

Appellate Practice

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Casino & Resort Development

Complex Commercial Litigation

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Corporate Political Activity Law

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GENOVA, BURNS & GIANTOMASI

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NEWARK, NJ



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Orientation for Municipal Officials that are Newly Elected or Re-Elected

Labor Relations Overview

By: GENOVA, BURNS & GIANTOMASI





Creation of PERC, L. 1968, c. 303

- **PERC was created by the New Jersey Employer-Employee Relations Act (N.J.S.A. 34:13A-1 et seq.)**
- **Purpose of Act, N.J.S.A. 34:13A:2:**
 - **“It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes, both in the private and public sectors; that strikes, lockouts, work stoppages and other forms of employer and employee strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic and public waste; that the interests and rights of the consumers and the people of the State, while not direct parties thereto, should always be considered, respected and protected; and that the voluntary mediation of such public and private employer-employee disputes under the guidance and supervision of a governmental agency will tend to promote permanent public and private employer-employee peace and the health, welfare, comfort and safety of the people of the State. To carry out such policy, the necessity for the enactment of the provisions of this act is hereby declared as a matter of legislative determination.”**





Creation of PERC, L. 1968, c. 303

- **Statutory Autonomy, N.J.S.A. 34:13A-5.1(a):**
 - **“The Division of Public Employment Relations shall be concerned exclusively with matters of public employment related to determining negotiating units, elections, certifications and settlement of public employee representative and public employer disputes and grievance procedures. For the purpose of complying with the provisions of Article V, Section IV, paragraph 1 of the New Jersey Constitution, the Division of Public Employment Relations is hereby allocated within the Department of Labor, and located in the city of Trenton, but not withstanding said allocation, the office shall be independent of any supervision or control by the department or any board or office thereof.”**





Public Employer Relations Commission

- 7-Member Tri-Partite Structure-two members are representative of public employee organizations, two are representative of public employers, and three are representative of the general public

- Chair -	P. Kelly Hatfield
- Public Member -	Sharon Krengel
- Public Member -	Paula B. Voos
- Employee Organization Member -	David Jones
- Employee Organization Member -	Richard Wall
- Public Employer Member -	John Bonanni
- Public Employer Member -	John H. Eskilson





Public Employer Relations Commission (cont.)

- All commissioners serve for terms of 3 years and are appointed by the Governor with the advice and consent of the Senate
- Chairman must be a public member and serves as the Commission's full-time chief-executive





