MINUTES OF MEETING
NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION
December 19, 2013
10:00 p.m.
495 West State Street
Trenton, New Jersey

The meeting was called to order by Chair P. Kelly Hatfield.

Present were:

Commissioners:

John Bonanni
Paul Boudreau
John H. Eskilson
David Jones

Also present were:
David Gambert, Deputy General Counsel
Mary E. Hennessy-Shotter, Deputy General Counsel
Don Horowitz, Deputy General Counsel
Christine Lucarelli-Carneiro, Deputy General Counsel
Martin R. Pachman, General Counsel
Annette Thompson, who acted as Stenographer

At the commencement of the meeting, Chair Hatfield, pursuant to section 5 of the Open Public Meetings Act, entered this announcement into the minutes of the meeting:

> Adequate notice has been provided by the dissemination of a written "Annual Notice of Meeting." On December 13, 2012 a copy of such notice was:
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> (a) prominently posted in a public place at the offices of the Public Employment Relations Commission;
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> (b) sent to the business offices of the Trenton Times, the Bergen Record, and the Camden Courier Post, as well as to the State House press row addresses of 25 media outlets;
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> (c) mailed to the Secretary of State for filing; and
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> (d) posted on the agency's web site.

Furthermore on December 16, 2013, copies of an additional written "Notice of Meeting" were posted and sent in a similar manner.

The first item for consideration was the minutes of the November 21, 2013 regular meeting. A motion to adopt the minutes was made by Commissioner Boudreau and seconded by Commissioner Eskilson. Commissioners Bonanni and Jones abstained because they were not present at this meeting. The motion to adopt the minutes was approved by a vote of three in favor (Chair Hatfield, Commissioners Boudreau and Eskilson), and two abstentions (Commissioners Bonanni and Jones).

The Counsel's Office distributed a monthly report.

Deputy General Counsel Don Horowitz reported on a case listed on the report involving Paterson Police PBA Local 1 v. City of Paterson in which the Appellate Division has defined what is meant by the phrase "base salary". The 1.5% health benefits deduction law was the issue in dispute. The Court arrived at their definition by referring to the interest arbitration law N.J.S.A. 34:13A-16.7. An interest arbitration award was issued and in accordance with the statute directed that with the new contract employees will have 1.5% of their salary deducted to defray the cost of health benefits. Neither party disputed that and as a result the award was not appealed to us. When the employer started implementing that provision they deducted 1.5% of pensionable salary. The union contended that it should have been 1.5% of contractual salary and that dispute was taken to court, which the Appellate Division said was proper, rather than

bringing it to the Commission because they did not have an qualms with the 1.5% award, just what that meant, which did not arise until afterward. In this decision, which has been published, and is therefore precedential, the Court decides in essence that it is pensionable salary that the term "base salary" is equivalent to. There were several friends of the court that participated in this case, so I am reasonably sure there may be an attempt to have the Supreme Court rule on this issue but that is not a guarantee, since there was no dissent in the Appellate Division.

The first case for consideration was the draft decision in County of Atlantic and FOP Lodge 34, Docket No. CO-2009-276. Commissioner Eskilson moved the draft decision and Commissioner Bonanni seconded the motion. Commissioner Jones commented that the history here is strong and clearly this is a past practice. The motion to adopt the draft decision was approved by a vote of four in favor (Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson), and one opposed (Commissioner Jones).

The next case for consideration was the draft decision in Lakeland Regional Board of Education and Lakeland Educational Secretaries' Association, Docket No. CO-2009-454 and Lakeland Regional Board of Education and Lakeland Regional High School Teachers' Association, Docket No. CO-2009-455. Commissioner Bonanni moved the draft decision and Commissioner Jones seconded the motion. The motion to adopt the draft decision was

unanimously approved (Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Jones).

The next case for consideration was the draft decision in University of Medicine and Dentistry of New Jersey and Health Professionals and Allied Employees, Local 5089, Docket No. CO-2011-163. Commissioner Eskilson moved the draft decision and Commissioner Boudreau seconded the motion. The motion to adopt the draft decision was unanimously approved (Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Jones).

