



PUBLIC EMPLOYMENT RELATIONS COMMISSION

**REPORT TO THE
GOVERNOR
AND THE
LEGISLATURE**

**THE FIRST FIVE YEARS UNDER THE
"SCHOOL EMPLOYEES CONTRACT
RESOLUTION AND EQUITY ACT,"
P.L. 2003, c.126; N.J.S.A. 34:13A-31 et seq.**

EFFECTS ON NEGOTIATIONS AND SETTLEMENT

AUGUST 2008

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EXECUTIVE SUMMARY

The “School Employees Contract Resolution and Equity Act,” P.L. 2003, c. 126; N.J.S.A. 34:13A-31 et seq., “Chapter 126” (Appendix 1) prohibits school employers from unilaterally imposing or changing terms and conditions of employment while negotiating successor agreements. It also provides for a series of procedures if collective negotiations reach an impasse, including mandatory fact finding and appointments of super conciliators. Prior to the enactment of Chapter 126, a school employer could unilaterally impose its last best offer if it had exhausted the Commission’s impasse procedures and a genuine impasse persisted.

Chapter 126 took effect on July 10, 2003 and requires the Commission to submit a report on the effects of the Act on school negotiations and settlements together with any recommendations it may have to change the law. There have been no significant problems with implementing or administering the Act, and five years’ experience under the legislation indicates the following:

- There have been no unilateral impositions in New Jersey public schools.
- There has been no significant change in the number of school employee impasse cases filed with the Commission.
- There has been a significant increase in the use of fact finding.
- Most of the impasses that reach fact finding are settled without the issuance of a formal report.
- Very few impasses have required the appointment of a super conciliator.

- Every impasse that has reached super conciliation has resulted in a mediated settlement. No formal super conciliation report has been issued.
- There have been no teacher strikes.

Many factors besides Chapter 126 influence the demands placed on the Commission's impasse services. Those include the economy, legislative changes, and the relationship between local boards of education and the majority representatives of their employees.

To maintain a high level of excellence, the Commission has broadened its existing training program for labor relations professionals who perform mediation, fact finding and super conciliation. The Commission is not recommending any changes to Chapter 126.

INTRODUCTION

This report describes the Commission's actions to implement and administer Chapter 126 in an impartial manner and in accordance with the Legislature's direction. The report is submitted pursuant to Section 8 of Chapter 126, P.L. 2003, c. 126; N.J.S.A. 34:13A-38.

Chapter 126 prohibits school employers from unilaterally imposing, modifying, amending, deleting or altering any terms and conditions of employment, and provides for a series of procedures if collective negotiations between an employer and majority representative reach an impasse. Those procedures include mandatory participation in fact finding if mediation is unsuccessful, and the appointment of a super conciliator if no agreement is reached after the issuance of a fact finding report. The Act also directs the commission to promulgate related rules and regulations (P.L. 2003, c. 126, s.9; N.J.S.A. 34:13A-39) and to submit a report to the Governor and Legislature five years after its implementation concerning "the effects of the act on negotiations and settlement between school employees and their employers with any recommendation it may have for any changes in the law." P.L. 2003, c. 126, s.8; N.J.S.A. 34:13A-38.

Public employers covered by Chapter 126 include: "any local or regional school district, charter school and its board of trustees, vocational school district, educational services commission, jointure commission, county special services school district, community college, county college, or board or commission under the authority of the Commissioner of Education, the State Board of Education, or the New Jersey Commission on Higher

Education.” P.L. 2003, c. 126, s.2; N.J.S.A. 34:13A-32.

DISCUSSION AND ANALYSIS

School Employee Impasses Prior to Chapter 126

The Commission originally adopted rules for negotiations impasses on the authority of section 5.4(e) of the New Jersey Employer-Employee Relations Act, P.L. 1974, c. 123; N.J.S.A. 34:13A-1 et seq., which directed the Commission to adopt rules “to regulate the time of commencement of negotiations and the institution of impasse procedures so that there will be full opportunity for negotiations and the resolution of impasses prior to required budget submission dates.” Id.

