88-9, 13 NJPER 645 (¶18243 1987), aff'd 227 N.J. Super. 1 (1988), certif. den. 111 N.J. 591 (1988).

[29] Daly v. High Bridge Teachers Ass'n, 242 N.J. Super. 12 (App. Div. 1990), certif. den. 122 N.J. 356 (1990).

voluntary dues paying members and whether the representative maintains a demand-and-return system for objecting to fees not attributable to its representational duties. If these conditions are met, the Commission must order the employer to deduct fees from paychecks of non-member employees. When called into question, the constitutionality of the 2002 amendments was affirmed by the Appellate Division twice in 2004.[30]

MEDIATION AND FACT-FINDING

Several teacher strikes in the mid-sixties led to intense legislative review culminating in the 1968 passage of the Act. These strikes demonstrated that collective negotiations were moving forward in the State without formally adopted legislative policy. In the absence of a statute or a formal impasse resolution mechanism, parties were left without direction and the public was negatively impacted. When the Legislature finally acted in 1968, it entrusted PERC with authority over impasse resolution mechanisms.

PERC would assign a mediator upon request after determining the existence of an impasse. If mediation failed to result in voluntary resolution of the impasse, the Commission, upon the mediator's recommendation or at the parties' request, could invoke fact-finding. Absent a voluntary settlement during the fact-finding process, the fact-finder would issue a written report with recommendations for settlement.

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[30] Hunterdon Cty, and CWA Local 1034, 369 N.J. Super. 572 (App. Div. 2004), certif. den. 182 N.J. 139 (2004), aff'g P.E.R.C. No. 2003-24, 28 NJPER 433 (¶33159 2002) Raritan Valley Comm. Coll. and Raritan Valley Comm. Coll. Staff Fed./AFT, Local No. 4143, 31 NJPER 7 (¶5 App. Div. 2004), aff'g P.D.D. No. 2004-4, 29 NJPER 404 (¶133 2003).

In the absence of an express statutory reference to whether a strike was lawful or unlawful, the New Jersey Supreme Court had to decide this issue. It did so in Union Beach Bd. of Ed. v. NJEA, 53 N.J. 29 (1968). The Court held that public employees did not have the right to strike in the absence of an express grant and that the 1968 Act did not contain such an express grant.

Mediation has probably been the most effective and least controversial process administered by PERC. PERC annually receives more than 500 demands for the assignment of mediators, and voluntary resolution of impasses is achieved during mediation in 80 to 90% of these cases. PERC's mediators have commanded respect in the labor community. In addition to staff mediators, PERC uses independent mediators in approximately 10% to 20% of these disputes because of seasonal demands that must be met promptly. This normally occurs in the fall upon the opening of schools since there are over 600 school districts that must be serviced, some of which have multiple negotiating units.

Fact-finders are appointed after a selection process by the parties similar to the one provided for in grievance arbitration. As the parties' sophistication and confidence in the mediation process grew, the use of fact-finding decreased significantly after the 1970's. Since fact-finding is not binding, its premise is heavily rooted in conciliation and it is rare that the parties expect the fact-finder to serve in an adjudicatory capacity. Much greater emphasis has been placed on either resolution of the dispute or acceptability of the report and recommendations.

In 2003, the Act was amended to prohibit school boards from unilaterally imposing their last best contract offers and to establish a super conciliation process after a fact-finding report has failed to resolve a negotiations impasse. The amendments also addressed confidentiality and specified that

mediators, factfinders, and super conciliators cannot be required to disclose confidential documents or to testify concerning mediations.

The New Jersey Supreme Court addressed mediator confidentiality in a non-labor context in State v. Williams, 184 N.J. 432 (2005), when it held that a mediator appointed by a court pursuant to Rule 1:40 could not testify in a criminal proceeding regarding a participant's statements during mediation. The defendant who wished to call the mediator had not shown a need for that testimony sufficient to overcome the privilege of mediation confidentiality or that the evidence was not available from other sources.

