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I. REMOVING WORK FROM THE BARGAINING UNIT

A. Subcontracting.

1. Cleaning Services. The employer lawfully subcontracted janitorial and cleaning services following the layoff of two custodial employees; consequently, the Board dismissed an unfair labor practice complaint. Although the work in question was bargaining unit work, the employer utilized outside cleaning services and the work sites during the entire period of one laid off employee’s employment. Moreover, the subcontracting did not vary significantly in kind or degree from what had been customary under established practice because the volume and nature of work performed by the subcontractor remained the same after the employees were laid off. *Town of Farmington*, Dec. No. 4462 (Conn. SBLR 4/20/10).

2. Maintaining Minimum Staffing Threshold. The employer unlawfully repudiated and/or modified an agreement to allow subcontracting if the number of bargaining unit employees did not fall below 54. The Commission rejected the employer’s argument, and the ALJ’s determination, that the agreement involved a permissive bargaining subject because it involved staffing levels. “We have found that repudiation exists when 1) the contract breach is substantial, and has a significant impact on the bargaining unit and 2) no bona fide dispute over interpretation of the contract is involved. . . . Here, the quid pro quo was a promise to maintain a certain staffing level in exchange for an agreement on subcontracting. . . . [W]here a permissive subject of bargaining is intertwined with mandatory subjects, repudiation of the permissively bargained portion constitutes repudiation of the entire agreement. Similarly, in this case, breach of the agreement to allow subcontracting so long as the number of bargaining unit employees does not fall below fifty-four has a substantial and significant impact on the unit, and, there is no dispute over contract interpretation.” *City of Roseville*, 23 MPER ¶55 (Mich. ERC 6/11/10).

3. Contracting with Another Public Employer. The county employer lawfully negotiated an agreement with another county employer provide officer coverage to transport and secure certain inmates who were receiving medical care. A State statute authorized local governing units to enter into contracts with any other local governing unit “for the joint provision within their several jurisdictions of any services which any party to the agreement is empowered to render within its own jurisdiction,” including police protection. The interlocal service agreement did not result in the loss of jobs or a reduction in hours of work for bargaining unit employees. “We have
distinguished interlocal service agreements from other subcontracting and unit work cases because interlocal service agreements are neither an assignment of work to a private employer nor the assignment of unit work to non-unit employees of the same public employer. Instead, we apply the traditional negotiability balancing test to the circumstances of the case.” Applying the balancing test, the Commission held that, “Sheriff’s officers have an interest in preserving their unit work and negotiated compensation for overtime. The County has an interest in deciding what services it will provide and determining the best method to provide those services. Here, the County eliminated an overtime opportunity for sheriff’s officers when it entered into an interlocal services agreement . . . . This action has not resulted in any layoffs or reduced the work week below that specified in the contract. The sheriff’s officers have lost overtime opportunities, but an overtime guarantee cannot be used to require an employer to deliver services when it chooses not to do so. The County’s interest in determining what services to provide and how they will be provided outweighs the FOP’s interest in preserving unit work. A restriction on the County’s right to enter into the agreement would substantially limit its governmental policymaking powers.” However, the employer was obligated to negotiate the effects of its decision because the union agreed to a reduction in the overtime compensation rate to preserve the work. County of Union, 36 NJPER ¶67 (NJ PERC 5/27/10).

4. Services Provided by Instructional Support Services Aides. The employer unlawfully subcontracted the services of its aides providing instructional support services. At issue was the interpretation of a recent statutory amendment, which provided that employer is a “public school employer,” the subcontracting of non-instructional support services is no longer a mandatory subject of bargaining, but is now a prohibited subject of bargaining. The amendment, however, did not define the phrase “non-instructional support services.” The employer unsuccessfully argued that the phrase “noninstructional support services” applies to all of its support employees, thus differentiating between those who provide professional instructional services and those who provide support services. “We agree with the ALJ’s conclusion that the phrase “noninstructional support services” does not apply to instructional services provided by support personnel.” Consequently, services provided by chapter I instructional aides/kindergarten aides, RTC coordinators, and library aides were properly characterized as instructional, and except for those special education aides who regularly provide only health or personal care services, the services provided by special education aides also are instructional. Harrison Community Schools, 23 MPER ¶82 (Mich. ERC 9/20/10); accord Pontiac School District, 23 MPER ¶81 (Mich. ERC 9/20/10)(work performed by occupational therapist and physical therapist not non-instructional).

5. Custodial Work. The employer lawfully subcontracted our custodial work after terminating the employment of the person who previously performed that work. “[A] public employer has a managerial prerogative to subcontract. Therefore, [the union] may not challenge the subcontracting decision through binding arbitration.” Middlesex County College, 36 NJPER ¶70 (NJ PERC 5/27/10).
B. Transferring Bargaining Unit Work.

1. Monitoring Video Surveillance Cameras by Civilian Employees. The employer unlawfully hired three civilian employees for the sole task of watching video surveillance monitors that formerly had been monitored by police officers. The employer’s action resulted in the reduction of one police officer bargaining unit position on each shift. The Board held that “[A]n employer is not excused from its statutory duty to negotiate the assignment of bargaining unit work out of the unit merely because the employer has changed how the work is being performed. . . . [C]onducting surveillance of the public at large, looking for suspected criminal activity and responding to it, has been a function exclusively assigned to City police officers. Thus, whether done in person or by remote observation, such as through the use of video surveillance cameras, identifying activity as criminal in nature and determining what would be appropriate law enforcement response to that activity, are matters and duties within the purview of the bargaining unit police officers. Therefore, on this record, the unilateral assignment of civilian Service Representatives to monitor the City streets looking for suspected violations of the law (even via video surveillance cameras), and deciding whether the witnessed conduct warrants a police officer’s response, is an unlawful assignment of police bargaining unit work to non-bargaining unit personnel. . . . [S]ince at least July 2007, the bargaining unit police officers exclusively performed the work of monitoring the City streets via the video surveillance cameras. Thus, the City police officers had the expectation that any video surveillance monitoring work would be performed by bargaining unit employees. Contrary to the employees’ expectations to the work, . . . as a result of the assignment of the Service Representative to each of the bargaining unit shifts, one less police officer was used to monitor video surveillance cameras during each shift. When the City assigned three full-time civilian employees to monitor the video surveillance cameras in July 2008, it thereby unilaterally removed bargaining unit work form the City police officers in violation of . . . the PLRA.” City of Philadelphia, No. PF-C-08-115-E (Pa. LRB 7/15/10).

2. “Dispatching” Work. The employer lawfully declined to fill a dispatcher’s position vacated by the employee’s accepting another position and assigned the duties to other employees, including members of other bargaining units and supervisors (who also are unionized). Although his title was Dispatcher, the employee performed actual dispatching functions only 10% of the time. He also worked one day per week performing solely clerical work. Moreover, the employee’s duties were performed by other employees, including members of the employee’s own bargaining unit, employees in other bargaining units and unionized supervisors. Even though the employer did not fill the vacancy, there still are Dispatchers in the bargaining unit, and the Dispatcher position has not been eliminated. The Board held that the union failed to establish a prima facie case of unlawful subcontracting. “First, it is clear that the work in question has always been performed by both non-union employees and employees from various locals. While dispatching work itself may in fact belong to the Union, it was uncontested that [the employee], despite his title, was barely performing traditional dispatching work . . . . In addition, . . . the work that was actually performed by [the employee] . . . had not historically been performed solely by bargaining unit personnel, but instead by non-union personnel and employees from
the Union and other locals. The Union did not present any evidence showing that the alleged subcontracting or transfer of work after [the employee] left . . . was any different than what had customarily occurred. Further, this record is devoid of any evidence showing that the alleged subcontracting or transfer of work had a demonstrable adverse impact on the bargaining unit. The MDC has not eliminated the position of Dispatcher from the Union. No one has lost his or her job or any overtime opportunities.” Finally, the employer’s actions were consistent with past practice. “[E]mployees other than strictly Union bargaining unit members had previously performed the work in question.” Metropolitan District Commission, Dec. No. 4464 (Conn. SBLR 6/1/10).

3. Civilization of Dispatch Duties. In another case, the same Board held that an employer unlawfully hired civilian supervisors to perform dispatching services. The Board held that the union established a prima facie case of unlawful subcontracting for which the employer offered no defense. “[S]upervising dispatch functions for the City’s Police Department is clearly the work of this bargaining unit as specified in the 2008-12 agreement and the prior agreements between the parties dating back more than twenty years. It is uncontested that Union members have consistently performed this function to the exclusion of all others for at least that period of time.” In addition, “the hiring of civilian employees in the [new Emergency Operations Center] EOC to supervise the dispatchers is a significant departure from the past practice of this unit where the Union members exclusively supervised the dispatchers in the Communications Center performing police dispatch work.” Finally, “there was a demonstrable adverse impact on the members of the bargaining unit who bid on and were assigned to the Communications Center based upon their seniority. Those sergeants assigned to the Communications Center were transferred . . . without an opportunity to bid on another assignment as is permitted by the collective bargaining agreement.” City of Bridgeport, Dec. No. 4478 (Conn. SBLR 8/18/10).

4. Eliminating Purchasing Assistant Position. The employer did not unlawfully transfer bargaining unit work when it eliminated a purchasing assistant position as part of a budget reduction plan. The purchasing assistant was the only bargaining unit position within the purchasing department. The work previously performed by the Purchasing Assistant was reduced by approximately 85 percent. The remaining duties that continued to be performed were tasks also previously performed by non-bargaining unit employees. “Charging Party failed to introduce any evidence establishing that the duties performed by the purchasing assistant prior to the reorganization were exclusive to the bargaining unit. . . . A showing of exclusivity is essential to establish that an employer has a duty to bargain over the transfer of work outside the unit, and the Union carries the burden of proof as to that issue. Even assuming arguendo that the duties in question were exclusive to Charging Party’s bargaining unit, . . . the school district had no duty to bargain over the alleged transfer of work. . . . [T]he charging party must also establish that the transfer had a significant impact on unit employees. The record must show for example that unit employees were laid off, terminated, demoted, not recalled or lost a significant amount of overtime as a result of the transfer of work. The mere loss of unit positions or speculation regarding the loss of promotional opportunities within the unit does not constitute a significant adverse impact. In the instant case, Charging Party has failed
to demonstrate that its members suffered any significant adverse impact which would give rise to a bargaining duty on the part of the school district. Despite the elimination of the purchasing assistant position, there is no evidence that any bargaining unit member became unemployed as a result of the 2006 reorganization, nor did the Union present any evidence that its members lost benefits or overtime due to the transfer of work. . . . [T]he only bargaining unit member identified as having lost her position due to the reorganization[] took another job within the school district after her position in the purchasing department was eliminated.” *Birmingham School District*, 23 MPER ¶74 (Mich. ERC 8/13/10).

5. **Summer Work.** The employer’s apparent transfer of summer work formerly performed by bargaining unit members was mandatorily negotiable. The employer eliminated for financial reasons summer work hours and compensation for certain employees (with their former duties to be handled by administrators and technology staff). The employer then posted job notices for the positions Summer District Technology Maintenance and Summer District Technology Support and hired employees into these positions that are not represented by the union. “A grievance challenging an employer’s decision to move unit work to non-unit employees for economic reasons is a mandatorily negotiable issue and is legally arbitrable.” *Flemington Raritan Regional School District Board of Education*, 36 NJPER ¶141 (NJ PERC 9/23/10).

6. **Parking Meter Coin Collection Duties.** The employer unlawfully transferred parking meter coin collection duties to a non-unit employee. Six years before, the employer installed electronic and municipal meters resulting in an 18%-20% decline in coin collection work, and an even greater decrease in the amount of minor repairs performed by employees. The one employee who primarily performed the work completed his tasks in only four hours each day. Two other bargaining unit employees substituted for him during his absence. Shortly after that employee died, the employer assigned the work to a part-time non-unit hiree. The employer unsuccessfully argued that that its unilateral action resulted from a diminution in the amount of work to be performed and that the reassigned work was not substantially similar to exclusive unit work. “Contrary to the Village’s argument, the unilateral action in this case does not involve a reduction in the work hours of unit employees resulting from a diminution in the amount of work to be performed. Rather, . . . the evidence demonstrates[] that the Village unilaterally transferred unit work without a related curtailment in the level of services. The reduction in work cited by the Village began at least six years ago and led to unit employees performing the work on a part-time basis until the Village unilaterally transferred the work to a nonunit part-time employee in 2008. The Village’s related argument that the reassigned work is not substantially similar to the work exclusively performed by unit employees is equally without merit. The changes resulting from the installation of electronic and municipal meters took place six years before the unilateral transfer. There is no evidence of any change in the nature of the work at the time of the transfer, if ever; the duties were performed by unit employees on a part-time basis, well before the transfer of the unit work.” *Incorporated Village of Rockville Centre*, 43 NYPER (LRP) ¶3030 (NY PERB 9/21/10).
7. **Curriculum and Instruction Secretary.** The employer’s financially and technologically motivated decision to consolidate the position of bargaining unit Curriculum and Instruction Secretary and the non-unit position of Administrative Assistant to the Superintendent was lawful, and an arbitration award ordering that the bargaining unit position be restored was vacated. The employee holding the bargaining unit position accepted the new consolidated job, resulting in no loss of employment (the holder of the non-unit position had retired). The majority of duties in the consolidated position were performed by the bargaining unit position. In response to the employer’s unopposed unit clarification petition, the Bureau of Mediation Services held that the consolidated position was “confidential.” “[T]he school district did not contract out union work, hire additional non-union personnel, or prevent employment of any union members. A union position was eliminated, but because [the bargaining unit employee] was offered and accepted the new position, no union member lost a job. There is no evidence in the record that the terms and conditions of employment of any other union member is affected by consolidation of the clerical positions. . . . [T]his case involves reorganization of the organizational structure specifically identified in the CBA as an inherent managerial right not requiring negotiation.” *Independent School District No. 656, Faribault, Minnesota, vs. International Union of Operating Engineers, Local Union No. 70*, No. A10-670, 2010 Minn. App. Unpub. LEXIS 1123 (Minn App. 11/23/10).