Commission rules (Appendix 2) require parties to begin negotiations no later than 120 days prior to the public employer’s budget submission date. N.J.A.C. 19:12-2.1. If the parties are unable to reach an agreement through direct negotiations, they may jointly or individually file a Notice of Impasse to petition the Director of Conciliation to appoint a mediator. N.J.A.C. 19:12-3.1. The Director conducts an investigation to determine whether an impasse exists. If an impasse does exist, the Director appoints a mediator whose function is “to assist parties to a voluntary agreement [by holding] separate or joint conferences to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between the parties.” N.J.A.C. 19:12-3.3. Any information disclosed by a party to the mediator cannot be divulged voluntarily or by compulsion. Any files, records, reports or documents received or prepared by a mediator are confidential. The mediator cannot be

compelled to produce any confidential records or to testify about any mediation on behalf of any party in any proceeding brought under the New Jersey Employer-Employee Relations Act. N.J.A.C. 19:12-3.4. At the conclusion of the mediator's involvement in an impasse, the mediator prepares a confidential report to the Director of Conciliation detailing the number, dates and length of mediation sessions, the issues resolved, and any issues that remain unresolved. N.J.A.C. 19:12-3.5.

Based on the mediator's report of a continuing impasse, or by joint or separate petition of the parties, the Director may invoke fact finding. N.J.A.C. 19:12-4.1. While the Director has the authority to directly appoint a fact finder, standard practice is to send an identical list of three names of fact finders to the parties. Each party is permitted to indicate a preference by striking one name from the list and ranking the remaining two names. N.J.A.C. 19:12-4.2.

The fact finder usually begins his or her involvement in a case by continuing to assist the parties toward a mediated voluntary settlement. In this capacity, the fact finder is vested with the same privileges and responsibilities as a mediator concerning confidentiality and immunity. N.J.A.C. 19:12-4.3(c). The fact finder is authorized to conduct a hearing and issue a non-binding report that includes findings of fact and a recommended settlement. The fact finder may "subpoena witnesses, compel their attendance at a hearing, administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas duces tecum." N.J.A.C. 19:12-4.3(b).

After a fact finder issues a report, the parties are required to meet within five days to

try and reach an agreement. Prior to the passage of Chapter 126, if the impasse continued, the Director of Conciliation could “take whatever steps (were) deemed expedient to effect a voluntary settlement of the impasse.” Id. Often, this meant that the parties would continue negotiating on their own with the fact finder’s report as a guide. Occasionally, a third labor relations neutral, a “super mediator” or “conciliator,” would be appointed to further assist the parties to reach a settlement. On rare occasions, an impasse persisted even after these post-fact finding efforts. After the Commission’s impasse procedures were exhausted, boards of education could implement their “last best” offers.

Commission records indicate that on eleven occasions since 1977, boards of education unilaterally imposed terms and conditions of employment in New Jersey public school districts (agency records may not reflect all situations where an employer imposed its last best offer). Seven of these cases resulted in litigation before the Commission. In three of the litigated cases, the Commission found that boards had lawfully implemented salary guides after exhausting impasse procedures.¹ In three other litigated cases, the Commission found that boards violated a duty to negotiate in good faith by not exhausting impasse procedures,² or not implementing their “last best” offers.³ The seventh litigated case was an

¹Red Bank Bd. of Ed., P.E.R.C. No. 81-1, 6 NJPER 364 (¶11185 1980), aff’d NJPER Supp.2d 99 (¶81 App. Div. 1981); Bayonne Bd. of Ed., P.E.R.C. No. 91-3, 16 NJPER 433 (¶21184 1990); Readington Tp. Bd. of Ed., PERC No. 96-4, 21 NJPER 273 (¶26176 1995).

²Willingboro Tp. Bd. of Ed., P.E.R.C. No. 78-20, 3 NJPER 369 (1977).

³Mount Holly Tp. Bd. of Ed., P.E.R.C. No. 84-27, 9 NJPER 596 (¶14252 1983); Fredon Tp. Bd. of Ed., P.E.R.C. No. 96-5, 21 NJPER 275 (¶26177 1995).

interlocutory proceeding that was eventually settled by the parties.⁴ The four remaining cases of the eleven eventually settled, two of them, Middletown and Manville, after strikes.

To place those numbers in perspective, there are nearly 600 school districts in the State of New Jersey and more than twice that number of collective negotiations units with contracts. Most collective agreements have three-year terms and about one-third of the agreements expire every year. The Commission averages about 120 Notices of Impasse filed annually from negotiations units of school employees.⁵

School Employee Impasses Under Chapter 126

Chapter 126 provides, that:

Notwithstanding the expiration of a collective negotiations agreement, an impasse in negotiations, an exhaustion of the commission's impasse procedures, or the utilization or completion of the procedures required by this act, and notwithstanding any law or regulation to the contrary, no public employer, its representatives, or its agents shall unilaterally impose, modify, amend, delete or alter any terms and conditions of employment as set forth in the expired or expiring collective negotiations agreement, or unilaterally impose, modify, amend, delete, or alter any other negotiable terms and conditions of employment, without specific agreement of the majority representative. N.J.S.A. 34:13A-33.