INTEREST ARBITRATION

A major amendment to the Act in the area of impasse procedures came in 1977 when the Legislature granted binding interest arbitration to police and firefighters and their employers.[31] The adopted mechanism for interest arbitration was virtually identical to that recommended in 1976 by a tripartite bipartisan study commission created in 1974.[32] That study commission had recommended the interest arbitration mechanism for all public employees, but the Legislature limited its action to police and firefighters.

The most notable feature of the interest arbitration law was the adoption of the terminal procedure of last best offer. This specific procedure was unique to New Jersey. In the event the parties did not come to an agreement, they were required to develop final offers on all outstanding issues. Economic issues had to be grouped by the parties and the arbitrator had to select from one

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31 L. 1977, c. 85.

32 L. 1974, c. 124.

of the final offers. Non-economic issues were to be decided by considering each party's final offer on an issue-by-issue basis. The statute encouraged the parties, if they so desired, to choose among several different kinds of terminal procedures besides this final offer mechanism.

The New Jersey Supreme Court first reviewed this process in disputes involving police officers employed in Atlantic City and Irvington.[33] The Court decided that the statutorily mandated budget cap of 5% did not create a ceiling on the amount that could be awarded by the arbitrator. Instead, the arbitrator was required to consider all the evidence, including the employer's ability to pay in light of the requirements of the Cap Law, and to give due weight to the statutory factors set forth in N.J.S.A. 34:13A-16(g), as deemed relevant for the resolution of the dispute. The Court also ruled that so long as Cap Law constraints are considered in interest arbitration, there is no unconstitutional delegation of legislative authority.[34]

In 1982, in Newark FMBA, Local No. 4 v. City of Newark, 90 N.J. 44 (1982), the Supreme Court upheld the validity of a Commission rule, N.J.A.C. 19:16-5.7(f), granting arbitrators the discretion to permit revisions of positions at any time before the close of the hearing, so long as the other party has an opportunity to respond. That rule also permited the arbitrator to terminate the parties' ability to revise at any earlier point. The rule's purpose was to permit the parties to continue to negotiate in an effort to minimize the differences in their final offers. Stressing that the selection of impasse resolution procedures was at the heart of the Commission's expertise, the Court deferred to the Commission's interpretation of the interest arbitration statute and its assessment that the rule

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[33] City of Atlantic City v. Laezza, 80 N.J. 255 (1979); New Jersey State PBA, Local 29 v. Town of Irvington, 80 N.J. 271 (1979).

[34] Atlantic City, 80 N.J. at 268-69. See also Division 540, ATU v. Mercer Cty. Improvement Auth., 76 N.J. 245 (1978).

had worked well in practice. The rule was later amended to preclude revisions in final offers after an arbitrator begins taking evidence or testimony, unless the arbitrator approves an agreement between the parties to permit revision before the close of hearing.

In 1994, the New Jersey Supreme Court issued two decisions that had a significant impact on the interest arbitration community. PBA Local 207 v. Bor. of Hillsdale, 137 N.J. 71 (1994); Washington Tp. v. New Jersey PBA, Local 206, 137 N.J. 88 (1994). The Court vacated the awards under review, holding that the arbitrators had unduly emphasized comparisons with police salaries in other communities and had improperly placed the burden on the municipalities to prove their inability to pay the union's final offer. Hillsdale, 137 N.J. at 86; Washington Tp., 137 N.J. at 92. The Court observed that the statute invited comparison with other public and private sector jobs. Hillsdale, 137 N.J. at 85. Further, the statutory direction to consider the financial impact on the municipality demanded more than answering the question whether the municipality can raise the money to pay the salary increase. Id. at 86. The Court emphasized that arbitrators must identify and weigh all the relevant statutory factors, analyze the evidence pertaining to those factors, and explain why other factors are irrelevant. Id. at 84-85.

In January 1996, the Police and Fire Public Interest Arbitration Reform Act was signed into law. The Reform Act changed the terminal procedure to conventional arbitration (absent an agreement to use another terminal procedure), required the Commission to assign arbitrators by lot where the parties do not agree on an arbitrator, and required that an award be issued within 120 days of an arbitrator's selection or assignment, unless the parties agree to an extension. The comprehensive list of factors that must be considered in deciding a dispute was amended to provide more specific direction to the arbitrator and the parties. Incorporating the language of the Hillsdale

decision, the statute was amended to require the arbitrator to indicate which statutory factors are relevant, analyze the evidence on each relevant factor, and explain why the other factors are not relevant.