8. **Extended School Year Work.** The employer’s decision to hire non-employees to extended school year (ESY) positions was mandatorily negotiable as it involved a preservation of work issue. “The Board has not shown that sustaining that aspect of the grievance would interfere with its right to determine the number of ESY jobs, or the type of employees it decided were needed to staff the program. Its action did not involve a decision to curtail ESY services or other educational programs. Nor has the Board abolished positions for reasons of economy. The cases it cites are distinguishable. And, there is no assertion that the grievant was unqualified for the ESY position she sought or that the out-of-district physical therapists had superior experience or qualifications. Where qualifications are not in dispute, a board of education may be bound by agreements governing the allocation of summer positions. Similarly, where no issues of educational or governmental policy are presented, claims seeking the preservation of work performed by members of a negotiations unit are mandatorily negotiable and arbitrable.” *Mercer County Special Services School District Board of Education*, 36 NJPER ¶138 (NJ PERC 9/23/10).

II. **LEGAL IMPEDIMENTS TO ESTABLISHING MANDATORY SUBJECTS OF BARGAINING**

A. Educational Issues.

1. **Performance-Based Withholding of Salary Increment.**

   The withholding of a teacher’s salary increment because of the evaluation of the teacher’s performance is preempted by a statute that requires any decisions be appealed to the State Commissioner of Education. The employer denied the salary increment “due to the unsatisfactory fulfillment of your professional responsibilities.”
The Superintendent’s memorandum explaining the decision listed nine reasons, seven of which related to whether the teacher had met the professional expectations of her teaching position. The Commission held that the teacher could not grieve the denial. “The stated reasons focus on the teacher’s alleged teaching performance deficiencies. The concerns about timeliness and tardiness are relevant to teaching performance. Here, the majority of the Board’s stated reasons go beyond whether duties were performed in a timely manner.” *Old Tappan Board of Education*, PERC No. 2011-39 (NJ PERC 10/28/10).

2. **Reducing Extended School Year Per Diem.** A challenge to the employer’s reduction in per diem compensation for employees working an extended school year from $1/187^{\text{th}}$ of the annual ten-month salary to $1/200^{\text{th}}$ was not pre-empted by a State statute that defined a “day” as $1/200^{\text{th}}$ of a ten-month employee’s compensation. “This statute applies only when an employee has exceeded the annual sick leave and accumulated sick leave and seeks extended sick leave. There is no statute or regulation addressing per diem compensation for employees working in a summer program. The Board and Association could have negotiated any formula for ESY compensation including a straight dollar amount per day.” *Mercer County Special Services School District Board of Education*, 36 NJPER ¶139 (NJ PERC 9/23/10).

3. **Tuition-Free Education for Non-Resident Child of Employee.** The employer’s refusal to admit as a tuition-free student a non-resident employee’s child is mandatorily negotiable and not preempted by statute. A contract provision, entitled “Professional Courtesy,” allowed students of employees to attend school tuition-free. A student whose court-appointed guardian was an employee was permitted to attend kindergarten and the first grade. When the student’s grandmother asked that the student be evaluated due to academic problems, the employer summarily expelled the student, claiming that the student had been admitted in error and that the Board of Education never had approved his enrollment. The student later was tested by another school and found to be eligible for special education services. The employer unsuccessfully argued that “the educational placement of special education students is regulated and cannot be overruled by a local board of education” and that “[o]nce special education is concerned, negotiations must give way to the federal and State statutory/administrative schemes.” The employer also argued that State statutes that restricted enrollment of non-resident students controlled. The Commission held that, “The discretion granted to boards of education under N.J.S.A. 18A:38-3 to grant tuition waivers can be exercised through the collective negotiations process. . . . Contracts providing for tuition waivers are negotiable and enforceable. The failure of a school board to approve a particular waiver does not relieve the Board of its obligation to execute a waiver required by contract. . . . No statute or regulation would preclude Quinton from waiving tuition for a special education student placed in Quinton consistent with an IEP developed by the student's home district.” *Quinton Township Board of Education*, 36 NJPER ¶3 (NJ PERC 1/28/10).

4. **School Board’s Failure to Vote on Withholding Increments.** A challenge to the school board’s failure to vote on whether to withhold the increments of two teachers that had been ordered by the Superintendent was preempted by statute. Although the labor contract authorized the school board to approve withholding increments, a State
statute vested authority in the State district superintendent (who had full authority to operate a school district that was under full State intervention) to withhold increments. “Those statutes grant the State District Superintendent with the authority to take personnel actions such as increment withholdings and establish that the school board shall function in an advisory capacity only. . . . Thus, the Association may not pursue these grievances that seek to require the District Superintendent to get the advisory board’s approval of these increment withholdings. The final decision to withhold an increment rests with the District Superintendent.” Paterson City State-Operated School District, 36 NJPER ¶13; (NJ PERC 2/25/10).

B. Benefits.

1. Increased Co-Payment. The employer unsuccessfully argued that an increased co-payment for doctor office visits from $5 to $10 that was mandated by the State Health Benefits Plan (SHBP) and passed on to employees was pre-empted. The labor contract provided that the employer would assume all premium increases during the contract term. The court affirmed PERC’s holding that a grievance challenging the increase involved a mandatorily negotiable subject and could be arbitrated. The arbitrator then found that the employer violated the labor contract and ordered reimbursement of the co-payment increase. “We emphasize that PERC’s decision expressly preserved [the employer’s] right to refile its scope petition if the arbitrator concluded that [the employer] had violated the collective bargaining agreement and a dispute arises over the negotiability of any remedy issued. [The employer] may pursue this argument by refile its scope petition as permitted by the PERC decision.” Borough of East Rutherford, v. East Rutherford P.B.A. Local 275, No. A-1260-08T2, 2010 N.J. Super. Unpub. LEXIS 452 (NJ Super. March 4, 2010).

2. Changing Medical Insurance Carriers. The employer’s change in medical carriers, resulting in a decreased level of health coverage, was mandatorily negotiable. The employer was a member of the State Health Benefits Plan (SHBP), which terminated one health plan and initiated two preferred provider plans. The union demanded bargaining, invoking a contract provision requiring reopener negotiations whenever there are legislative changes covering health benefits. The employer unsuccessfully argued that bargaining was statutorily preempted. “[T]he level of health benefits is generally negotiable absent a preemptive statute or regulation and a grievance contests a change in a negotiated level of benefits is generally arbitrable. An arbitrator may determine whether the parties made such an agreement and whether the employer violated such an agreement.” The Commission added, however, that “an arbitrator cannot order the employer to continue the State Health Benefits Program Traditional Plan. That portion of the SHBP was eliminated by statute.” The Commission also declined to address, as premature, whether the employer could be required to re-open the salary provisions of the contract. “Should the arbitrator find a contractual violation and a dispute arise over the negotiability of any remedy issued, the Township may re-file its scope petition . . . .” City of Elizabeth, 36 NJPER ¶30 (NJ PERC 3/25/10).
C. Legislatively Imposed Furlough Days. The Governor of California lawfully implemented a two-day-per-month unpaid furlough program for State employees, despite the apparent absence of statutory, because of special legislation from the State’s General Assembly that ratified the program. The Court rejected arguments that the Governor possessed such authority from statutes: (1) defining the workweek (finding that the statutory language neither authorized nor prohibited furloughs); (2) authorizing the Department of Personnel Administration to rules relating to hours of work and overtime compensation; (3) providing an emergency exception to the obligation to meet and confer before implementing any law, rule, resolution or regulation directly relating to matters within the scope of representation; and (4) authorizing layoffs. The General Assembly’s legislation authorized the substantial reduction in appropriations for employee compensation, which could be achieved either through collective bargaining or “existing administration authority.” The latter option authorized unilateral furlough days and ratified the Governor’s previously implemented furloughs. The Court held that there was nothing in the State’s collective bargaining laws that precluded the General Assembly from adopting a furlough plan through legislative enactment. Professional Engineers in California Government v. Schwarzenegger, 50 Cal. 4th 989, 239 P. 2d 1186, 116 Cal. Rptr. 480 (2010).

D. Employee Personal Use of Vehicles. State Department of Education regulations requiring the employer to adopt a new vehicle use policy, did not prohibit the employer from entering into an agreement for the offset of compensation. The employer’s policy provided that vehicles may be assigned to individuals or to organizational units for use in a pool only in accordance with certain conditions. The employer previously permitted employees to take vehicles home at the end of their workday and drive them to work on the following day. Under the new policy, they had to park the vehicles on Board property at the end of the work day. The employer unsuccessfully argued that bargaining was not required because its policy tracked the regulation’s requirements about who can and cannot be assigned a vehicle. “Nothing in the regulation or the current circular addresses the impact of the loss of the ability to commute. Accordingly, the impact issue is not preempted . . . .” Buena Regional Board of Education, 36 NJPER ¶54 (NJ PERC 4/29/10).

E. Residency Compliance Appeal Procedure. The employer unlawfully failed to negotiate a procedure by which bargaining unit members may appeal an initial determination by the employer as to whether or not they are in compliance with the residency policy. The Board rejected the employer’s argument that a State statute preempted negotiations. To start, the statute applied only to police forces of less than 200 full-time officers. Preemption would not have occurred even if the statute applied. “The plain and clear language of the statute grants certain localities the right to unilaterally impose a residency requirement on its police officers. It is silent with respect to an appeal procedure from an employer's initial determination of non-compliance with the residency requirement. Consistent with precedent finding that a contractual alternative to judicial review . . . is a mandatory subject of negotiations, we conclude that an appeal procedure from an initial determination that an employee is not in compliance with a residency requirement is a mandatory subject. Simply put, such a determination adversely impacts an employee's terms and conditions of employment.” City of Niagara Falls, 43 NYPER (LRP) ¶3005 (NY PERB 2/8/10).
F. Successorship After Merger. A union’s proposal that addressed what would happen if the district was dissolved or merged with a neighboring fire district was not preempted by a statute that addresses local Civil Service units that merge with non-Civil Service units. The proposal stated in part that, “Upon such consolidation, merger, or transfer of assets and assumption, the Fire District as used herein shall mean said other corporation or government agency and this Agreement shall continue in full force and effect.” The statute, “on its face, does not preempt the proposed contract language. The statute addresses local Civil Service units that merge with non-Civil Service units. That may or may not be the circumstances should this fire district be consolidated or merge with another unit. Should the circumstances addressed by [the statute] occur, the provisions of that statute would preempt any conflicting contract language and should the Locals try to enforce through binding arbitration any conflicting provision, the District or the successor entity may file a new scope of negotiations petition seeking a restraint of that arbitration. However, based on this record and absent specific facts about a possible merger or consolidation, we cannot find that [the statute] would necessarily preempt the contract proposal.” Mount Laurel Fire District No. 1, 36 NJPER ¶87 (NJ PERC 6/24/10).

G. Discipline.

1. Police Discipline Procedures. The decision to preempt the statutory civil service procedural protections for police officers with an alternative procedure that includes binding arbitration is a mandatory bargaining subject. Prior case law had held that a City Charter and Administrative Code, and State police disciplinary laws pre-dating certain civil service laws delegating police disciplinary authority to City officials, demonstrate a public policy that outweighs the strong and sweeping policy supporting collective negotiations under the Act. This exception, however, does not apply to more general State laws that regulate towns, villages and other political subdivisions. Thus, an employer unlawfully attempted to repudiate a contractual discipline procedure for police officers that culminated in binding arbitration, and to replace that procedure with one that culminated in a ruling by the Town Board. The employer argued unsuccessfully that the police discipline procedures were preempted by the general State laws. Town of Wallkill, 42 NYPER (LRP) ¶3017 (NY PERB 7/23/09), aff’d, Town of Wallkill v. NY PERB, 43 NYPER (LRP) ¶7005 (NY Sup. Ct. 6/15/10).

