What follows is an overview of Commission case law since the April 1999 Annual Conference.

### Discrimination and Protected Rights

The New Jersey Employer-Employee Relations Act prohibits discrimination to encourage or discourage union activity protected by the Act, and interference with protected rights.


### Assignments, Duties, and Shift Selection


An employer may unilaterally assign duties incidental to an employee’s job description and regular duties. In *City of Rahway*, P.E.R.C. No. 99-99, 25 NJPER 249 (¶30105 1999), where the firefighters’ job description and normal duties did not encompass hydrant flushing, the City did not show that having public works employees rather than firefighters flush hydrants would substantially limit governmental policymaking. Accordingly, the grievance was at least permissively negotiable and legally arbitrable.
A school board has a managerial prerogative to assign teachers to supervise students before and after school to ensure student safety, security and control. Bergenfield Bd. of Ed., P.E.R.C. No. 99-100, 25 NJPER 286 (¶30120 1999). Release time, workload and methods of selecting staff to perform the duties were found legally arbitrable. Ibid.

Public employers and majority representatives may agree that seniority can be a factor in assignments to shifts where all qualifications are equal and managerial prerogatives are not otherwise compromised. Somerset Cty. Sheriff, P.E.R.C. No. 2000-20, 25 NJPER 419 (¶30182 1999), recon. den. P.E.R.C. No. 2000-38, 26 NJPER 16 (¶31003 1999), app. pending App. Div. Dkt. No. A-1635-99T5. In that case contesting the employer’s decision to deviate from the bidding system to require female correction officers to work certain shifts, the Commission restrained arbitration only to the extent the grievances, if sustained, would compromise the Sheriff’s statutory duty to have at least one female correction officer on every shift.

Similarly, an employer had a prerogative to transfer a nurse instructor from the night shift to the day shift to increase day shift instruction. Essex Cty., P.E.R.C. No. 2000-19, 25 NJPER 416 (¶30181 1999). See also Township of Scotch Plains, P.E.R.C. No. 99-113, 25 NJPER 339 (¶30146 1999)(given contractual clause protecting employer’s operational needs and given factual dispute, Commission declined to restrain arbitration over denial of shift selection); City of Plainfield, P.E.R.C. No. 2000-74, 26 NJPER ___ (¶____ 2000)(work schedule not mandatorily negotiable to extent it provides that officers will be placed on shifts through bidding based solely on seniority); City of Elizabeth, P.E.R.C. No. 2000-16, 25 NJPER 410 (¶30178 1999); City of Elizabeth, P.E.R.C. No. 2000-15, 25 NJPER 407 (¶30177 1999)(employer had prerogative to establish new task force on new shift and assign employees; grievance could contest elimination of regular shift for patrol division).

assignments was found not mandatorily negotiable to the extent it pertained to assignments requiring special qualifications.

Employers are not required to negotiate about overall staffing levels or how many police officers will be assigned to be on duty at a particular time or deployed on a particular duty. *West Milford Tp.*, P.E.R.C. No. 2000-63, 26 *NJPER* 104 (¶31042 2000); *see also North Hudson Reg. Fire and Rescue*, P.E.R.C. No. 2000-78, 26 *NJPER* ___ (¶____ 2000)(firefighter/captain ratio not mandatorily negotiable). And a clause that prevents an employer from replacing absent officers with officers of equal rank may be permissively, but is not mandatorily negotiable. *Ibid.*

### Civilianization

A police employer that acted primarily for operational reasons had no obligation to negotiate before transferring two superior officers and filling their posts with civilian employees. *City of Jersey City*, P.E.R.C. No. 2000-10, 25 *NJPER* 376 (¶30164 1999).

Work preservation clauses remain mandatorily negotiable in the abstract, but for police officers, the clause must specify that it is subject to employer’s right to civilianize for demonstrated governmental policy reasons. *City of Passaic*, P.E.R.C. No. 2000-8, 25 *NJPER* 373 (¶30162 1999).

### Work Schedules

Consistent with Supreme Court cases and the Legislature’s decrees, the Commission and the Appellate Division have generally held that work schedules of police officers and firefighters are mandatorily negotiable. See cases cited in *Maplewood Tp.*, P.E.R.C. No. 97-80, 23 *NJPER* 106, 113 (¶28054 1997). However, the Commission and the Appellate Division have also found exceptions to the rule of negotiability when the facts prove a particularized need to preserve or change a work schedule to protect a governmental policy determination.

In *Township of Clinton*, P.E.R.C. No. 2000-3, 25 *NJPER* 365 (¶30157 1999), recon. granted P.E.R.C. No. 2000-37, 26 *NJPER* 15 (¶31002 1999), app. pending App. Div. Dkt. No. A-002208-99T2, the work schedule proposal was not facially invalid. Therefore, the parties could develop a full record enabling an interest arbitrator to evaluate their
concerns in light of the public interest and all the statutory criteria the interest arbitrator must apply in crafting an arbitration award.