The Reform Act also gave the Commission new responsibilities in administering the interest arbitration statute. It is now required to conduct an annual mandatory training program for arbitrators and to perform, or cause to be performed, an annual survey of private sector wage increases. The Commission, rather than Superior Court, now has jurisdiction to decide appeals from interest arbitration awards.

Teaneck Tp. v. Teaneck FMBA Local No. 42, 177 N.J. 560 (2003), aff'g 353 N.J. Super. 289 (App. Div. 2002), involved an appeal from an interest arbitration award granting a 24/72 work schedule to the Township's firefighters and resolving several other issues such as salaries and stipends. The Commission affirmed the award, but delayed implementation of the 24/72 work schedule for firefighters until that schedule was also adopted for their superior officers. P.E.R.C. No. 2000-33, 25 NJPER 450 (¶30199 1999). The Commission held that an interest arbitrator should not place firefighters on a different work schedule than superior officers unless he or she determines that the different schedules would not impair supervision or that, under all the circumstances, there are compelling reasons to grant the proposal that outweigh any supervision concerns. On the record before it, the Commission found that different schedules would impair supervision and that there were not compelling reasons for having a separate schedule despite that impairment.

Both the employer and the FMBA appealed. The Appellate Division affirmed all aspects of the Commission's decision except the delayed implementation of the work schedule. It embraced the Commission's standards for reviewing interest arbitration awards, its approach to analyzing the

negotiability of work schedules and for determining whether a work schedule should be awarded, and its standards for analyzing a contention that a work schedule proposal will cause supervision problems. However, the Court held that instead of modifying the award, the Commission should have remanded it to have the arbitrator apply the impairment of supervision and compelling reasons standards in the first instance. The Court stressed that the interest arbitration reform statute vests the arbitrator with the responsibility to weigh the evidence and to fashion an award given the evidence and the statutory criteria.

The Supreme Court granted the employer's petition for certification. That petition raised a single issue: do public employers have a managerial prerogative to keep firefighters and superior officers on a common schedule? At oral argument, the questions indicated that several Justices did not think that issue was difficult or that it had been preserved since no scope of negotiations petition had been filed. The Court issued its per curiam affirmance within three weeks of the argument.

In 2007, the Cap Law reemerged as a significant topic in labor relations when the Legislature amended N.J.S.A. 34:13A -16g , which lists the factors to be assessed by an interest arbitrator, to formally include consideration of the Cap Law. The statute was amended as follows:

> (9) Statutory restrictions imposed on the employer. Among the items the arbitrator or panel of arbitrators shall assess when considering this factor are the limitations imposed upon the employer by section 10 of P.L. 2007, c. 62 (C 40A:4-45.45)

Section 10 of the referenced law caps the increase in the property tax levy from one year to the next at 4%, but adds certain exclusions to the calculation of the adjusted tax levy. The exclusions include increases in amounts for debt services; lease payments with county improvement authorities;

amounts raised to replace reduced State formula aid; certain increases in pension contributions and health care costs; and uncollected taxes.

Recently, in Somerset Cty. Sheriff's Office, P.E.R.C. No. 2007-33, 32 NJPER 372 (¶156 2006), aff'd 34 NJPER 21(¶8 App. Div. 2008), an Appellate Division panel affirmed the Commission's decision affirming an interest arbitration award in which the arbitrator reasonably determined that the County's own pattern of settlement with its four other law enforcement units warranted a similar salary award for the fifth unit of law enforcement officers involved in this case. The law enforcement officers in all five units performed coordinated and integrated work. The Court concluded that the Commission made a rational policy judgment in finding that an employer's settlement pattern with similar employee units is an important consideration in applying the statutory criteria and it accepted the determination of the arbitrator and the Commission that sheriff's officers performed work comparable to other law enforcement units. In a related case, Somerset Cty. Sheriff's Officers FOP Lodge #39 v. Somerset Cty. and Somerset Cty. Sheriff, App. Div. Dkt. No. A-5789-06T3 (4/29/08), the Appellate Division reversed the decision of a trial court that had denied the FOP's application for interest on an arbitration award plus counsel fees for the cost of the FOP's action to enforce the award. The Court stated that once the Commission rendered its decision, the onus was on the County to implement the award; it should not have been the FOP's burden to move for enforcement.