2. Time Limits for Filing Charges. A union proposal which addressed time limits for the filing of disciplinary charges was preempted by statute. The proposal stated that, “All disciplinary charges shall be brought within forty-five (45) days of the date upon which the appointing authority or party bringing the charge has sufficient information to believe that an infraction has been committed. In the absence of the institution of the charge within the forty-five (45) day period the charge shall be dismissed.” The employer successfully argued that the proposal was preempted by a State statute that contained a similar time limit but provided an exception for charges that are also the subject of a concurrent criminal investigation. The union “It may seek to negotiate contract language that incorporates the statutory exception. However, the provision is not mandatorily negotiable as written because its does not include or reference the exception required by statute.” County of Monmouth, 36 NJPER ¶19 (NJ PERC 2/25/10).
3. **Initiating Major Discipline.** The employer’s decision to give a police lieutenant a six-day suspension for an infraction that warranted minor discipline was preempted by statute. The employer brought disciplinary charges against the lieutenant for allegedly violating Civil Service rules regarding misuse of public property (including motor vehicles), care of property and disobedience of orders. The Commission held that an arbitrator’s review of the employer’s decision to bring major disciplinary charges would infringe upon the employer’s right to discipline in the first instance. *City of Newark*, 36 NJPER ¶69 (NJ PERC 5/27/10).

In another decision involving the same parties, the Commission held that the employer’s initiation of major discipline (eight-day suspension) against a sergeant, along with his transfer, was not mandatorily negotiable. “[T]he City has a prerogative to impose discipline in the first instance, subject to review either pursuant to the grievance procedure or before the Civil Service Commission, depending on whether the final discipline imposed is minor or major. . . . That holding applies here as well where the [union] claims that the City should have brought minor, not major disciplinary charges.” However, whether the City should have convened a Command Conference rather than a Trial Board, and its failure to provide notice and an opportunity to be heard before transferring the sergeant for disciplinary reasons was negotiable and arbitrable. *City of Newark*, 36 NJPER ¶23 (NJ PERC 3/25/10).

4. **Alternate Statutory Appeal Procedures.** A State statute that provided an alternate statutory disciplinary appeal procedure does not preempt the labor contract’s discipline and grievance/arbitration procedures because the statute applies only to non-Civil Service jurisdictions. The employer contended that “it is a unique hybrid office because although its employees salaries are paid by the County and the County provides space and equipment for its functions, its budget is subject to the powers and jurisdiction of the State Auditor, its employees are state appointees and it is an autonomous office.” The Commission rejected that argument: “By its plain language, [the statute] applies only to counties where Civil Service is not operative. The County is a Civil Service jurisdiction and therefore the statute is not applicable. Assuming that all of the Superintendent’s assertions are true regarding the unique hybrid nature of the Superintendent’s Office, none of those factors transform the County to a non-Civil Service jurisdiction.” *Passaic County Office of Superintendent of Elections*, 36 NJPER ¶144 (NJ PERC 9/23/10).

5. **Statutory Broad Appointive Authority.** A State statute that “grants the Superintendent wide and discretionary appointive powers” does not preempt the contractual discipline and grievance/arbitration procedures when an employee is discharged. “That statute provides that the Superintendent ‘may’ remove certain employees whenever she deems it necessary. Disciplinary review procedures are generally mandatorily negotiable. Disciplinary review procedures were negotiated by the parties into their collective negotiations agreement. Absent preemption, the [union] may seek to enforce the disciplinary review procedures that were agreed to through collective negotiations.” *Passaic County Office of Superintendent of Elections*, 36 NJPER ¶144 (NJ PERC 9/23/10).
H. Reporting Vehicle Use as Taxable Income. Part, but not all of an employer’s decision to report, as taxable income, the value to employees of using authority-owned vehicles to commute to and from work was preempted by the tax laws. The employer issued a memorandum providing that for the 2009 tax year, employees assigned employer vehicles would be deemed to be receiving a benefit of $3.00 per day ($54.00 per month) for being able to commute in the employer’ trucks. A schedule of the paychecks reflecting the benefit was issued. “The parties agree that the tax code generally views employer-provided vehicles as fringe benefits and that the value of such benefits is part of an employee’s gross income unless specifically excluded. They disagree about whether an exclusion applies. Only the Internal Revenue Service can determine whether commutation in these vehicles must be considered taxable income. An arbitrator cannot make that determination. However, [the union] may pursue a claim that the Authority is contractually obligated to seek a determination from the Internal Revenue Service about the taxable status of the use of Authority vehicles and/or to seek an exemption under Internal Revenue Service rules.” New Jersey Turnpike Authority, 36 NJPER ¶32 (NJ PERC 3/25/10).

I. Home Rule Charter. The employer could not, pursuant to the Town Home Rule Charter, unilaterally establish the size of its police department in contravention of its agreement to refrain from making such changes during the terms covered by the labor contract; however, the employer could discontinue, after the labor contract expired, the practice of filling employment vacancies as they occurred because the size of the police workforce was a permissive bargaining subject. The Charter was not in direct conflict with the State’s collective bargaining law. “[T]Charter allowed the council to establish the number of officers and patrolman, and subsequently, the council has the right to organize the police department in an efficient manner, subject to its duty to bargain collectively with the FOP over wages, hours, working conditions, and all other terms and conditions of employment. . . . While the Town is correct that setting the size of its total workforce is an inherent right of management, it is not correct in asserting that the Union cannot seek arbitration when the Union alleges the Town reduced the size of the workforce during the term of the CBA and in direct contravention of the CBA. . . . Neither the Town’s Charter nor the Town’s inherent rights of management give the Town the right to unilaterally alter the size of its workforce in direct contravention of a collectively bargained contract provision. The decision of the Town to agree not to reduce its workforce during the terms of the controlling CBA does not preclude it from carrying out its statutory requirements, nor does it intrude on the essence of its mission in violation of Rhode Island decisional law. . . . When the terms of such agreement have expired, however, a different situation is presented. . . . [A]fter the Town has notified the Union that it no longer intends to be bound by the minimum workforce size provision, an arbitrator would not be appropriate to resolve the bargaining dispute because setting the size of the police workforce through attrition is a subject ‘reserved to the discretion of management.’ Town of North Providence v. Drezek, No. PC 09-5835, 2010 R.I. Super. LEXIS 98 (R.I. Super 6/29/10).

J. Civil Service Laws.

1. Furlough Days. The employer’s unilateral reduction of the workweek by one day per week for ten consecutive weeks, which is labeled as “temporary layoffs,” was not
preempted by Civil Service regulations that addressed layoffs. The State’s Civil Service Commission (CSC) had approved the temporary layoff plan. The reduced workweek eliminated the employees’ expected annual pay increase. The Commission held that “Civil Service laws and regulations do not preempt negotiations over the workweek and pay reductions embodied in the temporary layoff plan approved by the . . . CSC.” The Commission reasoned that, “We accept the . . . CSC’s determination that the temporary layoff plan had an economic rationale and that it did not violate any Civil Service laws, but that determination does not preclude negotiations. The facts that the employer has complied with a Civil Service requirement protecting employees does not negate the employees’ right to negotiate before their compensation, workweek and work year are reduced. The Civil Service Act and the Employer-Employee Relations Act provide employees with separate and distinct rights. A representative of the Civil Service Commission has determined that the Borough has met its obligations under the Civil Service Act to protect employee rights, but he has not considered whether the employees have a right under the Employer-Employee Relations Act to negotiate over the temporary layoffs. The Borough retains the discretion to decide whether or not to implement the temporary layoffs and may negotiate over the layoffs without violating any Civil Service statute or regulations. *Borough of Belmar*, PERC No. 2011-34 (NJ PERC 10/28/10).

2. **Denial of Payment for Unused Vacation Time upon Retirement.** An employer’s denial of payment of unused vacation time upon retirement to an employees who had participated in a donated leave program was preempted by Civil Service regulations. The employee had exhausted both his sick and vacation time because of a work-related injury. The City permitted – even though it did not have a Civil Service-approved donated leave program – other employees to donate their sick time. When the employee retired, he still had 53 unused donated days, which the employer returned to the donor employees. Civil Service regulations required any recipients of donated sick days to return any unused days upon retirement and prohibited such recipients from receiving payment for unused donated sick days. The regulations also required the receiving employee to exhaust all paid leave before receiving donated sick leave. The employer successfully argued that the dispute involved payment for unused donated sick days, which Civil Service regulations precluded. Accordingly, any claim for payment of used time, whether it was sick time (as the employer contended) or vacation time (as the union contended) was preempted by the Civil Service regulations. *City of Hoboken*, PERC No. 2011-44 (NJ PERC 11/23/10).

3. **Payment for Accumulated Vacation Time Beyond Civil Service Limits.** The employer’s refusal to allow an employee to continue to accrue vacation time beyond the limits permitted by Civil Service regulations was pre-empted, but its denial of payment to the employee for unused vacation time was not preempted. The employee had accumulated vacation time well beyond the regulatory 60-day limit, and the employer repeatedly granted her requests to carry over her unused time from one year to the next (even though Civil Service regulations required her to use the time within one year after it is earned). The employer denied her last request and also denied her request to be paid for unused time, directing her to bring her vacation balance with regulatory limits or lose the time, even suggesting that she work a four-day week to use the time off. When the employee failed to reduce her vacation balance (which
was more than 100 days over the regulatory limit), the employer reduced her vacation
time to 60 days. The Commission held that while the Civil Service regulation
“prohibits the accumulation of more than two years of vacation leave[,] . . . the
regulation addresses itself to the scheduling of vacation days and the loss of vacation
days, not to possible payment for unused vacation days not yet lost.” The Civil
Service regulation, therefore, “does not expressly and specifically prohibit an
employer from agreeing to give an employee the option of a cash payment for unused
but still available vacation days instead.” Twp. of Mount Holly, PERC No. 2011-41
(NJ PERC 10/28/10).

4. Reduced Workweek. The employer’s financially-motivated decision to reduce the
workweek of the three bargaining unit employees in the Building Department and
Registrar's Office from full-time to part-time was mandatorily negotiable, even
though the Civil Service Commission approved the reduction as a layoff under the
Civil Service laws. Civil Service statutes and regulations “do not preempt
negotiations over the Borough’s decision to reduce weekly work hours because they
do not mandate a reduction in work hours or otherwise restrict the Borough's
discretion to decide whether or not to reduce work hours. Indeed, [the Civil Service
regulation] emphasizes that it is the employer, not the Civil Service Commission, that
decides whether to institute or pursue a layoff action. The employer thus retains
discretion over whether or not to implement this workweek reduction to achieve
budgetary savings and it has a duty to negotiate over that reduction even though it has
a prerogative to reduce the overall number of employees. The fact that the employer
must comply and has complied with a Civil Service requirement protecting
employees does not negate the employees [sic] right to negotiate before their
workweek is reduced. The Civil Service Act and the Employer-Employee Relations
Act provide employees with separate and distinct rights. A representative of the Civil
Service Commission has determined that the Borough has met its obligations under
the Civil Service Act to protect employee rights; he has not determined that the
employees do not have a right under the Employer-Employee Relations Act to
negotiate over the workweek reduction. The Borough retains the discretion to decide
whether or not to implement this workweek reduction and it may negotiate over that
reduction without violating any Civil Service statute or regulations.” Borough of
Keyport, 36 NJPER ¶133 (NJ PERC 9/23/10).

5. Accumulated Vacation Leave. Civil Service statutes preempted a union proposal to
retain contract language regarding the accrual of vacation leave beyond the year it
was earned or the next succeeding year. The Civil Service statute permitted accrual
of vacation only during the year it was earned or the next year. “The statute
recognizes that business demands may prevent vacation days from being used in the
year they are earned, but states that such days shall accumulate and be granted during
the next succeeding year only. Thus, [the contract provision] is not mandatorily
negotiable to the extent it permits employees to accumulate vacation leave beyond the
year after the vacation is earned.” City of Hoboken, 36 NJPER ¶31 (NJ PERC Dir.
3/25/10).

6. Binding Arbitration for Major Discipline. A union proposal which specifically
permitted the union to invoke binding arbitration for major discipline was preemt
by State Civil Service statutes. The employer successfully argued that the proposal was not negotiable because it did not recognize that certain actions were reviewable only to the Civil Service Commission and not to binding arbitration. The Commission rejected the union’s argument that the employer could seek to restrain arbitration of such matters. “We find this provision to be not mandatorily negotiable. It specifically permits the PBA to invoke binding arbitration for major discipline. Major discipline for Civil Service employees can only be appealed to the Civil Service Commission.” County of Monmouth, 36 NJPER ¶19 (NJ PERC 2/25/10).