Chapter 126 prohibits school employers from unilaterally imposing or changing terms and conditions of employment while negotiating successor agreements. Chapter 126 also

⁴Keansburg Bd. of Ed., I.R. No. 91-22, 17 NJPER 314 (¶22138 1991).

⁵The Commission also receives almost as many impasse cases from non-school employee negotiations units each year.

mandates participation in fact finding “in any case where the Commission’s mediation procedures have been exhausted with no final agreement reached.” N.J.S.A. 34:13A-34(a). The fact finder must be appointed no later than 30 days after the parties’ last meeting with the mediator. If the fact finder prepares a report recommending a settlement, it must be presented to the parties immediately after its issuance and be available to the public ten days later. If the parties do not reach a voluntary agreement within 20 days after the report issues, the Director of Conciliation must appoint a “super conciliator” to assist the parties, in accordance with the Commission rules. N.J.S.A. 34:13A-34(b) and (c).

The Commission adopted rules, effective July 20, 2004, implementing Chapter 126. Those rules allow the parties to jointly request the appointment of a particular super conciliator subject to the Director’s approval. Absent an approved joint request, the Director designates a super conciliator. N.J.A.C. 19:12-4.4(c). The super conciliator, while functioning in a mediatory role, is subject to and protected by the same rules as mediators concerning confidentiality. When appointed, the super conciliator is directed to promptly schedule investigatory proceedings to:

- a. Investigate and acquire all relevant information regarding the dispute between the parties;
- b. Discuss with the parties their differences, and utilize means and mechanisms, including but not limited to requiring 24-hour per day negotiations, until a voluntary settlement is reached, and provide recommendations to resolve the parties’ differences;
- c. Modify or amend the fact finder’s report for

reconsideration by the parties in a further effort to achieve a voluntary settlement by the parties; and

- d. Institute any other non-binding procedures deemed appropriate by the super conciliator. [N.J.S.A. 34:13A-35]

If the parties are unable to reach agreement with the assistance of a super conciliator, the super conciliator is required to issue a formal report to the parties that is to be made available to the public ten days later. N.J.S.A. 34:13A-36.

Since the enactment of Chapter 126 at the beginning of FY 2004, eleven impasses proceeded to super conciliation. Of the eleven cases, seven involved impasses filed in FY 2003, before the enactment of Chapter 126; one involved an impasse filed in FY 2004; two involved impasses filed in FY 2005; and one involved an impasse filed in FY 2006.

Analysis

The following chart reflects impasse filings and appointments from FY 1999 through FY 2008. It indicates the number of Notices of Impasse filed, the number of impasses settled in mediation, the number of impasses sent to fact finding, the number of impasses settled in fact finding pre-report, the number of fact finding reports issued, the number of conciliator (pre-Chapter 126) or super conciliator appointments and settlements, the percentage of impasses settled in mediation, the percentage of fact finding cases to impasses filed, the percentage of fact finding reports issued to fact finding cases and impasses, and the percentage of conciliator or super conciliator appointments to impasses filed. The fact

**FILINGS AND APPOINTMENTS IN SCHOOL EMPLOYEE IMPASSES
BY FISCAL YEAR 1999-2008**

	Pre-Act					Post-Act					Average	
	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	Pre-Act	Post-Act
Notices of Impasse Filed	141	125	116	111	129	122	117	129	107	118	124.4	118.6
Settled in Mediation	117	103	108	98	82	86	69	85	79	76	101.6	79.0
Impasses sent to Fact Finding	41	25	14	19	25	45	38	45	28	35	24.8	38.2
Settled in FF (Pre-Report)	19	19	14	13	16	23	33	25	22	27	16.2	26.0
Fact Finding Reports Issued	8	8	5	3	4	13	15	9	6	5	5.6	9.6
Conciliators / Super Conciliators Appointed	0	0	1	1	1	7	1	2	0	1	0.6	2.2
Settled in Conciliation or Super Conciliation	0	0	1	1	0	4	5	1	1	0	0.4	2.2
Percentage of Impasses Settled in Mediation	83%	82%	93%	88%	64%	70%	59%	66%	74%	64%	82%	67%
Percentage of Impasses sent to Fact Finding	29%	20%	12%	17%	19%	37%	32%	35%	26%	30%	20%	32%
Percentage of FF Cases Where Report Issued	20%	32%	36%	16%	16%	29%	39%	20%	21%	14%	24%	25%
Percentage of Impasses Where FF Report Issues	6%	6%	4%	3%	3%	11%	13%	7%	6%	4%	4%	8%
Percentage of Impasses Reaching Conciliation or Super Conciliation	0.0%	0.0%	0.9%	0.9%	0.8%	5.7%	0.9%	1.6%	0.0%	0.8%	0.5%	1.8%