The privacy of interest arbitration proceedings was addressed recently when the Township of Hopewell initiated a court proceeding contesting an interest arbitrator's application of N.J.A.C. 19:15-5.7(d) to exclude the public from an interest arbitration hearing absent the parties' agreement to allow the public to attend. The arbitrator ruled that all members of the governing body could

attend the proceeding, but not the public at large. Presiding Judge Shuster of the Chancery Division of the Mercer County Superior Court conducted a hearing and issued a decision denying the Township's request to either open the arbitration to the public or to stay the arbitration until the Court decided the merits of the suit. In re Interest Arbitration Hearing between the Township of Hopewell and Hopewell PBA Local 342, Dkt. No. C-14-08 (2/4/08). He concluded that the Court had jurisdiction to consider the Township's arguments under the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., ("OPMA"); no irreparable harm would occur if the public could not attend the arbitration; the Public Interest Arbitration Reform Act, N.J.S.A. 34:13A-14 et seq., rather than OPMA controlled the case; the public policy favoring prompt settlement of labor disputes justified privacy in interest arbitration hearings; and OPMA should not be used as a vehicle to eviscerate the Reform Act and the Commission's regulation.

GRIEVANCE ARBITRATION

In the private sector, the Steelworkers Trilogy assumes that grievance arbitration will be the end, not the beginning, of litigation. It thus commands that courts accord the arbitration process great deference.[35] But in the New Jersey public sector, the courts have been more assertive. That has been especially so when the result of a case has been costly or questionable.

For example, in State v. State Troopers Fraternal Ass'n, 91 N.J. 464 (1982), the Supreme Court held that an award requiring the employee to maintain a $1.25 co-payment level for

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[35] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

prescription drugs was not "reasonably debatable." And in CWA v. Monmouth Cty. Bd. of Social Services, 96 N.J. 442 (1984), the Court found no contractual authorization for an award granting back pay between the time employees were illegally removed from a promotion list and the time they were eventually promoted. In County College of Morris Staff Ass'n v. County College of Morris, 100 N.J. 383 (1985), the Court vacated an arbitration award reinstating (with an eight month unpaid suspension) a questionable employee. To reach that result, the majority construed private sector precedents and concluded that absent express contractual authorization, the arbitrator could not properly consider the absence of any prior warnings in determining whether there was just cause to discharge the employee. Chief Justice Wilentz sharply dissented, emphasizing that arbitration awards should be given great deference, "a deference that necessarily includes a sympathetic rather than a hostile reading of the arbitrator's opinion." Id. at 406-407. Morris Cty. has since been limited to its facts and the particular wording of the arbitrator's award.[36]

More recent case law indicates that the courts have become more accepting of the arbitration process. In Bloomfield Bd. of Ed. v. Bloomfield Ed. Ass'n, 126 N.J. 300 (1991), aff'g 251 N.J. Super. 370 (App. Div. 1990), the Court held contractually arbitrable a grievance contesting the employer's refusal to pay employee medical expenses for the period following its insurer's declaration of insolvency and before it retained a new insurance carrier. Its per curiam opinion adopted the Appellate Division's reasoning, including its embrace of the Steelworkers Trilogy and the strong public policy favoring arbitration of labor relations grievances. In 1995, the Supreme Court upheld a grievance arbitration award reading a just cause clause into a collective negotiations agreement and restoring the increment of a teaching staff member accused of excessive absenteeism.

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[36] See Local 153 OPEIU v. Trust Co. of New Jersey, 105 N.J. 442 (1987).

Scotch Plains-Fanwood Bd. of Ed. v. Scotch Plains-Fanwood Ed. Ass'n, 139 N.J. 141 (1995).

