What follows is an overview of Commission case law since the April 2003 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.


**Assignments and Transfers**

Public employers have a non-negotiable prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs. *See, e.g.*, *Local 195, IFPTE v. State*, 88 N.J. 393 (1982); *Ridgefield Park Ed. Ass’n v.*
Arbitration was restrained to the extent a grievance challenged an employer’s selection of employees to assign to senior citizen bus driving duties during regular work hours. *Borough of Hawthorne*, P.E.R.C. No. 2004-33, 29 NJPER 513 (¶164 2003). The Commission denied a restraint to the extent the grievance alleged a violation of contractual overtime or job posting provisions.


Allegations that the managerial prerogative to assign was exercised discriminatorily must be litigated through an unfair practice proceeding, not binding arbitration. *Millville Bd. of Ed.*, P.E.R.C. No. 2004-5, 29 NJPER 375 (¶117 2003).

Employers may unilaterally assign duties if they are incidental or comprehended within an employee’s job description or normal duties. *See, e.g., City of Newark*, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985). The Commission held that requiring homeroom teachers to collect lunch money was intertwined with regular homeroom duties and not negotiable. *Guttenberg Bd. of Ed.*, P.E.R.C. No. 2003-71, 29 NJPER 178 (¶52 2003).

An arbitrator could determine whether non-courtroom duties are outside a judiciary clerk’s job description and whether the employer breached the contract by assigning those duties. *New Jersey State Judiciary*, P.E.R.C. No. 2004-51, 30 NJPER ____ (¶___ 2004). Should the arbitrator sustain the grievance, the employer would be permitted to refile its petition for consideration of whether it had a managerial prerogative to cross-train employees by assigning the grievant to perform clerical duties and another clerk to courtroom duties.

Contract provisions allowing employees to bid for work hours or shifts by seniority are mandatorily negotiable, provided management may deviate from a seniority system when necessary to accomplish a governmental policy goal. The Commission held that enforcement of an alleged right to have platoon assignments determined by seniority would substantially limit government’s policymaking powers. *Union
A contract cannot be construed to give a senior employee an absolute preference for a day shift position, but it can be construed to give a senior employee a preference absent a demonstrated need to select a different employee. *Scotch-Plains Fanwood Bd. of Ed., P.E.R.C. No. 2004-55, 30 NJPER ___ (¶___ 2004)*.

A contract proposal that permits employees to notify the employer of their interest in filling vacancies or transferring laterally was found mandatorily negotiable. *Passaic Cty., P.E.R.C. No. 2003-96, 29 NJPER 297 (¶91 2003)*. But an employer has a prerogative to assign employees within a shift based on criteria other than seniority or service record.

A union could arbitrate a challenge to the assignment of extra teaching periods, but the arbitrator could not issue an order that prevented the board from assigning extra periods if the board could not have hired qualified staff. *Clifton Bd. of Ed., P.E.R.C. No. 2003-80, 29 NJPER 211 (¶62 2003)*.

Almost all aspects of assignments to extracurricular activities in school districts are mandatorily negotiable. *N.J.S.A. 34:13A-23.*


**Staffing**

An employer has a nonnegotiable right to determine whether and when to fill vacancies. An alleged agreement to create and fill positions cannot be enforced through binding arbitration. *City of Elizabeth, P.E.R.C. No. 2004-8, 29 NJPER 388 (¶122 2003)*.

Employers have a prerogative to determine staffing levels associated with the delivery of services. *Old Bridge Bd. of Ed., P.E.R.C. No. 2003-79, 29 NJPER 228 (¶70 2003)*. Arbitration was therefore restrained over grievances seeking to require an employer to fill vacant positions and seeking to prevent the employer from reassigning employees to cover vacancies during their regular work hours at other locations. Arbitration was permitted over work schedule changes. *New Jersey Turnpike Auth., P.E.R.C. No. 2003-90, 29 NJPER 281 (¶84 2003)*.

**Discipline**

Proposals to grant tenure or job security protections to school board custodians are mandatorily negotiable. *Phillipsburg Bd. of Ed.*, P.E.R.C. No. 2003-73, 29 *NJPER* 181 (¶54 2003). Parties may legally agree that just cause will be required before custodians are terminated midyear or before their employment contracts are non-renewed. *Ibid; see also Linwood Bd. of Ed.*, P.E.R.C. No. 2004-26, 29 *NJPER* 492 (¶155 2003) (non-renewal of custodian could be submitted to binding arbitration).

Reassignments or transfers of police officers may not be submitted to binding arbitration, even if the alleged reassignment is disciplinary. *City of Trenton*, P.E.R.C. No. 2004-52, 30 *NJPER* __ (¶___ 2004). Police officers who believe that they have been unjustly reassigned or transferred as a form of discipline must file a Superior Court action in lieu of prerogative writ.

Unions may not negotiate or use a disciplinary review procedure to challenge discipline imposed on non-unit employees. *City of Trenton*, P.E.R.C. No. 2004-16, 29 *NJPER* 413 (¶138 2003).