finding and conciliation appointments are not necessarily derived from impasse cases filed in the same fiscal years.

The chart shows that over the last ten years the number of school employee Notices of Impasse ranged from 107 to 141 annually. Prior to the enactment of Chapter 126, approximately 20% of all impasse cases moved to fact finding. Since the enactment, approximately 32% of all impasse cases moved to fact finding. The percentage of impasse cases requiring fact finding reports has doubled from 4% to 8%, due largely to activity during the first two years of Chapter 126. The number of fact finding cases that settle without a report remained at approximately 75%. Our experience indicates that impasses resolved in fact finding typically require nearly twice the time as those resolved in mediation.

A total of eleven super conciliators have been appointed since Chapter 126 was enacted, seven during its first year. From FY 2005 through FY 2008, the Commission has averaged one appointment annually. To date, every super conciliation has been resolved with a mediated settlement, without the need for a formal report.

The trends noted in the chart cannot be attributed exclusively to Chapter 126. A number of factors influence the demands placed on the Commission's impasse procedures. Perhaps the most important is the relationship that exists locally between boards of education and the majority representatives of their employees. Parties with a good negotiations history and stable labor relations are less likely to reach impasse, and when they do, are more likely to settle earlier in the process. The economy also influences negotiations for successor

agreements. Currently, conditions include rising fuel and grain prices; unstable credit and housing markets; and successive quarters of slow growth or a contracting economy. It is more difficult to reach agreements when faced with both inflationary and recessionary pressures.

Recent legislation also affects negotiations. Over the past three years, in response to rising property taxes, the Legislature has imposed spending limits and levy caps; encouraged shared services, joint meetings, and mergers and consolidations; and redefined State Health Benefits Plans. See P.L. 2007, c.62 and c.63. Proposed Department of Education Accountability Regulations are also likely to affect negotiations over related terms and conditions of employment.

Finally, the availability and expertise of the Commission's staff mediators and its ad hoc panels of mediators and fact finders play a role in how effectively and expeditiously they can assist the parties at impasse to reach settlement. From FY 2003 to FY 2006, the Commission had only two full-time staff mediators. The Commission now employs four full-time staff mediators. With the added staff, the Commission can offer parties at impasse earlier dates for first mediation sessions and shorter delays between sessions.

To maintain a high level of excellence for its staff and ad hoc panels, the Commission has broadened its education program for the labor relations professionals who provide mediation, fact finding and super conciliation. The latest training session was held on June 9, 2008. Consistent with the Commission's neutrality and its statutory mission to prevent or

promptly resolve labor disputes, the training addressed recent legislative changes concerning health benefits, school district and local government budgets, tax levy caps, funding formulas, and shared services, joint meetings and mergers and consolidations.

All of the factors discussed above influence the degree to which parties seek assistance from the Commission's impasse process. Without the possibility of unilateral imposition there is no longer a reluctance on the part of some majority representatives to move to fact finding when an impasse persists through mediation. There has not been a teacher strike in a New Jersey public school since Chapter 126 was enacted.

It is difficult to predict how the process will be used over the next few years. Given the external factors discussed above, it seems likely that more parties will need the assistance of the Commission's impasse procedures. The Commission expects more parties to file Notices of Impasse and it anticipates that the number of mediation sessions needed to resolve impasses may increase. It is likely that more impasse cases may require fact finding or even super conciliation appointments. These trends would be likely to occur regardless of the enactment of Chapter 126.

Section 8 of Chapter 126 invited the Commission to make recommendations "for any changes in the law." The implementation and administration of Chapter 126 has posed no significant problems. Accordingly, the Commission is not recommending any changes to Chapter 126.