7. **Seniority as a Tie-Breaker.** Contract provisions that require seniority prevails in selecting for promotions or transfers when all qualifications are equal do not interfere with the “Rule of Three” under civil service laws. One provision stated specifically that seniority shall be a tiebreaker only where the Rule of Three does not apply. Another provision addressed provisional or interim appointments, which are not subject to the “Rule of Three.” “Thus, there is no conflict with that rule or the employer's prerogative to determine qualifications for those appointments.” Mount Laurel Fire District No. 1, 36 NJPER ¶88 (NJ PERC 6/24/10).

8. **Calculation of Seniority for Layoffs.** A grievance contending that the employer improperly computed the employee’s seniority for layoff purposes was preempted by the statutory definition of “layoff unit” in the Civil Service statutes, which provided that, in local service, the layoff unit shall be a department in a county or municipality. The labor contract defined seniority as “the accumulated length of continuous full time service with the Town, computed from the last date of hire.” The employee’s “contractual claim that departmentalizing of seniority violated the contract is preempted by this definition of the layoff unit. More generally, we have restrained binding arbitration of grievances involving the demotional/layoff rights of permanent Civil Service employees with statutory appeal rights.” Town of Hammonton, 36 NJPER ¶33 (NJ PERC 3/25/10).

K. Fiscal Emergency Laws.

1. **Municipalities Financial Recovery Act.** An interest arbitration award that provided wages, benefits and other improvements to working conditions that exceed the limits contained in a Recovery Plan that was developed under the State’s Municipalities Financial Recovery Act properly was partially vacated, with the remaining portions upheld as consistent with the Recovery Plan. Among other things, this Act provides that, “A collective bargaining agreement or arbitration settlement executed after the adoption of a plan shall not in any manner violate, expand or diminish its provisions.” The Act also specifically authorizes recovery plan provisions involving possible changes in collective bargaining agreements and permanent and temporary staffing level changes or changes in organization. The employer was determined in 1992 to be financially distressed, and it has been operating under a series of Recovery Plans, the most recent implemented in 2002. The Recovery Plan provided that any changes occurring during collective bargaining “must be in conformance with the financial parameters of the Recovery Plan.”
The interest arbitration panel believed that the award was consistent with the Recovery Plan, but the courts modified the wage, health insurance benefits, minimum staffing, and pension provisions of the award. The court upheld increasing life insurance benefits to twice the yearly wage of the bargaining unit member, and providing for rank differential of four percent in base wages paid to ranks above Private.

a. **Wages.** The wage portion of the award mandated an 8% increase retroactive to January 1, 2008, and further increases of between 3.0% and 3.2% every six months until 2014 (amounting to 45% over seven years). The court held that the 8% increase should start as of the date of the Award in November 2008 because retroactive payments violated the Plan. The remaining increases, which were prospective in nature, were consistent with the Plan “regardless of whether they are intended to make up for purported lost ground.”

b. **Health Benefits Costs.** The health insurance benefits portion of the award increased certain out-of-pocket costs, made the employer fully responsible for premium payments up to a certain amount, required the parties to split equally any premium costs above that amount, and allowed retirees to remain covered for 10 years after retirement. The court held that providing insurance benefits to retirees violated the Plan; therefore, it ordered coverage terminated as of the date of a prior decision that likewise invalidated retiree insurance coverage. The court, however, rejected the employer’s contentions that the remaining portions of the Award exceed the expenditure caps in the Plan due to lack of evidence.

c. **Staffing.** The court invalidated provisions in the Award regarding maintaining current levels of minimum staffing of firefighters on a per apparatus basis (as opposed to minimum overall staffing, which the Plan prohibited). “Although the topic of minimum manning of each piece of apparatus is subject to bargaining, it is also a matter impacting managerial prerogatives related to the overall budget and organizational structure. Because of its potential broad reach, we conclude that the "apparatus staffing" provision of the 2008 Award unduly interferes with managerial prerogatives and should be voided.” The court also vacated another provision that the employer would not unnecessarily endanger the health and safety of a bargaining unit member by subjecting the member to a managerial or physical condition the employer could have anticipated or prevented by the expenditure of moneys or other action, because the provision “expressly mentions managerial conditions and the expenditure of funds. Clearly, it unduly interferes with the City’s managerial rights involving overall budget as well as the express managerial rights.” In addition, another provision that applied to minimum manning should the employer close multiple stations at the same time, unduly interfered with managerial prerogatives related to overall budget and organizational structure. Furthermore, the court held that the Award “does not permit the City to determine and change job duties for each position, to determine and change schedules for each employee, and to assign work to any employee, as expressly required by . . . the Plan.” However, the court upheld adding contract language regarding safe working conditions because it was consistent with language previously upheld by the court. The court further held that another
portion of the Award that addressed minimum manning of a “Quint,” did not unduly infringe on the managerial prerogatives related to overall budget and organizational structure.

d. Pension Benefits. The pension portion of the Award increased pension payments as a percentage of annual salary based upon length of service. The court vacated the Award’s provisions regarding increased pension benefits for three reasons. First, the State’s pension statute limited the employer to provide a total pension allowance of 50% of the salary currently paid to a patrolman or fireman, highest pay grade. The Award allowed a pension up to 70% of salary. Second, the Award failed to comply with the State pension law’s requirement of providing a cost estimate to any changes. Third, the Award failed to address whether the revised pension plan was actuarially sound.


2. Special Municipal Aid Act – Additional Compensation for Permanent Civil Service Appointment. Whether to award additional compensation for an employee when her appointment to supervising code enforcement officer became a permanent civil service appointment is not preempted by State statute that sets forth the conditions under which the financial matters of a municipality may become subject to oversight by a financial review board as well as the specific powers that such a board possesses. The employer was classified as a distressed City and received funding under the State’s Special Municipal Aid Act. Under a memorandum of understanding regarding the conditions under which aid would be received, the employer agreed to abide by the financial, administrative and operational recommendations made by the State’s Department of Community Affairs Local Finance Board. The employer was subject to a fiscal review by the Board, which had the power to approve and deny the employer’s annual budget, all debt, all contracts, and all municipal expenditures. The employer unsuccessfully argued that, “its financial matters are subject to Board review, it cannot independently provide wage increases mid-contract to employees unless an employee has been promoted to a new position or a desk audit conducted pursuant to [State Civil Service Regulations] determines that the employee is working beyond the scope of his or her current job title.” “The statute sets forth the conditions under which the financial matters of a municipality may become subject to oversight by a financial review board, and the specific powers that such a board possesses. Nothing in that statute expressly, specifically and comprehensively preempts the issue in this case which relates only to whether the grievant should have received additional compensation for her promotion. Although the City’s financial matters are subject to oversight by the Board, that fact does not insulate the City from arbitration over mandatorily negotiable terms and conditions of employment like compensation.”

City of Bridgeton, 36 NJPER ¶137 (NJ PERC 9/23/10).

L. FMLA Certification Requirements. The employer’s requirement that an employee complete an FMLA certification form when the employee declined to take FMLA leave was not preempted by the FMLA. “[A]n employer may need to use a doctor’s certification or similar means to ascertain an employee’s FMLA eligibility and meet its
notice and designation obligations. However, there may be circumstances where the employer has sufficient information from the employee to meet its designation obligations without the use of a doctor's certification. For example, when an employee has a broken arm and the medical condition is obvious. Accordingly, the employer’s ability to compel an employee to submit a doctor’s certification depends on the facts surrounding each employee’s leave. The FMLA regulations do not address an employer’s duty to designate leave as FMLA-qualifying when, as in this case, the employee declines FMLA leave and wishes to use paid leave. Therefore, under these specific facts, the employer did not have a statutory right to require completion of the form. However, an employee who decline FMLA leave and does not complete a medical certification may waive FMLA protections.” Township of Parsippany-Troy Hills, 36 NJPER ¶127 (NJ PERC 8/12/10).

III. MANDATORY BARGAINING SUBJECT ESTABLISHED

A. Wages.

1. Eliminating Detective Stipend. The employer’s elimination of the detective stipend for officers reassigned from detective to patrol was mandatorily negotiable. The employer had revised the status of nine police officers by rescinding their detective status. The union challenged only the detective pay claim and did not challenge the transfer decisions. The Commission held that, “[A] grievance asserting that the City had agreed to continue to pay detective stipends to officers it had reassigned to the patrol division would not substantially limit the employer’s policymaking powers.” The Commission cautioned, however, that “[i]f the FOP cannot prove the existence of an agreement to continue the stipend after a transfer from the detective bureau, it would follow that the salary reduction was a direct consequence of the managerial decision to transfer the grievants. Thus, absent such an agreement, an arbitrator cannot order that the officers continue to receive detective pay.” City of Newark, PERC No. 2011-53 (NJ PERC 12/16/10).

2. Retirement Incentive Payment. The employer could not unilaterally implement a $1,000 payment for employees’ submission of a resignation letter or retirement application by a certain date. The employer previously had implemented lump-sum retirement incentive payments with the union’s approval. The employer administered internship and recruiting programs for nurses with a local college, trying to fill as many of its vacant nursing positions as possible with those graduates because nurses with local ties were less likely to leave their positions. The employer reviewed its staffing needs and concluded that it could not hire nurses from the graduating class unless nurses retired or resigned during the upcoming year. The employer unsuccessfully argued that its letter asking employees to disclose whether they intended to retire or resign within the upcoming year was not a “retirement incentive” because it was not intended to encourage employees to retire or resign. “[T]he issue here is not whether Respondent really wanted to encourage employees to leave. Nor is the issue whether Respondent had the right to ask Charging Party’s members to provide it with notice of their intention to leave their employment. Rather, the issue is whether Respondent could unilaterally decide to pay employees to provide such notice. Whether the purpose of this monetary incentive was to encourage employees
to leave or merely encourage them to provide advance notice of their leaving, . . . the incentive constituted an ‘emolument of value which accrued to employees out of their employment relationship.’” Alpena Regional Medical Center, 23 MPER ¶11 (Mich. ERC 2/12/10).

3. **Prevailing Wage Ballot Initiative.** The employer breached its duty to meet and confer in good faith when it failed to bargain to agreement or impasse a prevailing wage measure to agreement or impasse prior to placing it on the ballot. The initiative would have changed the calculation of prevailing wages used in the determination of rates of pay for County employees. The initiative provided that: (a) only public sector salaries would be used to calculate the prevailing wage, private sector salaries would be excluded; (b) “wages” would be defined to include all employer paid costs; (c) the terms “comparable” and “commensurate” would be defined to mean substantially similar or substantially in conformity with; and (d) in calculating the prevailing wage, those employees paid a base wage of $100,000 would be conclusively presumed to earn the prevailing wage (this presumption would be in addition to the existing one for rates of pay contained in a collective bargaining agreement with recognized employee organizations). The voters rejected the initiative. The Commission distinguished prior decisions that “merely determined the City’s initial bargaining position, and did not set wages” or set an amount “at not less than” a certain baseline salary. “The Prevailing Wage Measure, however, did not include the ‘not less than’ or similar language. Instead, the measure provided: ‘Rates of pay for county employees shall be fixed by the Board of Supervisors and shall be commensurate with rates of pay that are prevailing throughout the county for comparable public sector employees.’ Absent the ‘not less than’ language, we find that this provision did not establish an initial bargaining position. Instead, it established the wages of the employees in question based on the prevailing wages throughout the County.” County of Santa Clara, 34 PERC ¶109 (Cal. PERC 6/25/10); County of Santa Clara, 34 PERC ¶97 (Cal. PERC 6/8/10).

4. **Placement on Teacher Salary Guide.** The union’s challenge to the employer’s placement of a teacher on the salary guide was mandatorily negotiable. The employer alleged that the teacher had been incorrectly placed on the guide and had been overpaid for a prior school year, and its decision was intended to recoup the overpayment. The employer unsuccessfully alleged that it had a managerial prerogative to recoup payments made to the grievant under an erroneous salary guide placement. “[U]nder the negotiability balancing test, placement on the salary guide is a mandatorily negotiable compensation issue. The arbitrator may determine whether the grievant was placed on the correct step of the salary guide.” Hanover Park Regional Board of Education, 36 NJPER ¶84 (NJ PERC 6/24/10).

5. **Discontinuing Round-Trip Transportation.** The employer unlawfully discontinued providing round trip transportation between two airports for police officers working their regular day off, or at an airport location which was not their permanent work assignment. Because of the employer’s action police officers, when working their regular day off, or on a vacation day, were required to report for duty at the location where the overtime was being worked, rather than reporting to their permanently assigned base, and then being transported, while on duty, to the location
where the overtime was being worked. “[T]he matter in dispute in this case involves wages which are indisputably terms and conditions of employment. . . . [T]he issuance of the . . . memorandum resulted in a reduction of overtime pay as well as having a potentially adverse impact on other mandatorily negotiable benefits for the affected police officers. . . . [T]hese police officers still needed to go to their permanent base in order to retrieve their uniforms and the specialized equipment necessary for them to perform their assigned duties. . . . [T]he reason . . . police officers were being required to report to their assigned workplace when they were working on their regular day off, or on vacation, was to avoid the payment of overtime for the time involved in transporting these officers.” *Port Authority of New York and New Jersey*, 2010 NYPER (LRP) LEXIS ¶155 (Port Auth ERP 6/30/10).