The next case for consideration was the draft decision in County of Atlantic and PBA Local 243, FOP Lodge 34 and PBA Local 77, Docket Nos. CO-2011-253, CO-2011-254 & CO-2011-255. Chair Hatfield was recused because she issued the interim relief decision in this matter. Chair Hatfield removed herself from the meeting.

Commissioner Boudreau assumed the role of Acting Chair. Commissioner Eskilson moved the draft decision and Commissioner Bonanni seconded the motion.

General Counsel Martin Pachman noted that we were notified a few days ago of the withdrawal of the unfair practice charge by PBA Local 243 because they settled their contract with Atlantic County. What has been done, because this was a consolidated case, was to add a footnote on the last page of the draft decision which states that on December 17, 2013 PBA Local 243

withdrew Docket No. CO-2011-253 therefore is no longer a party in this consolidated matter.

Commissioner Jones stated he is troubled by this draft decision. It is clearly dynamic status quo and he feels the draft was authored strictly from selective parts of case law that ignore other things. If we look at this strictly from the managerial sense that increments disincentivise the willingness for a group to go forward then the obvious other side of that is that by freezing them or denying them somebody who is in a position in their 5th year can anticipate something in their 6th year or in their 10th year can anticipate something in their 11th year because they earned that experience and they are able to hopefully be more efficient and a supervisory type leader. That is what all these increments are about. You are supposed to be getting better at your job. The increments are not raises in a true sense and we have had this debate before. Then we have cases like Bloomfield that would allow us to say wait a second there is a much larger issue here. The cite that we use does not allow for the fact that this has a reverse detrimental effect.

Commissioner Eskilson stated from a practical standpoint it recognizes the limitation of the interest arbitrator. If step movements generate an increase defined by law that would exceed what an arbitrator could award then there just might be nothing left. That is an issue of fairness on the labor side, and I think this recognizes practical realities.

Commissioner Bonanni stated it balances the civilian aspect of the workforce as well. (Inaudible)

Commissioner Eskilson stated step increments have been defined in law and that step increments are a raise. If it is considered part of the overall increase in salary you have to define it as a raise.

Commissioner Jones responded it is an increase but it is not a raise. A raise is something that can be negotiated. There are methodologies that can be employed a) within the law, if somebody wants to go outside of the cap they are not constrained by it, all they have to do is get permission from constituents, from the voters and b) more importantly when you talk about a collective bargaining group that is something that is to be decided when unions go into an agreement with a dually authorized and recognized collective bargaining team. When that negotiations team goes in and they decide how the senior members are going to be treated or how the junior members are going to be treated that is their choice, it is not for us to decide that.

Commissioner Eskilson stated he simply wants to apply the steps. Changes in longevity payments generated in all 3 or 4 years of a contract that exceeded 3% so an arbitrator could not award the dynamic status quo. Fortunately we settled the contract. We also notified the union that we have this issue and we may have been where Atlantic City is now. There was no way to

do it, there was no way to slice that pie. The pie was already bigger than the law allowed. There are real examples where this helps with that and it recognizes the practical realities set forth in the law.

Commissioner Jones responded I totally understand what you are saying and I realize that we are constrained by the 2% cap, but we are not locked in. We have people who are going to be on the losing side by adopting this position. This only helps management's side.

Commissioner Eskilson responded that we can agree to disagree. I don't think it is just good for management. I do think there would have been, in a case like this, a mention of fairness at top step had that case gone to arbitration. There was nothing there for them, nothing, it could not have been awarded. I don't think it is just fair to management, I think there is an issue for fairness for officers at the top step.

Commissioner Jones responded let me house your concern with my reality. In 1981 after a decade of work I went to top step. I stayed there until 2012. I did not get any kind of special bonuses or super longevity or any of these other things that we pay employees. After a decade on the job I should have been as good at the job as I was going to be. Unless I moved into a supervisory position, then I, and the group collectively, stayed there. When I had a chance to change it when I was the boss I

still didn't change it. So for 23 of my 33 years I stayed at top step. That was a decision that was up to the group. I understand where you are coming from and you are trying to find something for your senior members at top step, that is up for them to decide. There is a reality to that top step argument.

The motion to adopt the draft decision was approved by a vote of three in favor (Commissioners Bonanni, Boudreau and Eskilson), and one opposed (Commissioner Jones).