Proposals to maintain the current work schedule and to guarantee contractual time off consistent with staffing levels were also found mandatorily negotiable. *Township of Long Hill*, P.E.R.C. No. 2000-40, 26 *NJPER* 19 (¶31005 1999).

### Discipline


An employer can agree to fair procedures for initiating and hearing disciplinary charges, subject to the employer’s ultimate power, after complying with negotiated procedures, to make a disciplinary determination. *City of Passaic*, P.E.R.C. No. 2000-54, 26 *NJPER* 75 (¶31027 1999).


#### Evaluation/Reprimand

*Holland Tp. Bd. of Ed.,* P.E.R.C. No. 87-43, 12 *NJPER* 824 (¶17316 1986), aff’d *NJPER Supp.2d* 183 (App. Div. 1987), explains the distinction between annual evaluations of teaching performance and disciplinary reprimands. The Commission presumes that the substantive comments of an evaluation relating to teaching performance are not disciplinary, but that statements or actions which are not designed to enhance teaching performance are disciplinary.

In *Bergenfield Bd. of Ed.*, P.E.R.C. No. 99-112, 25 *NJPER* 336 (¶30145 1999), the Commission found that comments on an evaluation were not a reprimand; but that a separate memorandum was a reprimand that could be contested in arbitration. In *Wanaque Borough Bd. of Ed.*, P.E.R.C. No. 2000-7, 25 *NJPER* 371 (¶30161 1999), a memorandum was not punitive and did not threaten future discipline. See also *Downe Tp. Bd. of Ed.*, 25 *NJPER* 361 (¶30161 1999).

Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), sets the ground rules governing an employer’s responses to the activities of one of its employees when that person acts as an official of an employee organization. In Ridgefield Bd. of Ed., P.E.R.C. No. 2000-58, 26 NJPER 92 (¶31037 2000), a memorandum to the Association president over a labor-management issue that did not appear in the president’s personnel file was not a disciplinary reprimand subject to arbitration under N.J.S.A. 34:13A-29.

**Increment Withholdings**


### Compensation

A grievance claiming a contractual right to incremental salary increases was found legally arbitrable. *Township of Wayne*, P.E.R.C. No. 2000-48, 26 *NJPER* 61 (¶31021 1999).


A union could legally arbitrate a claim that the employer reneged on an agreement that it would not reduce the salary of an employee who accepted a demotion. *Piscataway Tp.*, P.E.R.C. No. 99-106, 25 *NJPER* 299 (¶30126 1999).

A proposal to include clothing allowance and hazardous pay in base pay is mandatorily negotiable; whether those items will be in base pay for pension purposes must be addressed by the Division of Pensions. *City of Newark*, P.E.R.C. No. 2000-29, 25 *NJPER* 444 (¶30195 1999).

### Workload and Overtime

The Commission has held that when no volunteers are available, a public employer may unilaterally mandate that a certain number of employees will work overtime. Thus, a school board was found to have a prerogative to require custodians to work overtime. *Rumson-Fair Haven Reg. H.S. Bd. of Ed.*, P.E.R.C. No. 99-111, 25 *NJPER* 335 (¶30144 1999).

Div. 1998). Thus, a dispute over which of two qualified classes of employees may fill a temporary vacancy to earn overtime was found legally arbitrable. *Borough of West Paterson*, P.E.R.C. No. 2000-62, 26 *NJPER* 101 (¶31041 2000). However, a municipality had a prerogative to deviate from established overtime arrangements to respond to a snow emergency as quickly as possible. *Washington Tp.*, P.E.R.C. No. 2000-18, 25 *NJPER* 415 (¶30180 1999).

Compensatory time for kindergarten teachers required to work longer on the days preceding holidays was found mandatorily negotiable. *Egg Harbor Tp. Bd. of Ed.*, P.E.R.C. No. 2000-50, 26 *NJPER* 65 (¶31023 1999). A requirement of a four and one-half hour day before holidays was found not mandatorily negotiable. Equitable distribution of workload was found negotiable for non-teaching workloads, but not teaching assignments. *Ibid.*

An employer has a right to deny or revoke leaves when necessary to ensure adequate staffing, but the Commission found that an arbitration award requiring the employer to grant leave time did not prevent the employer from meeting its staffing needs and was therefore within the scope of negotiations. *Town of Secaucus*, P.E.R.C. No. 2000-73, 26 *NJPER* (¶____ 2000).

### Health Benefits

Health benefits are mandatorily negotiable unless preempted. Preemption questions often require the interpretation of statutes and regulations governing those issues. The text and legislative history of *N.J.S.A. 40A:10-23* indicate that the Legislature intended to give a public employer the discretion to pay for health coverage premiums for retirees and their dependents provided it did so uniformly for eligible retirees. *Township of Pemberton*, P.E.R.C. No. 2000-5, 25 *NJPER* 369 (¶30159 1999) (retiree health benefit proposal not mandatorily negotiable unless modified to clarify that changes do not take effect until the uniformity requirements of *N.J.S.A 40A:10-23* are met).