6. **Reduced Pay from Transfer.** The employer’s decision to reduce the pay of two police officers after transferring them from the detective division to the patrol division was mandatorily negotiable only to the extent of challenging the reduction in pay and not the transfer. “We have often restrained arbitration over claims contesting the substantive decision to transfer a police officer from detective to patrol officer. It does not matter whether the personnel action is disciplinary or not. The PBA, however, is not challenging the transfer decisions. We will not restrain arbitration over the claim raised by the grievance that the officers were contractually entitled to continue to receive their detective-level pay. . . . If the PBA cannot prove the existence of an agreement to continue the stipend after a transfer from the detective bureau, it would follow that the salary reduction was a direct consequence of the managerial decision to transfer the grievants. Thus, absent such an agreement, an arbitrator cannot order that the officers continue to receive detective pay.” *Township of Bloomfield*, 36 NJPER ¶14 (NJ PERC 2/25/10).

B. Benefits.

1. **Health Care Premium Contributions of Retirees.** The employer unlawfully refused to bargain over changes to its contributions to health care premiums for retirees. The Commission held that unions may demand bargaining over retirement benefits for current employees. “While . . . a municipality is not required to negotiate over the terms of retirement benefits of retired persons, it is required to negotiate over the future benefits of currently employed persons. The right to bargain for retirement benefits which fall within established boundaries is not hollow and useless.” *City of Gainesville*, 35 FPER (LRP) ¶356 (Fla. PERC 11/17/09).
C. Hours.

1. Furlough Days. The use of unpaid “furlough days” continues to be one of the most frequent responses to the fiscal crises of public entities during the current recession. In many instances, the furlough days are negotiated. In a few instances, however, employers or other governmental entities – claiming either managerial prerogative or existing contract rights – have attempted to implement such furloughs unilaterally, resulting in challenges by the affected unions.

a. Reducing Yearly Calendar. In one case, the employer unsuccessfully attempted unilaterally to reduce the work year from 260 days to 240 days, and correspondingly reduce employees’ pay, to reduce its operating costs. The labor agreement did not specify the length of the work year, but employees had worked 260 year during the preceding year. Finding that the employer’s action is reality was a furlough, the Commission held that “[T]he employer’s decision to reduce its work calendar from 260 days to 240 days permanently impacted the hours and wages of employees” and “would also impact the employees’ pensions.” The Commission reasoned that, “Despite the employer’s legitimate need to achieve budgetary savings, the decision to close facilities for 20 days impacted employee wages and hours so substantially that the decision must be bargained. Although . . . employers generally have the entrepreneurial right to control the level of services that they provide, this employer was not reducing services, nor did it provide any evidence demonstrating that its decision to close its facilities on certain days was due to lack of work, or that the public was no longer utilizing a service it offered. . . . The union had a legitimate interest in being afforded the opportunity to work with the employer through collective bargaining to provide possible alternatives to reducing wages and hours of certain of its bargaining unit employees. The union is not required in this hearing to specify alternatives it might have proposed; it is only required to demonstrate that the reduction to the calendar was a mandatory subject of bargaining that triggered its right to be provided notice and an opportunity to request bargaining.” Griffin School District, Dec. No. 10489-A (Wash. PERC 6/18/10).

b. Implementation During Representation Election. In another case from the same jurisdiction, the employer likewise could not unilaterally implement ten furlough days – which were intended to achieve labor savings and not to eliminate services – during a pending representation election proceeding. The Commission held that the employer’s bargaining obligation extended beyond impact bargaining. The Commission agreed that “[T]he employer’s desired action . . . immediately impacted the wages, hours and working conditions in such a manner as to predominate over the employer’s managerial prerogative.” The Commission distinguished prior decisions where employers were allowed to change the scope of its operation because “this employer’s decision to close its offices does not constitute a programmatic change to any employer service, rather the decision to implement furloughs simply precludes certain services from being available on ten days of the year. The employer presented no evidence demonstrating that the decision to close certain offices was a strategic one based upon a study of
experience, or that it was actually eliminating or making wholesale changes to its services.” King County, Dec. No. 10576-8-A (Wash. PERC 6/22/10).

c. **Temporary Layoffs**: In two other cases from the same jurisdiction, the employers unsuccessfully attempted unilaterally to implement what they called “temporary layoffs.” In one instance, the employer reduced the workweek by one day per month for eight months, and in the other the reduction was one day per week for ten consecutive weeks. In both instances, the employer’s motive was to reduce labor costs. In both cases, the labor agreement defined a workweek (“five consecutive days, Monday through Friday” and “forty (40) hours per week”). In the lead case, the Commission held that while “[p]ublic employers . . . have a managerial prerogative to reduce staffing levels through permanent layoffs[,] . . . in assessing the personnel actions falling short of abolishing positions, Court and Commission cases have consistently distinguished the non-negotiability of permanent staffing reductions from the negotiable issues of reductions in employees’ work years, workweeks, and work hours. That is so even when the latter reductions could be labeled layoffs under education or Civil Service laws. . . . Accordingly, as a rule, reductions in weekly work hours and corresponding reductions in pay are generally negotiable. The Commission distinguished the case from another decision that involved “undisputed financial necessity and a complete departmental shutdown affecting all employees, some of whom – including the Acting Commissioner – were managerial executives and two-thirds of whom were outside of the charging party’s unit and the Act’s coverage” Rather, “the savings sought by the Borough is approximately equal to the salary of just one full-time employee; the Borough at all times retains the non-negotiable managerial prerogative to reduce the number of employees . . . to achieve the same savings; there is no assertion or showing that any operations or programs . . . would be affected by the loss of one employee; and nothing in the record establishes that a significant number of employees outside the unit were affected by the shut down.” Borough of Belmar, PERC No. 2011-34 (NJ PERC 10/28/10); accord Twp. Of Mt. Laurel, PERC No. 2011-35 (10/28/10).

d. **Furlough.** In a case from another jurisdiction, the employer did not try to recharacterize its actions when it announce eight unpaid furlough/layoff days for more than 400 employees, but the result was the same. The Commission held that the decision had a significant effect on wages and hours. ““[W]hile a decision to reduce employee work hours may have the same fiscal effect on an employer as a decision to reduce the number of employees, such a reduction has a significant impact on the salaries and working conditions of employees who remain employed. . . . [T]he announcement of eight unpaid furlough/layoff days for more than 400 employees had a significant effect on Charging Parties’ units and constituted a substantial breach of their contracts. . . . Respondent took unilateral action to implement furlough/layoff days only after it had failed to persuade the union to agree to them. The issue in this case, of course, is not whether furlough days are a wiser approach to dealing with a fiscal crisis than reducing the number of employees, or whether furloughs are fairer to the employees or to the taxpayers. Rather, the issue is whether Charging Parties unit members were entitled to rely on the terms and conditions of employment agreed to by the
parties in their contracts during the term of those agreements. . . . Respondent’s announcement of unpaid furlough/layoff days which reduced the work period set out in Charging Parties’ contracts constituted a repudiation of Respondent’s obligation to bargain in good faith.” *Genesee County*, 23 MPER ¶69 (Mich. ERC 7/29/10).

e. Reducing Length of School Year. The employer unlawfully reduced the length of the school year from 198 to 184 days. The employer’s actions were financially motivated. “A decision by a public employer to reduce the size of its workforce is within the scope of managerial prerogative; however, the Employer here chose instead to reduce the number of days worked by each of its employees. . . . Although the decision to cutback shifts or hours may have a fiscal impact on the employer similar to a layoff, such a cutback is different from a layoff for the employees who remain employed. . . . Such a decision significantly changes employees’ hours, take home pay, and actual working conditions. Inasmuch as the composition of the work year is covered by unambiguous contract language in this matter, such a significant change as that imposed by the Employer is a substantial repudiation of the contract and of the underlying bargaining obligation. . . . Many public employers are presently facing such budget shortfalls, and in such times hard choices must be made. A fundamental conflict always exists when choosing between unattractive options. . . . The choice is often seen as between laying off less senior employees, and consequently reducing services or further burdening the remaining workforce, or accepting or imposing economic concessions upon all employees in the affected group. Such a fundamental and difficult balancing of interests may not however, in a bargaining situation, ordinarily be done unilaterally by either party without violating PERA.” *Goodrich Area Schools*, 22 MPER ¶103 (Mich ERC 12/7/09).

2. Reduced Workweek. Although not a furlough case, the employer’s financially-motivated decision to reduce the workweek of the three bargaining unit employees in the Building Department and Registrar’s Office from full-time to part-time, which allegedly disregarded seniority and eliminated health insurance coverage for the three employees was mandatorily negotiable. The reduction avoided the layoff of an additional employee and allowed the Construction Office to operate efficiently. The employer unsuccessfully argued that: (a) the reduction in workweek was a non-negotiable layoff action because the work hours reduction is a layoff under Civil Service law; and (b) even absent a preemptive statute or regulation, having to negotiate over reducing the workweek would significantly interfere with its governmental policy determination. “[A]n employer has a duty to negotiate before implementing a reduction in its employees workday, workweek, or work year.” The Commission “distinguish[ed] between the non-negotiable decision to reduce the overall number of employees and the generally negotiable decision to cut the work hours and compensation of employees continuing to work. The Commission rejected the employer’s argument that, ‘the action complained of and that there is no material difference between the Board’s right to cut staff and the right to cut months of service of staff personnel where the economy motive is common to both exercises,’ responding that, ‘While cutting staff . . . would be permissible unilaterally without prior negotiations, there cannot be the slightest doubt that cutting the work year, with
a consequence of reducing annual compensation of retained personnel and without prior negotiation with employees affected, is in violation of both the text and the spirit of the Employer-Employee Relations Act.” The Commission added that, “the fact that Civil Service regulations may provide that work hour reductions trigger certain Civil Service layoff protections does not control our determination as to whether this reduction in work hours is a layoff under the Employer-Employee Relations Act and therefore a managerial prerogative not subject to collective negotiations. It is the effect of a personnel action, not its label under a separate regulatory scheme, that counts.” The Commission also held that its decision would be unchanged under the traditional balancing test: “We recognize that the employer’s budgetary concerns on this issue are significant, but those concerns must be presented and protected through the negotiations process, where the employer is obligated to participate, but not to agree to any particular proposal. If the Borough does not achieve its budgetary objectives through the negotiations process, it may still realize any desired budgetary savings by exercising its prerogative to reduce the overall number of employees.” Borough of Keyport, 36 NJPER ¶ 133 (NJ PERC 9/23/10).

3. **Monthly Limits on Overtime.** Where the labor contract provision allowed troopers, corporals and sergeants to work discretionary overtime up to 400 hours per calendar year, the employer unlawfully issued a special order limiting the assignment of discretionary overtime to a maximum of 24-44 hours per month, depending upon rank. The employer unsuccessfully argued that the assignment of discretionary overtime is a matter of inherent managerial prerogative. “[W]here a public employer chooses to negotiate [inherent managerial prerogatives] . . .[t]hose matters negotiated and included in collective bargaining agreements are binding on the public employer for the life of the agreement. Thus, the mere identification of a matter as one of management prerogative . . . does not prohibit a public employer from negotiating over such matters or including agreements in a collective bargaining contract concerning such matters. Indeed, . . . once an employer has negotiated over such matters and reached agreements with a union and incorporated those agreements in a contract, it is an unfair practice for the public employer to refuse to honor those agreements during the life of that contract. . . . [A collective bargaining agreement] may well include compromises which span the boundaries of mandatory and permissive subjects of bargaining. A unilateral midterm modification of any aspect of that [agreement] therefore serves to undermine the integrity of the entire [agreement]. . . . [T]he prohibition against unilateral mid-term modifications of contractual provisions is not swayed because the provision at issue constitutes a permissive subject of bargaining. Just as the duty to execute an agreement should not turn upon the mandatory or nonmandatory nature of the subject matter, so too the obvious modification or repudiation of such an agreement during the contractual term should not be excepted from a good faith violation simply because there was no duty to bargain over that issue in the first instance.” Commonwealth of Pennsylvania (State Police), 41 PPER ¶ 32 (Pa. LRB 3/16/10).