Chair Hatfield returned to the meeting at this time.

The next case for consideration was the draft decision in Rutgers, The State University of New Jersey and Union of Rutgers Administrators-American Federal of Teachers, Local 1766, AFL-CIO, Docket No. SN-2012-011. Commissioner Eskilson moved the draft decision and Commissioner Bonanni seconded the motion.

Commissioner Jones stated he feels this issue should absolutely go before an arbitrator. This is a hybrid version of where we are privatizing these public employees and we are not supposed to be doing that. That is a policy decision that should be measured somewhere else. This is not about general staffing, respectfully, it is about duties and responsibilities. These are their jobs and has been their jobs and they are moving another group in and it is not fair. It is not a minimal staffing issue.

Mr. Pachman responded that nobody is privatizing anything. Both groups of employees work for the University. In addition to which we are not replacing one group of employees with another

group of employees, with respect to their normal work week. We are talking about, under certain circumstances with overtime, based on the record that we had before us in this case it would appear that both groups of employees, the AFT employees and the boiler operator employees, vis-a-vi the boilers did essentially the same work historically. It was really a question of if certain people are not there who do you call in on an overtime basis. The draft decision reflects that this is not a unit work issue. They both have done this work in the past and therefore the employer has the right to assign to this overtime position either "Peter or "Paul", and you are not robbing "Peter to pay Paul", you are just making the selections for whom to assign.

Commissioner Jones responded that is why he said it is a hybrid analogy. Because two people are performing the same function, whatever their affiliation is, it does not make them equals. To make another analogy why wouldn't we just shut down the FBI because they make $150,000 a year and replace them with the people who carry guns at the forestry service who make $45,000 a year. They are both getting paid by the same agency and they both do the same function.

Mr. Pachman responded they do essentially different things.

Commissioner Jones responded because it's the same function does not mean that the protections afforded for one group should be set aside so that the other group can get more work and profit

from it.

Mr. Pachman responded that this draft decision is very clear that both groups of employees did the same job.

The motion to adopt the draft decision was approved by a vote of four in favor (Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson), and one opposed (Commissioner Jones).

The next case for consideration was the draft decision in State of New Jersey and New Jersey Division of Criminal Justice Non-Commissioned Officers Association and New Jersey Division of Criminal Justice Superior Officers Association and Fraternal Order of Police, Lodge 91, Docket Nos. SN-2013-041, SN-2013-042 & SN-2013-043. This case is being tabled and will placed on next month's agenda.

The next case for consideration was the draft decision in Linden Board of Education and Linden Education Association, Docket No. SN-2013-051. Commissioner Eskilson moved the draft decision and Commissioner Bonanni seconded the motion.

Commissioner Jones asked if there was anything in this employee's history, there were some things in the record that say she was there for 7 years, and there are additional things that there is actually a 14 year history. Do we have any of these other evaluations up to that point where we had an issue? Nobody produces a statement or document, a complaining parent, a complaining colleague, nothing that would suggest that this is

more than an eye of the beholder thing. I am sure that the person who conducted the investigation does, but I also don't have that investigation. Where is everything else that lead up to this?

Deputy General Counsel Mary Beth Hennessy-Shotter responded that we are not considering the merits of the increment withholding. All we do is take, and we accept them as true, the reasons that the Board gave when they advised her why they withheld her increment. Even the union doesn't dispute that they withheld her increment for a performance evaluation reason. However, they also tell us we don't think that is true. Our determination is who is going to make that decision. We say the Commissioner of Education will, they will send it to an ALJ, and she will have the ability before the ALJ to argue her point and the ALJ will be able to make a credibility determination to decide whether there was justification for the increment withholding. All that evidence will be presented at the Office of Administrative Law.

Commissioner Jones responded only if we only believe one side.

Ms. Hennessy-Shotter responded that we always accept the employer's reason.

Commissioner Jones responded he has a problem with the record because it is incomplete. He understands that she is going to have her day in court, but he feels it should go before

an arbitrator.

Chair Hatfield responded she disagrees. This is an education issue and who better than the Department of Education should decide.

Commissioner Jones abstained from voting.

The motion to adopt the draft decision was approved by a vote of four in favor (Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson), and one opposed (Commissioner Jones).