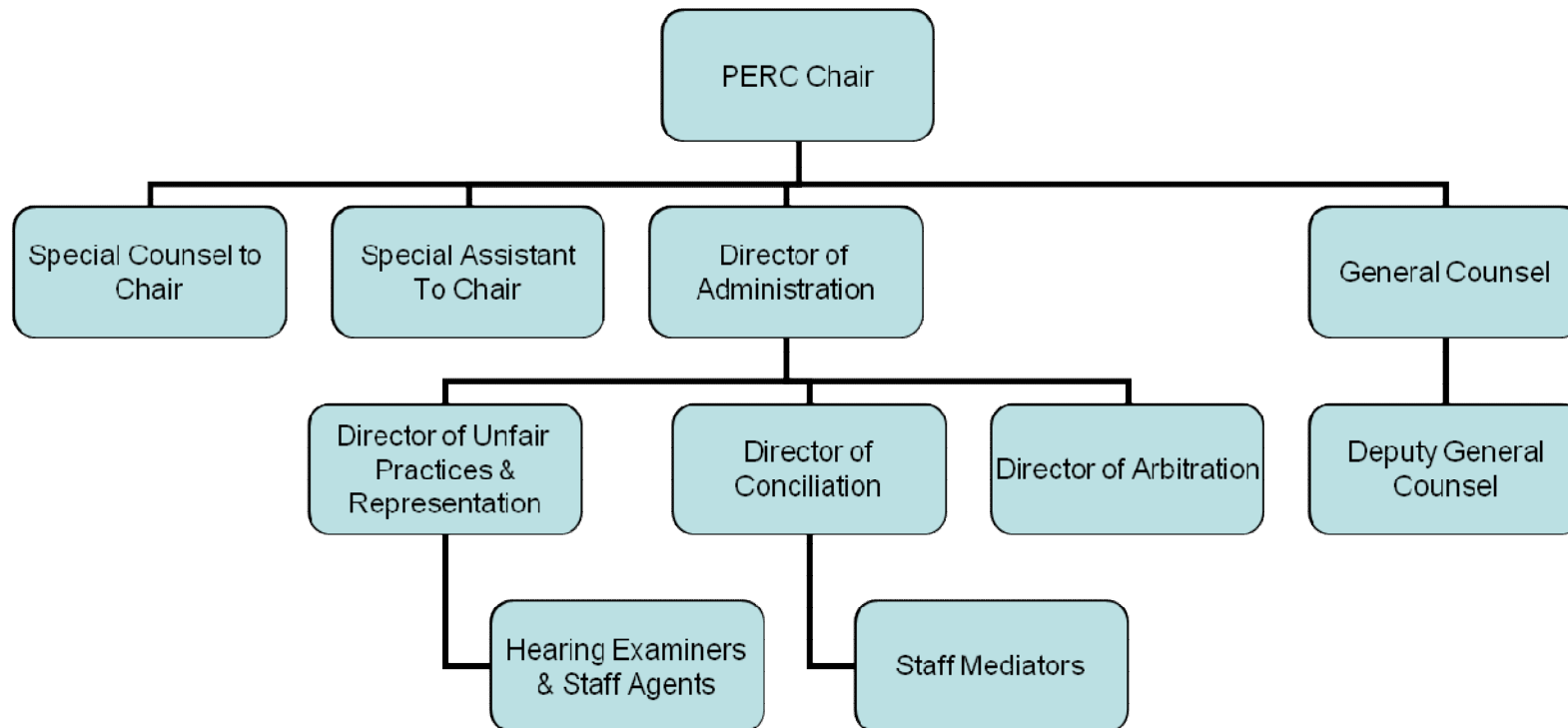
Jurisdiction

- All public employers – State of New Jersey, counties, municipalities, school boards, independent agencies and authorities (Meadowlands, N.J. Turnpike Authority, Sewerage Authorities, etc.)
- Public employees – any and all organizations representing public employees





Organization of PERC Staff and Functions





Statutory Development of Act

- L. 1968, c. 303 Representation and Impasse Procedures (mediation and fact-finding)
- L. 1974, c. 123 Unfair Practices/Scope of Negotiation
- L. 1977, c. 85 Interest Arbitration/Police & Fire
- L. 1979, c. 477 Agency Shop/Appeal Board
- L. 1979, c. 250 Transportation Act
- L. 1982, c. 103 Discipline
- L. 1989, c. 269 Extra-curricular, Discipline and Transfers in Public Education
- L. 1995, c. 425 Amending L. 1997, c. 85 Police & Fire Interest Arbitration
- L. 1996, c. 115 Discipline
- L. 1997, c. 330 Retiree Health Benefits and Interest Arbitration





Statutory Development of Act (cont.)

- L. 1999, c. 3 Prohibiting individuals convicted of certain offenses from holding union positions
- L. 2002, c. 46 Authorizing Commission to Order Representation Fees When Certain Conditions Are met
- L. 2003, c. 119 Permitting Binding Arbitration of Major Discipline for State Employees Pursuant to a Collective Negotiations Agreement
- L. 2003, c. 126 Establishing Super Conciliation Process to Follow Unsuccessful Fact-Finding in Negotiations Between Majority Representatives and School Boards or certain other Educational Employers
- L. 2005, c. 142 Limiting the Number of Negotiations Units of Non-Uniformed State Employees to the Ten Units Already Existing





Statutory Development of Act (cont.)

- L. 2005, c. 161 Establishing “card check” method of union certification
- L. 2005, c. 380 Creating presumption in favor of contractual arbitrability
- L. 2007, c. 62 Caps increase in property tax levy at 4%, with certain exceptions and waivers; amends N.J.S.A. 34:13A-16g to add this statutory restriction as an additional factor to be considered by interest arbitrators
- L. 2010, c.105 Interest Arbitration reform including 2% hard cap on certain contracts, random selection of arbitrators, expedited determination of awards, expedited appeal process





Procedures for Recognition and Certification of Public Employee Representative and Conduct of Elections to Determine Selection

- PERC cannot intervene in the absence of a dispute
- PERC aggressively seeks to obtain consent agreements
- Exclusions
 - Elected Officials, members of Boards and Commissions
 - Managerial Executives- means 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 (in school districts, includes only superintendant and assistant superintendant)
 - Confidential Employees- means employees 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.