4. **Replacing Full-Time Employees with Part-Time Employees.** The employer unlawfully instituted a policy of replacing full-time employees working a 40-hour week who vacate full-time positions in the same title with regular part-time employees (RPT) working a 39-hour week. RPT employees received substantially
reduced benefits, such as vacation, sick, personal and bereavement leave, shorter meal breaks, less pay for holidays, and shorter periods of “summer hour time.” The employer did not have a practice of replacing full-time employees with RPT employees. The employer unsuccessfully argued that its decision fell within its managerial authority. “[A]lthough staffing and the level of services provided by an employer are nonmandatory subjects under the Act, an employer’s choice of the specific means of accomplishing those prerogatives directly affect terms and conditions of employment and, therefore, is a mandatory subject. . . . [A]n employer’s policy decision may not be mandatorily negotiable if it is inherently or fundamentally related to the primary mission of the employer. However, the mere fact that a work rule has some relationship to an employer’s mission does not grant an employer the authority to act unilaterally if the change significantly or unnecessarily intrudes on the protected interests of bargaining unit members under the Act.” County of Erie, 43 NYPER (LRP) ¶3016 (NY PERB 4/22/10).

5. Denying Job Share Request. The employer’s denial of a physical therapist’s request to job-share a position with another physical therapist during the extended school year (ESY) and its decisions to hire non-district employees to ESY positions and permitting one of them to job share a position with an in-district employee, were mandatorily negotiable and arbitrable. “Job sharing agreements relate to employee work hours and are also mandatorily negotiable. And an employer changes terms and conditions of employment when it cuts the work year to ten months and categorizes the other month(s) as summer work.” Mercer County Special Services School District Board of Education, 36 NJPER ¶138 (NJ PERC 9/23/10).

D. Leaves of Absence.

1. Sick Leave Verification Procedures. The employer lawfully required a police sergeant to be examined by an employer-selected physician to substantiate his purported illness. The sergeant had submitted notes from his doctor which conflicted over his rate of recovery and anticipated return-to-work date. In response to one e-mail inquiry regarding when he would return to work, the sergeant retorted, “return to work when healthy and not a day before that. I cannot give you a timetable because there is no timetable.” Concerned over whether the sergeant ever would return to work, the employer directed him to be examined by an independent physician, at the employer’s cost. “[T]he Borough has a managerial prerogative to require the grievant to undergo a medical evaluation arranged by the Borough to verify the bona fides of his claim of illness. Here, the sergeant submitted conflicting information regarding whether he would be returning to work, and his doctor was unable to provide a clear anticipated return to work date. . . . In the face of unclear documentation, it would substantially limit governmental policy if the Borough could not reasonably exercise its right to verify a sick leave claim by requiring the sergeant to undergo a Borough-arranged medical evaluation.” Borough of Waldwick, 34 NJPER ¶135 (NJ PERC 12/18/09).

2. Use of Emergency Leave for Non-Emergency Purposes. The employer’s denial of a police officer’s request to use an emergency leave day to take off for a non-emergency reason. The labor contract provided that, “An employee may utilize an
emergency day in a non-emergency capacity; however, the employee must schedule it one week in advance.” The employer denied the request because the officer’s scheduled shift was already short of officers, thus requiring an overtime assignment to allow the request. The employer unsuccessfully argued that, “a contract cannot be construed to deprive an employer of its reserved right to deny leave requests if granting a request would prevent it from deploying the minimum number of officers it requires for a shift.” The Commission held that, “[T]he scheduling of vacation days and other time off is mandatorily negotiable so long as an agreed-upon system does not prevent an employer from fulfilling its minimum staffing requirements. . . . [A]n employer may deny requested time off to ensure that it has enough employees to cover a shift, but it does not preclude an employer from agreeing to allow an employee to take time off even though doing so will require it to pay overtime compensation to a replacement employee. The additional labor cost of overtime payments does not make a time off scheduling dispute non-negotiable and non-arbitrable.” Township of Livingston, 36 NJPER ¶26 (NJ PERC 3/25/10).

3. **Concurrent Use of FMLA Leave.** The employer lacked the managerial prerogative to require an employee to complete an FMLA certification form when the employee declined to take FMLA leave. The employer threatened to suspend an employee indefinitely if he did not submit the form. The employee wanted to use his paid leave rather than request an FMLA leave, but submitted the form by the deadline. “An employer has a prerogative to establish a sick leave verification policy and to use reasonable means to verify employee illness or disability. . . . We have repeatedly held that an employer has a prerogative to require employees on sick leave to produce doctors’ notes verifying their sickness. However, sick leave verification does not permit an employer to routinely request details of an employee’s illness. Unlike a doctor’s note, the form at issue requires an employee’s healthcare provider to detail the illness and treatment timeline for the employee or the employee’s family member. Because the employer does not need the details of an illness to verify sick leave, on balance, absent a question of sick leave abuse or fitness for duty, an employee’s privacy interests outweigh the employer’s interest in obtaining details of an employee’s illness or injury.” Township of Parsippany-Troy Hills, 36 NJPER ¶127 (NJ PERC 8/12/10).

4. **Restricting Leave Use.** The employer’s policy that denied use of leave time because the employer redeployed Traffic and Communications Bureau officers only for unscheduled absences, and did not count three particular officers toward minimum staffing requirements for scheduled absences was mandatorily negotiable. The policy stated that three particular officers will be counted toward staffing minimums for unscheduled absences, such as the same day use of sick leave, but not for scheduled absences, such as planned vacations or compensatory time. “[T]he issues relate to the negotiable and legally arbitrable issue of the use of contractual leave time.” Township of Wayne, 36 NJPER ¶118 (NJ PERC 8/12/10).
E. Other Conditions.

1. Discipline.

a. Violation of Smoking Policy. The employer’s ban on the use of tobacco products (both smoking and smokeless) by police officers in non-public employee work areas and in police vehicles not used for mass transportation was a mandatory subject of bargaining and was not an inherent managerial prerogative. The employer previously permitted its police officers to smoke and use tobacco products in its buildings, vehicles, and equipment, until the Borough’s council adopted an ordinance prohibiting the use of all tobacco products on or in borough-owned buildings, vehicles, and equipment. “[E]mployee tobacco use at his or her place of employment is germane to the employee’s work environment; thus, it is properly described as a working condition. While tobacco use may not be important to certain workers and has been proven to be deleterious to one's health, a policy on tobacco use nonetheless is a part of the environment in which tobacco users work. . . .” Furthermore, we find that the topic of workplace tobacco usage is unlike those significant core entrepreneurial topics that are more naturally considered to be inherently managerial in nature such as decisions regarding the programs of the employer, standards of service, overall budget, use of technologies, organizational structure, and selection and direction of employees. Thus, we conclude that collective bargaining over the policy regarding tobacco usage does not unduly infringe upon the employer’s inherent managerial decision making. . . . Our conclusion . . . is not altered by the means by which the Borough implemented the ban – through the enactment of the Ordinance. . . . [T]he employees’ collective bargaining rights . . . do not interfere with the Borough’s authority to pass such local legislation to the extent it bans tobacco use in public places. We also conclude, however, that the Ordinance, which unilaterally bans all use of all tobacco in certain non-public areas – such as smokeless tobacco use in police officer’s non-public work areas and Borough vehicles and equipment, and smoking in Borough vehicles not used for mass transit and equipment – impermissibly denied Borough police officers their statutorily-guaranteed collective bargaining rights . . . to negotiate over working conditions. We find the Borough’s enactment of the Ordinance with respect to non-public areas is in conflict with the principle that a municipality may not avoid its collective bargaining obligations through the passing of an ordinance. We must reconcile the ability of the Borough to enact legislation protecting the health, safety, and general welfare of its citizens with the rights of Borough police officers to engage in collective bargaining. In doing so, we conclude that, while local legislation which promotes clean air and warns of the risks of tobacco use may be laudatory, it may not serve as a barrier to negotiations over this topic when it constitutes a working condition subject to mandatory bargaining . . . .” Borough of Ellwood City v. PLRB, 998 A.2d 589 (Pa. 2010).

b. Minor Discipline. Discipline ranging from a written reprimand to a five-day suspension issued to employees for violating the employer’s lateness policy was mandatorily negotiable. The union did not challenge the lateness policy itself, or any of the employer’s changes to that policy. Instead, it grieved only the
discipline imposed for violating the lateness policy. State statute authorized arbitration of minor discipline (e.g., reprimands, fines and suspensions of five days or less) for all public employees except State troopers. *County of Burlington*, PERC No. 2011-52 (NJ PERC 12/16/10).

c. **Time Limits on Using Prior Discipline.** A union proposal that set time limits on the use of prior attendance offenses did not interfere with managerial prerogatives. The proposal stated that, “for infractions occurring thereafter, any employee who maintains a record free of attendance-related infractions for a period of twelve (12) consecutive months from the date the infraction was committed will revert to two previous levels of discipline on the current progressive disciplinary guidelines and will continue to revert to previous levels of discipline for each additional year the employee goes free from discipline.” The proposal excluded consideration of major offenses (i.e., a non-attendance offense which results in a suspension). Noting that case law “negotiations over a provision that would expunge disciplinary records,” the Commission held that the proposal was mandatorily negotiable. “The language in this agreement applies to a limited class of prior disciplinary infractions – those related to sick leave misuse and attendance issues – and does not require expungement of such past disciplinary infractions. It more narrowly provides that after an officer has maintained a clean attendance record for a period of time, such past transgressions be given lesser weight as part of a progressive discipline system. In addition, . . . the language in this agreement does not require that past major disciplinary action not be considered. . . . [S]uch a provision would not be negotiable for police officers whose major disciplinary actions cannot be considered by an arbitrator.” *County of Monmouth*, 36 NJPER ¶19 (NJ PERC 2/25/10).

d. **Restrictions on Pattern Absence Discipline.** A union proposal which provided that “Discipline for pattern setting will not be brought unless an employee has used their allotted 15 days of sick leave in a given year,” was mandatorily negotiable. “The provision does not preclude sick leave verification or discipline for sick leave abuse. It simply prohibits discipline for pattern setting when an employee’s allotted sick leave days have not been exhausted. An employee can still be disciplined if he or she takes sick leave but is not verifiably sick or if the employee in some other manner abuses sick leave. [State Civil Service regulations] permits Civil Service employees to be disciplined for chronic or excessive absenteeism or lateness. It does not preclude an agreement not to discipline employees who have not yet exhausted their annual sick leave allotment for pattern setting.” *County of Monmouth*, 36 NJPER ¶19 (NJ PERC 2/25/10).

2. **Transfers/Assignments.**

   a. **Assigning Dispatcher Duties to Police Officers.** A union’s contract proposal involving assignment of police officers to dispatcher duties was not mandatorily negotiable. The proposal precluded the employer from using police officers to fill in for absent dispatchers unless no other dispatchers were available. “Public employers have a managerial prerogative to assign additional duties that are
related to an employee's normal responsibilities. However, employees may negotiate for contractual protection against being required to assume duties outside their job titles and beyond their normal duties. There is nothing in this record to suggest that dispatching is not sufficiently related to the normal duties of these police officers so as to preclude the Borough from assigning that work without additional negotiations.” *Borough of North Caldwell*, 36 NJPER ¶4 (NJ PERC 1/28/10).

b. **Light Duty Assignments.** The employer’s implementation of a revised light duty policy was mandatorily negotiable. The revised light duty policy: (i) offered light duty on a temporary basis at the discretion of the business administrator and the department head, provided there are positions available for which the employee is qualified and such light duty does not create an undue hardship on the City; (ii) advised that the availability of light duty was not guaranteed; (iii) limited light duty assignments to six months, which the employer could extend or modify duty in its sole discretion; (iv) provided that failure to report to work as directed would constitute immediate grounds for dismissal; and (v) allowed an employee who believed that a light duty assignment was beyond his or her abilities to request a meeting with the business administrator, who would render a written response within three business days. The union contended that: (i) the employer violated the retention of benefits clause by eliminating consultation with the affected officer and his or her medical provider as part of the consideration of the appropriateness of a light duty assignment; (ii) the business administrator cannot be vested with the ability to assign police officers to other departments; (iii) extension of light duty beyond six months should be even-handed and non-discriminatory and not at the whim of the business administrator; and (iv) the new policy violates the progressive nature of the disciplinary system. The Commission held that while “[t]he City has a non-negotiable managerial prerogative to determine whether it wishes to maintain a light duty policy,” all of the union’s challenges raised mandatorily negotiable issues.

i. **Consultation Requirement.** “We have held to be mandatorily negotiable clauses requiring an employer to consult or discuss actions that it has the managerial prerogative to effect, but which have an impact on employee working conditions or performance. Consultation before assignment would not limit the City's ultimate light duty determinations.”

ii. **Assignment to Non-Department Duties.** “[T]he parties may agree to limit light duty assignments to work traditionally performed by police officers. Accordingly, this issue may be submitted to binding arbitration.”

iii. **Durational Limit.** “Allocation of available modified duty among qualified individuals is mandatorily negotiable. The allocation issue significantly affects the ability of injured employees to work and would not substantially limit any governmental policymaking determinations. There is no dispute that the employees would have to be qualified to perform the light duty assignments.”
iv. Progressive Discipline. The Commission rejected the employer’s civil service preemption argument. “Civil Service regulations specify that an employee may be subject to discipline for, among other reasons, failure to perform duties. Those regulations do not state that the failure to perform duties is grounds for immediate dismissal. Thus, the PBA’s claim that the City's policy is inconsistent with the parties progressive discipline system is not preempted . . .”