And an arbitrator could determine whether a grievant came within the terms of the borough’s resolution providing health benefits for surviving spouses of retired police officers, even though construction of the resolution might also require an interpretation of State Health Benefits Program regulations. *Borough of Bradley Beach*, P.E.R.C. No. 2000-17, 25 *NJPER* 412 (¶30179 1999).


State Health Benefit Program statutes and regulations do not prohibit a participating local employer from agreeing to provide a level of prescription drug coverage different from that offered by the State prescription drug plan; uniformity of benefits with respect to State and local employers is required only for basis benefits. Thus, an arbitrator could determine whether a local employer agreed to provide prescription drug benefits different from the State plan. *Hudson Cty.*, P.E.R.C. No. 2000-53, 26 *NJPER* 71 (¶31026 1999).

For State employees, the State Health Benefits Commission’s actions increasing dental co-payments did not repudiate union contracts or trigger a negotiations obligation. *State of New Jersey*, P.E.R.C. No. 2000-36, 26 *NJPER* 12 (¶31001 1999), recon. granted P.E.R.C. No. 2000-71, 26 *NJPER* (¶____ 2000). The union could seek binding arbitration, but deferral to arbitration was not appropriate given the posture of the case and because the employer would not agree to waive contractual arbitrability defenses. *Ibid*.

**Sick Leave**

In *Piscataway Tp. Bd. of Ed.*, P.E.R.C. No. 82-64, 8 *NJPER* 95, 96 (¶13039 1982), the Commission held that the employer had a prerogative to establish a sick leave verification policy and to use “reasonable means to verify employee illness or disability.” In *Township of Maplewood*, P.E.R.C. No. 2000-9, 25 *NJPER* 374 (¶30163 1999), the Commission held that the employer generally need not negotiate over proposals to justify a home check by a valid compelling reason, to limit home checks to normal day time business hours, to prohibit all home checks in the middle of the night, and to limit
home confinement to when a treating physician has so ordered.


Proposals concerning borrowing sick leave and extended sick leave in school districts cannot contravene education statutes. A proposal to borrow sick days from the following year was preempted by an education law requiring a minimum of ten fully-paid sick leave days each year. *Holmdel Tp. Bd. of Ed.*, P.E.R.C. No. 2000-43, 26 NJPER 27 (¶31008 1999). A proposal for additional sick days after all other leave days are exhausted was preempted by a requirement that extended sick leave be granted only on a case-by-case basis. *State-Operated School Dist. of the City of Newark*, P.E.R.C. No. 2000-51, 26 NJPER (¶31024 1999). A proposal for up to five paid leave days for family illness was found mandatorily negotiable. *Ibid*.

### Job Security


### Unilateral Changes in Working Conditions

*N.J.S.A. 34:13A-5.3* requires employers and unions to meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. The statute also requires negotiations over proposed new rules or modifications of existing rules governing working conditions.

An employer violated the Act when it replaced three full-time secretarial positions with six part-time secretarial positions with


### Promotions


The State police cannot be required to promote employees currently under investigation who otherwise meet the employer’s promotional criteria. *State of New Jersey (Division of State Police)*, P.E.R.C. No. 2000-61, 26 *NJPER* 98 (¶31040 2000), mot. for recon. pending. Requiring the employer to permanently promote these employees while they are under investigation would unduly encroach on the employer’s prerogative to make promotional decisions. *Ibid*.

### Mootness


The Commission denied a county’s request for review of a Director’s decision permitting withdrawal of a representation petition after the Prosecutor voluntarily recognized a unit of assistant prosecutors. Morris Cty. Prosecutor’s Office, P.E.R.C. No. 99-103, 25 NJPER 294 (¶30123 1999). The County was seeking a ruling that is the co-employer. Ibid.

In East Brunswick Bd. of Ed., P.E.R.C. No. 2000-41, 26 NJPER 21 (¶31006 1999), the Commission reaffirmed that it is for an arbitrator to decide whether a union should be able to arbitrate an issue not properly raised in the early stages of the grievance procedure.


Whether the employer complied with contractual obligations concerning faculty parking is not preempted by federal and state mandates on handicapped parking, or the policy decision to provide additional handicapped parking. Sussex Cty. Community College, P.E.R.C. No. 2000-76, 26 NJPER ___ (¶___.

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A contract clause requiring notification to the union 14 days before promulgation of new rules was found mandatorily negotiable. *North Hudson Reg. Fire and Rescue*, P.E.R.C. No. 2000-78, 26 *NJPER* ___ (¶_____ 2000). But not the requirement that no new rules go into effect until the union’s rights pursuant to law are exhausted. *Ibid*.

Six months notice of all subcontracting decisions, regardless of whether a subcontracting decision is necessitated by a fiscal emergency or is based on non-economic concerns, was found not mandatorily negotiable, although the parties may negotiate over a notice period that would take into account their competing interests. *Holmdel Tp. Bd. of Ed.*, P.E.R.C. No. 2000-43, 26 *NJPER* 27 (¶31008 1999). Six months notice of changes in the evaluation form was found to be too restrictive. The parties could negotiate over a period that gives the union an opportunity for input and the employer the ability to respond to educational policy needs. *Ibid*.