Procedures for Recognition and Certification of Public Employee Representative and Conduct of Elections to Determine Selection

■ Prohibitions

- Comingling of supervisors and non-supervisors
- Comingling of police and non-police
- Comingling of professionals and non-professionals (unless majority of professionals vote to mix)
- Comingling of craft and non-craft (unless majority of craft vote to mix)





Formal Representation Proceedings to Determine Appropriateness of Unit

- In the absence of factual dispute, decision, including direction of elections, will be made upon administrative investigation
- Where there are substantial factual disputes, a formal representation hearing is convened resulting in recommended decision to the Commission
- Criteria for determining appropriate negotiations unit
 - Due regard for community of interest of employees involved
 - Avoidance of conflicts of interest
 - Interests of public (avoidance of undue fragmentation of employees and decentralization resulting for insufficient authority on the part of the employer to negotiate effectively)
 - Approximate number of negotiating units – 3,500 (boards of education, state, counties, municipalities, independent boards, commissions and authorities)





Formal Representation Proceedings to Determine Appropriateness of Unit (cont.)

- Criteria for determining appropriate negotiations unit
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Scope of Negotiations

- Statutory Prohibitions
 - Pensions
 - Transfers Between Worksites in School Districts
- Prohibitions by Case Law
 - Terms and conditions of employment which are preempted by statute or regulation (Personnel, Education, etc.). State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978)
 - Terms and conditions of employment which, if negotiated would significantly interfere with the determination of governmental policy. Ridgefield Park Bd. Of Ed. V. Ridgefield Park Ed. Ass'n, 78 N.J. 144 (1978)
 - Permissive subjects – agreements over managerial prerogatives are not enforceable even after voluntary agreement. However, police and fire employees have a permissive category but agreement cannot substantively limit the determination of governmental policy. Paterson Police PBA v. City of Paterson, 87 N.J. 78 (1981)





Scope of Negotiations (cont.)

- Statutorily Negotiable
 - Grievance Procedures
 - Minor discipline in school districts
 - Representation fees
 - Extracurricular Activities
 - Disciplinary disputes and review procedures





Scope of Negotiations (cont.)

- **Mandatorily Negotiable**
 - Issues which directly and intimately affect then work and welfare of public employees and which, if negotiated, would not significantly interfere with the determination of governmental policy
- **Balancing Test**
 - Determine whether the issue in dispute predominantly relates to a term and condition of employment or the determination of governmental policy, *Woodstown-Pilesgrove Bd. Of Ed. V. Woodstown-Pilesgrove Ed. Ass'n.*, 81 N.J. 582 (1980)





Unfair Practices

- To Prevent and Remedy Unfair Practices Specified Under Statute by Employer or Employee Representative. N.J.S.A. 34:13A-5.4a,b; N.J.A.C. 19:14-1.1 et seq.
- PERC has Authority to Issue Complaints and Remedy Violations of the Act
- Activity Protected by the Act
 - Organization and participation in union activity
 - Negotiations
 - Processing of grievances





Unfair Practices (cont.)

- Union Animus in Administrative Decisions Prohibited
 - Hiring
 - Discharge and Discipline
 - Promotion
 - Transfers





Unfair Practices (cont.)

- Employer Unfair Practices
 - Interference, Coercion, and Restraint of Employee's Protected
 - Domination or Support of Employee Organization
 - Discrimination Due to Union or Union Related Protected Activity
 - Discrimination Due to Filing Complaints, Affidavits, or Petitions
 - Refusal to Negotiate in Good Faith
 - Refusal to Reduce a Negotiated Agreement to Writing





Unfair Practices (cont.)

- Union or Employee Unfair Practices
 - Interference, Coercion, and Restraint of Employee Rights
 - Interfering with Employer Selection of Negotiation/Grievance Representative
 - Refusing to Negotiate in Good Faith
 - Refusing to Reduce a Negotiated Agreement to Writing
 - Violation of PERC Rules and Regulations





Unfair Practices (cont.)

- Test Used to Determine Whether Decision Motivated by Anti-Union Animus- In re Bridgewater Tp., 95 N.J. 235 (1984)
 - To prevail, charging party must prove that discrimination for protected activity was a substantial or motivating factor
 - To prevail, public employer must then prove that it would have taken the same action regardless of the protected activity
- Employer May Not Unilaterally Alter Terms and Conditions of Employment





Unfair Practices (cont.)

■ Remedies

■ Orders

- Cease and Desist
- Reinstatement
- Restoration of Status Quo
- Compensatory Damages
- Attorney's Fees – IA failure to negotiate
- Posting of Notices
- New Election
- Bargaining Order





Unfair Practices (cont.)