City of Rahway, 36 NJPER ¶17 (NJ PERC 2/25/10).

c. Denial of Light Duty Assignment. Likewise, the denial of a light duty assignment, requiring an employee to take a leave of absence, is mandatorily negotiable. The employer denied the light duty assignment because the employee was not injured on the job. “We have long held that an employer is not required to negotiate over permitting employees to return to work on light duty. To do so would significantly interfere with the employer’s prerogative to determine job qualifications. For similar reasons, we have also restrained arbitration demanding that an employer create light duty assignments. However, where an employer offers light duty, whether by policy or practice, we have declined to restrain arbitration of grievances asserting that qualified employees were denied available light duty assignments. Once an employer decides to permit light duty, the allocation of available light duty assignments is a mandatorily negotiable issue analogous to the allocation of overtime work. Our rulings are grounded on the understanding that the employer has the prerogatives to determine whether to permit light duty assignments, the number of employees on light duty at any given time, what assignments are available as light duty, and the minimum qualifications required to perform light duty assignments.” Township of Parsippany-Troy Hills, 36 NJPER ¶12 (NJ PERC 2/25/10).

d. Notices of Available Transfers. A contract provision requiring the employer to post notices of open transfers was mandatorily negotiable. The notices had to include the nature and qualifications of the position. “Such notice provisions are mandatorily negotiable.” Mount Laurel Fire District No. 1, 36 NJPER ¶88 (NJ PERC 6/24/10).

e. Seniority as a Factor. A contract proposal requiring the employer to award a transfer based upon seniority when all other factors are equal is mandatorily negotiable. “[S]eniority would come into play only when all else is equal. Thus, there is no significant interference with any managerial prerogatives.” Mount Laurel Fire District No. 1, 36 NJPER ¶88 (NJ PERC 6/24/10).

f. Replacing Absent Subordinate. An employer’s decision to require a lieutenant to “drop” to the road sergeant position when the road sergeant was out on sick leave, but not when the sergeant was out on vacation, personal, or compensation time was mandatorily negotiable. The union challenged the assignments because they deprived employees of overtime opportunities. Under previous practice, another sergeant would be called in. “The Township has a managerial prerogative to determine that a lieutenant is qualified to fill in for an absent road sergeant.
However, the question in this case is whether the employer could have legally agreed to call in sergeants on overtime rather than have a lieutenant drop down to the road supervisor position. . . . That kind of agreement was permissively negotiable . . . .” Township of Nutley, 36 NJPER ¶81 (NJ PERC 6/24/10).

3. Work Schedules.

   a. Change from 4-4 to 4-2 Schedule. The work schedules of police officers may be submitted to interest arbitration because they are mandatorily negotiable. The employer retained a consultant to conduct an operational audit. The consultant concluded that the 4-4 schedule was the least efficient of the scheduling methods because it required more staffing than the 4-2 shift. The employer unsuccessfully argued that it had the managerial right “to fix the overall work schedule, even if financial considerations may partially motivate its actions.” The Commission held that, “We cannot conclude from the recommendations of the [consultant] that either the current work schedule or negotiations over a different work schedule would significantly interfere with the Township’s ability to meet its governmental policy need to provide effective enforcement services. Absent an employer’s showing of a compelling need to remove a work schedule from the arena of collective negotiations, on approach . . . is to have the parties present their arguments and supporting evidence to the interest arbitrator.” Township of Franklin, PERC No. 2011-48 (NJ PERC 11/23/10).

   b. Specialty Police Units. Union proposals to continue current language regarding scheduling for existing specialty units and/or propose new language for both existing units and new specialty units was mandatorily negotiable. The proposals involved the legal and investigative, warrants, canine, and bicycle units. The union proposed to memorialize the existing schedules for two recently-created units, the canine unit and the bicycle unit, and to either maintain current contract language or propose different language regarding the legal/investigative and warrants units. “The PBA does not seek to modify the schedule for the Legal and Investigative Unit. The employer has not explained how the PBA’s proposal differs from its desire to apply the current language controlling the Legal and Investigative Unit to the other specialty units. As for the Warrants, Canine and Bicycle Units, the employer argues that negotiating a schedule for these units inherently conflicts with the Sheriff's right to determine when services are provided, the deployment of resources, and the management of economic limitations. The PBA proposals, however, permit flexing of the schedules and the employer retains a right to deviate from a negotiated work schedule if a particular circumstance arises and the negotiated schedule would substantially limit the Sheriff's policymaking powers. We cannot conclude from the employer’s certifications and argument that the PBA’s proposals would significantly interfere with the ability of the Sheriff to meet its governmental policy need to provide effective law enforcement services. Absent an employer’s showing of a compelling need to remove a work schedule proposal from the arena of collective negotiations, our approach . . . is to have the parties present their arguments and supporting evidence to the interest arbitrator.” County of Atlantic, 36 NJPER ¶128 (NJ PERC 8/12/10).
c. **Weekend Coverage Schedule.** The employer unlawfully issued a new weekend coverage schedule that required full-time custodial and maintenance employees to work two to four fewer hours during their normal work week and to work Saturdays and Sundays on a rotating basis. The weekend coverage schedule required full-time employees to work two to four fewer hours during their customary Monday-Friday work week and to work those hours on Saturdays and/or Sundays on a rotating basis. The weekend coverage schedule also required part-time employees to work two additional hours beyond their customary twenty hour work week when they were scheduled to work the weekend shift. The new schedule deprived the full-time custodial and maintenance employees of two to four hours of overtime that they otherwise would have received for working on weekends and the part-time employees gained two additional hours for those weeks that they worked a weekend shift. Prior to the change, the same part-time employee worked the weekends for the District. “[T]he District’s unilateral action regarding coverage on weekends had the effect of changing the work schedules of the entire bargaining unit from fixed to rotating schedules. Previously, for at least eighteen years, one unit member worked weekends and the other unit members worked only during the week, with the exception of snow emergencies. Under the new schedule unilaterally implemented by the District, all unit members now had to work on weekends on a rotating basis. [A] unilateral, bargaining unit-wide change in shift schedules from fixed schedules to rotating schedules and vice versa is a mandatory subject of bargaining. The same result must obtain here where the District’s unilateral action deprive the employees of weekends off and keeps them from receiving overtime for working weekends, and the impact on employee interests clearly outweighs the impact on the District’s basic policy. Indeed, the new schedule has no impact on the District’s basic policy because it has the same weekend coverage that it had before; the sole change is that the entire bargaining unit provides weekend coverage rather than a single employee. Such a schedule change affecting the entire bargaining unit must be bargained and may not be unilaterally imposed by the District.” *Minersville Area School District*, 41 PPER ¶31 (Pa. LRB 3/16/10).

4. **Educational Issues.**

   a. **Participation in Professional Learning Community.** The effects of the employer’s requirement that teachers participate in a Professional Learning Community program during previously unassigned time were mandatorily negotiable. Teachers were required to meet once weekly for approximately 30 minutes and submit a written report of what occurred to the building principal. Special assignments sometimes are given, which must be completed and submitted to the building principal. In some instances, teachers lost 18 hours per year of unassigned time, for which the union demanded compensation (but did not challenge the decision to implement the program). The employer unsuccessfully argued that losses in unassigned time were “not severable from the educational decision to implement the program during the course of the teachers’ paid work day.” The decision was mandatorily negotiable because “implementation of the PLC program is not at issue . . . and because the Association’s demand for arbitration is limited to compensation for lost unassigned time . . . .” “[W]here a
duty period is replaced by an instructional period, or when preparation time is replaced by either a duty period or instructional time, grievances seeking compensation for alleged violations of teaching load agreements or practices are legally arbitrable.” *Twp. Of Egg Harbor Board of Education*, PERC No. 2011-45 (NJ PERC 11/23/10).

b. **Reducing Length of Extended School Year.** The employer unlawfully reduced by one week the length of the extended school year (ESY). The employer unsuccessfully argued that it had the management right to determine the ESY calendar. “The issue of the ESY student calendar is not a mandatorily negotiable subject as it involves a major educational determination. The Association does not, however, contest the Board’s right to set the ESY calendar. Instead, the Association claims a contractual right to a 213-day work year for teaching in the ESY program. [Prior case law] differentiates between the student calendar and faculty workdays, work hours, workload and compensation, finding all but the calendar to be mandatorily negotiable.” *Mercer County Special Services School District Board of Education*, 36 NJPER ¶139 (NJ PERC 9/23/10).

5. **Using the Employer’s Dumpster.** The employer unlawfully discontinued the 32-year practice of allowing employees to use its dumpster for personal trash as long as it did not create extra costs. The employer took this action after discovering a large quantity of carpet in the dumpster that an employee had brought from his home. The employer unsuccessfully argued that the employees’ use of the dumpster was not a mandatory bargaining subject because the use of the dumpster for personal trash is not rationally related to employee working conditions. The Board agreed (2-1) that “employees have a cognizable interest in use of the Authority dumpster to dispose of personal trash because allowing employees to dispose of their personal trash saved money that those employees would otherwise spend for a private or municipal trash hauler.” Applying the traditional three-part balancing test for determining the existence of a mandatory bargaining subject, the Board reasoned that, “[T]he Authority advanced no stated interest to outweigh the employees’ interest in the use of the Authority’s dumpster. At best, the Authority expressed its belated concern over the possibility of a violation of environmental laws. However, . . . the practice involved here only permitted employees to use the dumpster for personal trash where there would be no additional cost for the Authority. Indeed, if an employee’s use of the dumpster caused a violation of environmental laws, and thus a fine, administrative cost or fee, the employee’s use would have been unauthorized under the existing practice. As such, the Authority’s stated concern over possible violations of environmental laws does not outweigh the employees’ interest in use of the dumpster for personal trash, so long as the employees’ use does not create additional costs for the Authority.” *Milton Regional Sewer Authority*, No. PERA-C-09-229-E (Pa. LRB 12/21/10).

6. **Promotions.**

   a. **Denial of Promotion from Part-Time to Full-Time.** The denial of a bus operator’s promotion from part-time to full-time was mandatorily negotiable. The scope of negotiations for bus employees was broader than for other public sector
employees because such employees are covered under a different statute. Thus issues are mandatorily negotiable “unless, unique to this particular employment situation, NJT would be prevented from fulfilling its statutory mission.” The employer unsuccessfully argued that it was not required to consider seniority as a factor because past practice based such decisions on a merit point system. The Commissions responded that, “NJT has not provided any evidence establishing that using seniority as a factor in considering this promotion would interfere with its statutory mission to provide a coherent public transportation system in the most efficient and effective manner. NJT’s abstract notice that its promotion decisions are connected to its mission to provide a safe transit system is not sufficient to cause us to deviate from applying the general legal principle that promotional criteria are mandatorily negotiable for New Jersey Transit bus employees.” New Jersey Transit Bus Operations – Mercer, PERC No. 2011-40 (NJ PERC 10/28/10).

7. Attendance Policy. Some aspects of the employer’s new attendance policy either involved or triggered an obligation to negotiate over mandatorily negotiable subjects. “[T]he employer had a prerogative to establish a sick leave verification policy and to use reasonable means to verify employee illness or disability. However, disputes over whether a policy has been properly applied to deny sick leave benefits were found to be legally arbitrable. In addition, there are mandatorily negotiable issues that may flow from the adoption of an attendance policy. Such issues may include receipt of payment for accumulated, unused sick leave as a form of deferred compensation, a schedule of progressive penalties for sick leave abuse, restrictions on using other forms of paid leave for sickness, the cost of obtaining a doctor’s note, and the circumstances under which an employee can be removed from an overtime list.” Borough of Cliffside Park, 36 NJPER ¶22 (NJ PERC 3/25/10).