**Contested Transfer Determinations**

School districts may not transfer employees between work sites for disciplinary reasons. *N.J.S.A. 34:13A-25*.


A petition was dismissed where the employee’s work site was not changed. *Camden Bd. of Ed.*, P.E.R.C. No. 2003-76, 23 *NJPER* 222 (¶67 2003).

A petition was found moot after the employee was returned to her former work site. *Sparta Bd. of Ed.*, P.E.R.C. No. 2004-38, 29 *NJPER* 547 (¶176 2003).

**Increment Withholdings**

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


Withholdings not based predominantly on the evaluation of teaching performance may be reviewed by an arbitrator. Elizabeth Bd. of Ed., P.E.R.C. No. 2003-86, 29 NJPER 247 (¶74 2003) (alleged insubordination and poor attitude towards students and staff that did not directly impact on students).

Parties may legally agree to submit all increment withholdings from non-teaching staff members to binding arbitration. Atlantic City Bd. of Ed., P.E.R.C. No. 2003-72, 29 NJPER 180 (¶53 2003).

### Leaves of Absence

Under N.J.S.A. 40A:14-177, convention leave must be granted to duly authorized PBA representatives, subject to a maximum of ten percent of the PBA's membership. The statute does not grant the employer discretion to determine the number of employees eligible for convention leave. Hillsborough Tp., P.E.R.C. No. 2003-82, 29 NJPER 216 (¶64 2003).


No. 2004-42, 30 NJPER ___ (¶__ 2004). Accordingly, a restraint of arbitration challenging a denial was granted. But a restraint was denied concerning the employer’s alleged failure to comply with a contractual obligation to notify the employee of her SLI appeal rights.

An employer has a managerial prerogative to require verification of the proper use of bereavement leave that parties have agreed may be used only under certain circumstances. Leonia Bd. of Ed., P.E.R.C. No. 2004-4, 29 NJPER 373 (¶116 2003).

A grievance over the mandatorily negotiable issue of vacation pay or entitlement does not become non-arbitrable because the arbitrator may be called on to construe a settlement agreement as well as a contract clause. City of Newark, P.E.R.C. No. 2004-15, 29 NJPER 411 (¶127 2003).

Compensation


The Commission declined to restrain binding arbitration of a grievance alleging that an employee was promised a full step salary increase when she was promoted to a higher classification. Camden Cty. Superintendent of Elections, P.E.R.C. No. 2003-97, 29 NJPER 293 (¶90 2003).

A grievance seeking full-time employee benefits for a plumber who had worked for more than six months as permanent employee was found legally arbitrable. Elizabeth Bd. of Ed., P.E.R.C. No. 2003-94, 29 NJPER 290 (¶88 2003).

A proposal to eliminate longevity for new hires was found mandatorily negotiable. Borough of Waldwick, P.E.R.C. No. 2004-45, 30 NJPER ___ (¶__ 2004).

A proposal to have holiday pay paid along with the regular payroll was found to be
mandatorily negotiable, so long as the proposal did not seek to have an interest arbitrator rule on pension creditability. *Passaic Cty.*, P.E.R.C. No. 2003-96, 29 *NJPER* 297 (¶91 2003). Proposals to include longevity and holiday pay in base pay for compensation purposes were also found to be mandatorily negotiable. *Camden Cty. Corrections*, P.E.R.C. No. 2004-7, 29 *NJPER* 385 (¶121 2003).

A proposal for salary guide credit for prior service in other jurisdictions and a proposal relating to lump sum payments for unused sick leave time were held to be mandatorily negotiable. *Township of Winslow*, P.E.R.C. No. 2004-40, 29 *NJPER* 548 (¶178 2003).

The Commission restrained arbitration to the extent, if any, a grievance sought to pursue an illegal parity claim, but denied a restraint to extent the union argued that the contract required the reopening of a wage provision because another unit had received greater salary increases. *Township of Middletown*, P.E.R.C. No. 2004-32, 29 *NJPER* 512 (¶163 2003).

### Representation


The Commission sustained the Director of Representation’s decision to re-run a mail ballot election because incorrect addresses resulted in disenfranchising enough voters to affect the outcome of the original election. *State of New Jersey*, P.E.R.C. No. 2004-49, 30 *NJPER* ____ (¶__ 2004).

In rerun elections, the payroll period determining eligibility will be the latest completed payroll period preceding the date of issuance of the notice of rerun election. *Cumberland Cty. Bd. of Social Services*,
Motions for Reconsideration


Grievance Procedures

A proposal that changed the first step of the grievance procedure from being heard by the warden to being heard by the chief of investigations was found mandatorily negotiable. Camden Cty. Corrections, P.E.R.C. No. 2004-7, 29 NJPER 385 (¶121 2003).


Work Schedules

A proposal to memorialize the existing work schedule for police sergeants was found mandatorily negotiable. Howell Tp., P.E.R.C. No. 2003-74, 29 NJPER 183 (¶55 2003).