■ Remedies

■ Interim Relief

- Interim relief may be granted in both unfair practice proceedings and scope of negotiations proceedings. N.J.A.C. 19:13-3.10
- To receive interim relief must show there is no material fact dispute, irreparable harm, and likelihood of success on the merits
- PERC may also consider the hardship to the parties in granting or denying interim relief





Grievance Arbitration

- In general, grievance arbitration is a creature of the parties' collective negotiations agreement
 - Exception is public school employees- negotiated grievance procedure must terminate in binding arbitration for all discipline, including reprimands, in cases where there is no statutory procedure
- Grievance arbitration is initiated by the filing of a grievance, which is processed to arbitration. It is utilized by the parties as a mechanism for interpreting and enforcing the terms of the parties' agreement.





Grievance Arbitration (cont.)

- Two principal types of contractual grievances
 - Disputes concerning the interpretation and application of the collective bargaining agreement
 - Discipline
- Generally, collective negotiations agreement includes a just cause standard for reviewing disciplinary grievances, but parties are free to negotiate whatever standard of review or schedule of discipline is mutually agreeable





Interest Arbitration

- Statutory Procedure for resolving impasse in collective negotiations between public fire and police bargaining units and public employers
 - Conventional arbitration as terminal procedure
 - Arbitrator Must Apply Statutory Criteria/Standards
 - Appeals to Commission
 - Unlike grievance arbitration, interest arbitration is compulsory and does not rely on existence of a collective bargaining agreement





Interest Arbitration (cont.)

- Negotiations Period
 - Negotiations must begin at least 120 days prior to the expiration of the parties' collective negotiations period
 - The parties must meet at least three times during the 120-day period
- Mediation
 - When parties reach impasse, the Commission shall, upon the request of either party or on its own motion, take steps that it deems expedient to affect a voluntary resolution, including the assignment of a mediator.
N.J.S.A. § 34:13A-16(a)(2)
 - Either party may initiate mediation by notifying the Director of Conciliation, in writing, of the existence of an impasse and request the appointment of a mediator
 - The mediator shall assist the parties in reaching a voluntary agreement, and may hold separate or joint conferences as he or she deems expedient to effect a voluntary settlement
 - At the conclusion of mediation, the mediator shall submit a confidential report to the Director of Conciliation





Interest Arbitration (cont.)

■ Factfinding

- If mediation is unsuccessful in resolving the impasse, PERC, at the request of either party, shall invoke factfinding with recommendation for settlement of all issues in dispute. N.J.S.A. § 34:13A-16(b)(1); N.J.A.C. § 19:16-4.1(a).
- Where there is a dispute concerning whether an unresolved issue is within the scope of negotiations, the party asserting that the issue is outside the scope of negotiations shall file a scope of negotiations petition within ten days of receipt of the request for factfinding or within five days after receipt of the response to the request for factfinding
- Factfinder has authority and power to subpoena witnesses, compel their attendance, administer oaths, take testimony of any person under oath, and in connection thereto, to issue subpoenas duces tecum and require the production and examination of any governmental or other books or papers relating to any matter under investigation on any issue before the factfinder. N.J.A.C. § 19:16-4.3(b)
- If the impasse is not resolved through factfinding, the factfinder makes findings of fact and recommends the term of settlement





Interest Arbitration (cont.)

- Preliminary Determinations
 - Scope of Negotiations (arbitrator cannot issue any finding on pension or State Health Benefits Program)
 - Issue Definition (economic or non-economic, if final offer arbitration)





Interest Arbitration

Statutory Criteria

- 1) The interests and welfare of the public
- 2) Comparison of wages, salaries, hours, and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours, and conditions of employment of other employees performing the same or similar services with other employees generally
- 3) Overall compensation presently received by the employees, inclusive of direct wages, salary, vacations, holidays, excused leaves, insurance and pensions, medical and hospitalization benefits, and all other economic benefits received
- 4) Stipulations of parties
- 5) The lawful authority of the employer
- 6) The financial impact on the governing unit, its residents and taxpayers.
- 7) Cost of living
- 8) The continuity and stability of employment including seniority rights and such other factors
- 9) Statutory restrictions imposed on the employer (2007)





Employee Appeals to the PERC Appeal Board

- **3-Member Tri-Partite Structure**
 - **Chairman** - John F. Tesauro
 - **Member** - Raymond T. Bolanowski, Esq.
 - **Member** - Charles J. DeCicco