The next case for consideration was the draft decision in City of Hoboken and Hoboken Municipal Employees Association, Docket No. SN-2013-062. Commissioner Eskilson moved the draft decision and Commissioner Bonanni seconded the motion. Commissioner Jones is recused from voting on this matter because this case involves the Loccke law firm. The motion to adopt the draft decision was unanimously approved (Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson).

The last case for consideration was the draft decision in City of Newark and SEIU Local 617, Docket No. SN-2013-064. Commissioner Jones moved the draft decision and Commissioner Boudreau seconded the motion. The motion to adopt the draft decision was unanimously approved (Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Jones).

The next item for consideration was Mediation, Fact-Finding, Super Conciliation, Grievance Arbitration, and Binding Arbitration to Review Disciplinary Terminations, Not Involving Alleged Criminal Conduct, of Non-civil Service Law Enforcement Officers and Firefighters. Mr. Horowitz stated this is for impasse procedures and non-police and fire bargaining units. It also involves involuntary grievance arbitration and the special disciplinary arbitration procedures that apply to terminations of police and firefighters who are not accused of violating any misdemeanor or felony statute. The only change that really solicited significant comment was the proposed change that when a grievance arbitrator appointed from our panel issues a decision that they also send an electronic copy of that decision to the Commission. Those points were made mostly from the AFL-CIO, the State PBA and the NJEA. We also had some comments from the School Board Association which did not address that issue but raised some other issues which are really not addressed in this rule readoption, but in response to them we said that if you believe that what you commented on is a good idea then they can send a rule proposal to us. There is a provision that allows an agency to petition to adopt a new rule or amendment. The document contains the comments of the four interested parties and after that the proposed responses summarizing comments by each party and a response by the Commission to each of the points.

Commissioner Bonanni moved to readopt the rules with amendments and Commissioner Eskilson seconded the motion.

Commissioner Jones asked if police and fire and state police and other uniformed services are not impacted.

Mr. Horowitz responded that it does not affect state police because state police discipline has been construed by the courts to consider the Superintendent of State Police to be the equivalent of an administrative agency head and that discipline is reviewable by the Appellate Division of the Superior Court.

Commissioner Jones said he is talking about the arbitrable grievance decisions.

Mr. Horowitz responded that all we are doing is saying is that for 15 years the rule did read exactly what we are proposing and that they send us copies of their grievance arbitration awards.

Commissioner Jones responded he understand that none of that is going to change. He is talking about just going back to pre 2001 submission of the decision. The concern with these bodies is privacy issues. There concern is that certain aspects of discipline are exempt from the Open Public Records Act ("OPRA"). Their concern is that there is going to be a scorecard of arbitrators who move in a direction of management or move in a direction of labor. I would suggest that we create a generic form that would serve the Commission's and this body's need to

examine these things and contract these things and to meet your educational and follow-up goals. We could get a form out to these arbitrators who would do a 2-page check the block thing that would suit your tracking needs.

Mr. Horowitz responded that by giving the arbitrator extra work that might increase the cost to both parties.

Chair Hatfield responded that this is not about tracking arbitrators. We are not interested in that. We are interested in what kind of novel approaches are being made to resolve disputes. The more we open ourselves up to seeing what is going on out there the better we will be as neutral hearing examiners, attorneys drafting decisions, that is basically what this is all about. We are definitely not tracking.

Commissioner Eskilson responded that if it didn't matter when we were getting it and it didn't matter when we weren't getting this information, I imagine you are talking about the issues of discoverability for OPRA disclosure. There seems to be a legitimate public purpose education wise of PERC for receiving this information. The information is not subject to OPRA.

The motion to readopt the rules with amendments was approved by a vote of four in favor (Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson), and one opposed (Commissioner Jones).

The last item for consideration was Adoption of Annual Notice of Regularly Scheduled Meetings for 2014. Commissioner

Jones moved to adopt the notice and Commissioner Boudreau seconded. The motion to adopt the notice was unanimously approved (Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Jones).

Commissioner Boudreau made a motion to adjourn the meeting and Commissioner Bonanni seconded the motion. The motion was unanimously approved. The meeting was then adjourned.

The next regular meeting is scheduled to be held on Thursday, January 30, 2014.