In South Plainfield Bd. of Ed. v. South Plainfield Ed. Ass'n, 320 N.J. Super. 281 (App. Div. 1999), certif. den. 161 N.J. 332 (1999), the Court confirmed an arbitration award holding that the school board breached its collective negotiations agreements over a period of many years when it did not give salary guide credit to new teachers for experience in other districts. The arbitrator had not yet determined the remedy, but the Court noted that requiring the employer to make all teachers whole would result in enormous outlays and possible layoffs and service reductions. Borrowing standards for reviewing interest arbitration awards, the Court concluded that the public interest required the arbitrator, when awarding damages, to consider the fiscal impact of the award and to diminish back pay accordingly.

The Supreme Court recognized a common law right to confirm a grievance arbitration award in PBA Local 292 v. Borough of North Haledon, 158 N.J. 392 (1999). There, the Court permitted a union to file a common-law confirmation action after the statutory time limit (90 days) for a summary action had expired. A party may not seek to vacate an award after 90 days, but may raise affirmative defenses, including the position that the award violates a statute or public policy. The opinion tacitly accepts the Commission's amicus curiae position.

In Troy v. Rutgers, 168 N.J. 354 (2001), the Supreme Court held that faculty members could seek to enforce individual employment contracts allegedly entitling them to full-year appointments rather than academic-year appointments. The reduction of work year, and thus pay, was mandatorily negotiable, despite a claim that the employees' services were not needed during the summer. Further, the alleged individual agreements were not inconsistent with the collective negotiations

agreement, which would have taken precedence if there had been a conflict. The faculty members were also permitted to litigate their contractual claims in court rather than advisory arbitration.

In State of New Jersey v. Local 195, IFPTE, 169 N.J. 505 (2001), the Supreme Court abolished the "no-work, no pay" doctrine in upholding an arbitration award requiring the employer to pay an employee for overtime opportunities he lost when the employer did not rotate overtime assignments. Justice Zazzali's majority opinion found that the arbitrator's interpretation of the contract was reasonably debatable; in that regard it endorsed the Steelworkers' Trilogy from the private sector and especially its call for a flexible approach to an arbitrator's remedial authority. Id. at 514, 520-521. The Court further concluded that no express statutory or regulatory authority was needed to permit a monetary remedy for violating a contractual employment condition; section 5.3 of the Act provides such authority by requiring negotiations over terms and conditions of employment. Id. at 523-526. The Court also concluded that the "no-work, no-pay" doctrine is an anachronism given modern labor jurisprudence. Id. at 526-540.

Section 5.3 of the Act was amended in 2003 to permit the State and the majority representatives of its employees (except troopers) to negotiate agreements requiring binding arbitration of major disciplinary disputes. This amendment overrides section 5.3's prohibition against arbitrating a disciplinary dispute when there is an alternate statutory appeal procedure - - e.g. an appeal to the Civil Service Commission. The prohibition still applies to negotiations units of local government employees.

Under the Steelworkers Trilogy and Bloomfield Bd. of Ed. v. Bloomfield Ed. Ass'n, 126 N.J. 300 (1991), aff'g 251 N.J. Super. 379 (App. Div. 1990), contractual arbitrability depends on a reading of the arbitration clause, not on whether a court deems a grievance contractually meritorious

or frivolous. However, Marlboro Tp. Bd. of Ed. v. Marlboro Tp. Ed. Ass'n, 299 N.J. Super. 283 (App. Div. 1997), certif. den. 151 N.J. 71 (1997) bespeaks a judicial willingness to delve into the contractual merits of a dispute under the guise of determining contractual arbitrability. There, the Court restrained arbitration over a non-reappointment of non-professional employee; the union had claimed that the non-reappointment violated the parties' "just cause" clause, but the Court ruled that this clause did not apply.

More recently, the Supreme Court rejected the presumption of arbitrability in Camden Bd. of Ed. v. Alexander, 181 N.J. 187 (2004), in which it was grieved that the Board violated a just cause clause when it did not renew the annual employment contracts of 15 non-tenured custodians. By a 4-3 vote, the Court held that the grievances were not contractually arbitrable absent clear language making non-renewal decisions subject to the just cause and arbitration provisions.