The Commission found a proposal for a 4/4 police work schedule to be mandatorily negotiable. City of Clifton, P.E.R.C. No. 2004-20, 29 NJPER 477 (¶149 2003). However, the portion of the proposal mandating that shift starting times and shift staffing levels be set by a study of calls for police services compromised the City's prerogative not to adopt a proportional staffing policy and was not mandatorily negotiable. The Commission further concluded that the City's additional concerns -- including the need to purchase new police vehicles, coverage overlaps, and other additional expenditures -- could be considered
by the arbitrator without impeding governmental policy.

The Commission declined to restrain binding arbitration of a grievance seeking overtime compensation for officers whose schedules were changed to accommodate firearms training. *City of Atlantic City*, P.E.R.C. No. 2004-25, 29 *NJPER* 490 (¶154 2003).

**Health Benefits**

A contract proposal concerning eligibility for retiree health benefits was found not mandatorily negotiable because it was preempted by the uniformity requirements of *N.J.S.A. 40A:10-23*. *Essex Cty. Prosecutor*, P.E.R.C. No. 2004-19, 29 *NJPER* 473 (¶148 2003).


Applications for interim relief were denied by Commission designees where: the contract contained a sunset provision on an experimental work schedule, *Irvington Tp.*, I.R. No. 2004-1, 29 *NJPER* 307 (¶95 2003); there were substantial and material facts in dispute about firefighter transfers, *City of Newark*, I.R. No. 2003-11, 29 *NJPER* 162 (¶47 2003); the employer colorably claimed that a work schedule change was based on a managerial prerogative, *Hillside Tp.*, I.R. No. 2004-4, 29 *NJPER* 378 (¶119 2003); the parties’ contract permitted the employer to change insurance carriers so long as substantially similar benefits were provided, *Town of Secaucus*, I.R. No. 2004-5, 29 *NJPER* 391 (¶124 2003); the employer colorably claimed that it had a prerogative to require a minimum number of senior patrol officers on each shift, *City of Passaic*, I.R. No. 2004-7, 30 *NJPER* 5 (¶2 2004); and there were facts in dispute about a change in vacation benefits, *City of Trenton*, I.R. No. 2004-10, 30 *NJPER* ____ (¶____ 2004).

Applications for interim relief were granted where an employer: restricted...


Arbitration was restrained over the decisions to assume administration of the off-duty employment program and to require the Public Safety Director’s approval of any off-duty employment calling for police officers to perform police-type services in police uniforms. *City of Paterson*, P.E.R.C. No. 2004-6, 29 *NJPER* 381 (¶120 2003).

An employer’s policymaking powers would be substantially limited if a negotiated agreement could override the decision not to permit a police officer to bring criminal charges against a civilian for providing false information to a police department. *Hillsborough Tp.*, P.E.R.C. No. 2004-44, 30 *NJPER* ____ (¶____ 2004).

Based on a record consisting only of admissions in the employer’s Answer and the testimony of one witness without first-hand knowledge of the incident, a charging party did not prove its *Weingarten* allegations. *New
An arbitration award requiring the city to rearm a police officer would substantially limit the city’s policymaking power to determine the conditions under which it is proper for its police officers to be armed. *City of Newark*, P.E.R.C. No. 2004-36, 29 *NJPER* 543 (¶174 2003).

The Civil Service “rule of three,” which allows an employer to choose from among the top three promotional candidates, preempted arbitration of a grievance alleging contract violations when two higher-ranked employees were bypassed for promotion in favor of the third employee. *City of Elizabeth*, P.E.R.C. No. 2004-34, 29 *NJPER* 515 (¶165 2003).

No statute, regulation or court rule preempted negotiations over a proposal that the employer pay counsel’s fees in arbitration or court litigation should the union prevail on any issue. *Camden Cty. Sheriff*, P.E.R.C. No. 2004-46, 30 *NJPER* ___ (¶__ 2004).

A decision to implement block scheduling was found not mandatorily negotiable or legally arbitrable; but an alleged uncompensated increase in workload could be arbitrated. *Elizabeth Bd. of Ed.*, P.E.R.C. No. 2004-9, 29 *NJPER* 389 (¶123 2003).

A union cannot require that an employer show a higher standard than “reasonable individualized suspicion” before subjecting an sheriff’s officers to urinalysis or blood screening. *Passaic Cty.*, P.E.R.C. No. 2003-96, 29 *NJPER* 297 (¶91 2003).

The Commission ordinarily will not decide scope of negotiations petitions unless a negotiability dispute has arisen during negotiations for a successor agreement or a demand for arbitration has been filed and the petitioner is seeking to restrain binding arbitration of a grievance. *City of Cape May*, P.E.R.C. No. 2004-22, 29 *NJPER* 483 (¶151 2003); see *N.J.A.C.* 19:13-2.2(a)(4).


Commission designees have issued 19 decisions under the 2002 amendment permitting a majority representatives to file a petition seeking an order requiring the
employer to deduct representation fees from paychecks of non-members, provided certain statutory conditions are met. *P.L. 2002, c. 45.*