The majority and dissenting opinions agreed that the grievances were within the scope of negotiations – that is, the parties could have agreed that custodians would be protected against disciplinary non-renewals without just cause and could arbitrate their allegedly unjust non-renewals. But the opinions disagreed over whether contracts must specify non-renewals in the just cause and arbitration provisions to permit arbitration. The majority placed the burden on unions to gain specific language permitting arbitration; the dissent placed the burden on school boards to gain specific language excluding such disputes from arbitration.

In 2006, the Legislature weighed in on the issue of contractual arbitrability when it added the following paragraph to the end of N.J.S.A. 34:13A-5.3:

> In interpreting the meaning and extent of a provision of a collective negotiation agreement providing for grievance arbitration, a court or agency shall be bound by a presumption in favor of arbitration.

> Doubts as to the scope of an arbitration clause shall be resolved in favor of requiring arbitration.

The New Jersey Supreme Court addressed the amendment to N.J.S.A. 34:13A-5.3 in Alpha Bd. of Ed. v. Alpha Ed. Ass'n, 188 N.J. 595 (2006), where it stated that the amendment overruled Camden v. Alexander and established a presumption of contractual arbitrability in the New Jersey public sector.

The New Jersey Supreme Court again addressed the contractual arbitrability of grievances in Pascack Valley Reg. H.S. Bd. of Ed. v. Pascack Valley Reg. Support Staff Ass'n, 192 N.J. 489 (2007), and Northvale Bd. of Ed. v. Northvale Ed. Ass'n, 192 N.J. 501 (2007), in which mid-year terminations of school board employees were contested. In Pascack, by a 6-0 vote, the Court held that the mid-year termination of a custodian was contractually arbitrable. In Northvale, the Justices were evenly divided so the Appellate Division judgment was affirmed. It had held that the mid-year termination of a part-time secretary/teacher was not contractually arbitrable. The issue of contractual arbitrability is evolving and will continue to be a source of significant developments in public sector labor case law.

MISCELLANEOUS LEGISLATIVE DEVELOPMENTS

In 1999, the Employer-Employee Relations Act was supplemented to extend to the New Jersey public sector, prohibitions from union activities for persons convicted of certain crimes. See N.J.S.A. 34:13A-30; 29 U.S.C. §504. This provision, however, does not specify the forum for applying or enforcing its prohibitions.

P.L. 2007, c. 63 promotes shared services, joint meetings, and municipal consolidations. Sections 12, 19, and 27 authorize PERC to provide technical advice and mediation services to integrate separate labor agreements into a single agreement and to order interest arbitration if necessary. Section 27 also states that PERC may adjust the structure of collective negotiations units. Section 34 authorizes PERC to promulgate regulations to effectuate these powers and to establish a fee schedule to cover the actual costs of providing its services under the law.

Opinion 43 (supplementing Opinion 8), 187 N.J.L.J. 123 (1/8/07) sets forth that out-of-state attorneys may now participate in arbitrations and mediations in New Jersey, provided they comply with Rule of Professional Conduct 5.5. Out-of-state attorneys must register with the Supreme Court Clerk, authorize the Clerk to accept service of process, and obey the rules on registrations and fees.

SUMMARY

Looking back after 25 years, then Chairman Mastriani wrote:

> The process has worked so far. But, whether it will be as viable 25 years from now will depend upon its ability to be flexible and adapt to public policy concerns.

Fifteen more years have now passed and New Jersey's public sector labor relations process continues to play a vital role in the lives of public employees, those that manage the delivery of government services, and the public at large. The process has adapted to ever-changing economic and political times and there is every reason to expect that to continue. Chairman Mastriani continued:

> I am confident that public sector labor relations as an institution can succeed in responding to future challenges. There is enormous expertise among our labor and management practitioners. The process will be judged on its ability to provide solutions rather than confrontation and chaos. Creativity and cooperation will intensify in relation to the complexity of the problems which the process must resolve. Litigation will not be the answer to these challenges. It will set the guidelines and define legal rights, but it will not resolve the fundamental policy challenges to the process. Those challenges can only be met by all of us in the labor relations community.

His conclusion is as relevant today.