8. Vague and Overbroad Work Rules. The union challenged, as vague and overbroad, an employer’s special order requiring motor carrier enforcement officers (MCEOs) and motor carrier enforcement supervisors (MCESs) to “shall stop to assist disabled motorists, remove immediate hazards from the roadway, and assist at the scene of crashes where there is an absence of police officers or other qualified first responders.” The Board noted that, “With respect to employer-issued work rules, the Board has recognized that through negotiations with the employees' representative, broadly-worded work rules may be narrowed down to identify what is expected of employees, so that employees are on notice of conduct for which they may be subject to discipline. Accordingly, the Board has held that work rules that are vague and overbroad are mandatory subjects of bargaining to be negotiated with the employees' bargaining representative.” However, the affected employees were members of a different bargaining unit. The Hearing Examiner had rejected the union’s claim that the employer had transferred bargaining unit work, which the union never challenged. Accordingly, the Board vacated the Hearing Examiner’s proposed order to rescind the special order. The Board cautioned that, “It must be noted that our decision here does not foreclose the possibility that Special Order 2008-51 may, as applied, actually cause a removal of PSTA bargaining unit work in the future.” Commonwealth of Pennsylvania (State Police), 41 PPER ¶101 (Pa. LRB 8/17/10).
9. Employee Personal Use of Vehicles. State Department of Education regulations requiring the employer to adopt a new vehicle use policy, did not prohibit the employer from entering into an agreement for the offset of compensation caused by the policy change. The employer’s policy provided that vehicles may be assigned to individuals or to organizational units for use in a pool only in accordance with certain conditions. The employer previously permitted employees to take vehicles home at the end of their workday and drive them to work on the following day. Under the new policy, they had to park the vehicles on Board property at the end of the workday. The employer unsuccessfully argued that bargaining was not required because the purpose of the regulations was to limit spending by school districts and negotiations over impact would significantly interfere with that policy determination. “No statute or regulation prohibits offsetting compensation. And such an agreement would not significantly interfere with the Board’s prerogative to end commutation in its vehicles.” Buena Regional Board of Education, 36 NJPER ¶54 (NJ PERC 4/29/10).

10. Wearing Safety Vests During Breaks. The employer unlawfully implemented a rule requiring park maintenance employees to wear their reflective safety vests during breaks. Employees routinely took their vests off when on break or at lunch because they were hot or because the vests were dirty. “It is well established that safety rules and safe work practices are conditions of employment and, as such, are mandatory subjects of bargaining . . . . [T]he PPE [personal protective equipment] for particular jobs and when a particular item of PPE must be worn are mandatory subjects of bargaining . . . . “[A]n employer is required to bargain over the matter of appropriate wearing apparel in the workplace, including whether unit employees must wear uniforms. . . . Although whether vests must be worn during breaks may seem like a minor matter, . . . this work rule was a matter of legitimate concern to Charging Party, that Respondent had a duty to bargain over it, and that Respondent violated PERA when it failed to respond to Charging Party’s bargaining demand.” City of Detroit, 23 MPER ¶14 (Mich. ERC 2-14-10).

11. Policy Requiring Wearing Uniforms. An employer’s unilateral requirement that fire department employees wear uniforms whenever they are required to report to a location, including trips to the medical division was unlawful. The contract was silent regarding where and when said uniforms were to be worn. In addition, employees who were on sick leave or who were on leave as a result of a duty-related injury were not required to wear their uniforms when they were ordered to report to the fire department’s medical decision for physical therapy or other medical appointments. “It is well established that work rules governing employee appearance, including the wearing of uniforms, are working conditions which are proper subjects of bargaining . . . .” City of Detroit, 23 MPER ¶57 (Mich. ERC 6/21/10).

12. Medical Records/Forms Fees. The employer unlawfully changed established practices and policies regarding the acquisition of medical records and forms by employees, which included requirements that employees pay fees to obtain medical records and supplemental insurance forms and submit such requests in writing. Under prior practice, employees wishing to apply for supplemental insurance would ask the employer to complete the required forms and have them transmitted to the
insurance company. The employer provided this service at no cost to employees. The employer also did not charge a fee to obtain copies of employee medical records from the fire department’s medical division, nor did the employer require that requests for such records be made in writing. “[T]he unilateral implementation of a fee for bargaining unit members to obtain medical records and insurance forms constitutes a mandatory subject of bargaining because it may impact terms and conditions of employment or result in financial hardship. Free access to medical records and forms is a benefit to employees and is directly related to the employment relationship. The evidence establishes that copies of medical records may be required by the Union or its members to challenge a decision made by Respondent’s medical division regarding whether an injury occurred in the line of duty. Unit members need supplemental health forms in order to apply for optional health and life insurance available through the Employer. Although supplemental insurance is optional, it nevertheless constitutes a benefit of employment.” City of Detroit, 23 MPER ¶57 (Mich. ERC 6/21/10).

13. Contract Continuation Clause. The continued inclusion of a “continuation clause” in a labor contract was mandatorily negotiable. The continuation clause provided that, “This Agreement shall continue in full force and effect until a successor agreement is adopted which is then retroactive to the beginning of that school year.” “[C]ontract continuation relates to hours, wages, and terms and conditions of employment, because such a clause keeps in effect previously agreed-upon (or ordered) contract terms, including those which are mandatorily bargain-able, until a new agreement can be reached. . . . [A] contract continuation clause, because it continues the provisions of an existing contract until a new contract can be reached, including the salary schedule of the preceding agreement, is of ‘fundamental, basic, or essential concern to an employee's financial and personal concern.’ Moreover, . . . the contract continuation clause at issue is not a matter ‘which involve[s] foundational value judgments, which strike at the very heart of the educational philosophy of the particular [*606] institution.’ Matters that have been found to be of this nature include an employer’s decision to hire, retain, promote, transfer, or dismiss employees; the establishment of a pension plan; a change in a school calendar; or teacher appointment determinations.” Central City Education Association v. Merrick County School District No. 61-0004, a/k/a Central City Public Schools, 280 Neb. 27, 783 N.W.2d 600 (2010).

14. Medical Disqualification Procedures. A contract provision that detailed the procedures for removing employees who are unable to perform their job duties because of a physical or mental condition is mandatorily negotiable. These procedures required that the employee be examined by three medical doctors (employee, employer and neutral), whose majority decision would be final and binding. When an employee suffered a debilitating hip injury, the employer unilaterally ordered the employee to perform an agility test before returning to work. The employer concluded that the employee was unable to perform his job duties, and it transferred the employee to a lower-paying position that was within his physical limitations. The employer unsuccessfully argued that submitting the employee to a physical fitness agility test was not a managerial prerogative. The union grieved the employer’s actions, and an arbitrator sustained the grievance. The appellate court
refused to vacate the decision. “‘NJT further asserts its managerial prerogative to determine an officer’s physical fitness for duty has been improperly infringed upon by the arbitration Award. Not so. The issue in the arbitration was whether the contract-negotiated procedure for determining the physical fitness of an officer to resume duty as a police officer had been violated, not [the employee’s] actual fitness or unfitness for such duty, or NJT’s right to determine same. Although medical examinations to determine fitness for duty are a managerial prerogative in public-sector employment, particularly where, as here, physical fitness tests bear on a police officer’s ability to do his or her job, . . . while the fact of testing is a non-negotiable managerial prerogative, . . . there is a clear distinction between the decision to test, on the one hand, and the procedure to be utilized, on the other. Clearly, procedures for implementing non-negotiable substantive decisions are negotiable. [T]he FOP is not challenging NJT’s right to require a medical examination to determine an employee's fitness for duty . . . .’” New Jersey Transit Corp. v. New Jersey Transit Police, Superior Officers Fraternal Order of Police, Lodge 37, No. A-4902-07T3, 2010 N.J. Super. Unpub. LEXIS 53 (NJ Super. App. Div. 1/11/10).

15. Staffing Ratios. A union staffing ration proposal involved a mandatory bargaining subject. The proposal contained specific nurse-to-patient staffing ratios and staffing ratios for particular hospital units. “Those ratios specify that an individual nurse be assigned no more than a certain number of patients per shift based on the type of unit and the particular patients’ care needs. Because the amount of work a nurse must do on a particular shift depends on the number of patients to whom he or she is assigned, nurse-to-patient staffing ratios determine the workload of individual nurses. Moreover, staffing ratios do not interfere with the employer's prerogative to determine staffing levels because the employer may control staffing levels by increasing or reducing the number of patients admitted to a particular hospital unit.” The employer unsuccessfully argued that the union’s proposal was not within the scope of representation because the proposal merely sought to incorporate existing law into the labor contract. “[The employer] admitted during bargaining that it had an obligation to comply with those statutes. Thus, to the extent [the union’s] proposal merely sought to reiterate [the employer’] existing legal obligations, it was within the scope of representation.” Regents of University of California, 34 PERC ¶41 (Cal. PERC 2/2/10).

16. Prohibition on Outside Employment. The employer unlawfully imposed a blanket prohibition, to be enforced under threat of discipline, on court officers’ outside employment in locations where the sale of alcohol for on-site consumption was the primary business. The employer implemented this ban after two court officers were shot, one fatally, during off-duty employment as bouncers in a “gentlemens’ club.” The employer was concerned about: (a) adverse press coverage if court officers were involved in violent encounters during off-duty employment in disreputable establishments; and (b) potential liability stemming from the training that it provides court officers as peace officers and their use of employer-issued equipment during off-duty employment. “Generally, work rules that restrict represented employees’ activities while off duty, including outside employment, are mandatorily negotiable terms and conditions of employment. However, a new work rule that serves an objectively demonstrable need in furtherance of the employer’s mission may not be
mandatorily negotiable where the employer’s interests in a particular mission-related rule outweigh the impact that the change has on the employees’ terms and conditions of employment. The employer bears the burden of proof to establish that its mission-related purpose for the change is sufficient, on balance, to defeat its bargaining obligations. That a work rule may have some relationship to an employer’s mission does not permit the employer to act unilaterally in any manner it deems appropriate. A work rule that is directed to an employers’ mission may not be mandatorily negotiable only to the extent that it does not ‘significantly or unnecessarily intrude on the protected interests of bargaining unit employees.’ . . . [W]e are not persuaded that the new policy so advances UCS’s mission as to outweigh the employees’ interests in earning extra income while off-duty by working in bars and taverns where the legal sale and consumption of alcohol is the primary business, even if the new policy were confined to security services in those establishments. Indeed, we are not persuaded that working off-duty in such establishments, whether as a bartender, security person or in some other lawful capacity reflects poor judgment. There is, for example no reason to conclude that the officers exercised poor judgment by taking outside employment in the Queens nightclub. Although we might agree that strip-clubs are not nice places, . . . we cannot, on this record, conclude that court officers’ mere employment in such establishments impairs UCS’s ability to rely on them to fulfill its mission while they are on-duty. That press coverage of tragic events such as that which occurred in the Queens nightclub may prove embarrassing to UCS administrators does not outweigh the employees’ right to earn extra money engaging in off-duty security. We do not see how UCS would be less embarrassed if they were working as bartenders in such establishments, which . . . is not prohibited by the new policy. Finally, UCS’s potential liability for court officers’ off-duty conduct owing to its training of the officers is an economic factor that does not affect the duty to negotiate.” State of New York – Unified Court System, 43 NYPER (LRP) ¶3011 (NY PERB 3/17/10).

17. **Fitness for Duty Determination.** An employee’s discharge that is based upon a disputed fact regarding the employee’s fitness for duty following an on-the-job injury is mandatorily negotiable. Following a workplace injury, two physicians issued reports declaring the employee fit for duty. The employee then underwent a Functional Capacity Evaluation and was informed that he was not fit for duty. The employer unsuccessfully argued that, “the grievance challenges its determination that there were no available Light-Medium duty positions in the Department of Public Works and that the grievant has restrictions that preclude him from performing the Tree Specialist job for which he was employed.” “An employer has a managerial prerogative to set physical requirements for a position and require employees to maintain those standards. However, a factual dispute over an employee’s physical condition involves the mandatorily negotiable issue of whether the employee meets those requirements and is legally arbitrable.” Township of Evesham, 36 NJPER ¶123 (NJ PERC 8/12/10).

18. **Restrictions on Dual Employment.** An employer unlawfully implemented a policy that prohibited all future dual law enforcement positions with other law enforcement agencies to supplement employee income. The employer did not have a compelling need to change its policy, and its action was not precipitated by any actual problems
or conflicts resulting from the dual employment of unit members. The employer was concerned about future liability for the actions of its employees while employed by another law enforcement agency because the employer could be sued for providing inadequate training if one of its officers, while working for another police department, improperly discharged his or her firearm. The employer’s fear of potential litigation was exacerbated by concerns over the applicable qualifications for holding a position in other police departments, and the training, if any, provided by those departments. “It is well-settled that, in general, limitations on an employee’s use of non-working time to engage in dual employment are mandatory subjects under the Act. . . . “[T]he Village has not satisfied its burden of demonstrating that the provisions of the Directive do not go beyond what is necessary to further that mission. It is not disputed that the Directive places substantial limitations on the ability of unit members in their use of non-work time, including impairing their ability to supplement their income. Despite the lack of any demonstrated problems or conflicts resulting from secondary employment by unit members, the Directive prohibits such dual employment prospectively, and places other substantial restrictions and procedures on secondary employment. We are not persuaded by the Village’s argument that its concerns over potential civil liability outweigh the interests of [the union’s] unit members. . . . [P]otential liability is primarily an economic concern that can be resolved as part of the collective bargaining process. . . . [The Village] has not presented any proof supporting its related argument that secondary employment results in safety problems caused by fatigue among unit members.” Village of Catskill, 43 NYPER (LRP) ¶3001 (NY PERB 2/8/10).

19. Tuition-Free Education for Non-Resident Child of Employee. The employer’s decision to stop permitting employees’ children to attend district schools without paying tuition was mandatorily negotiable. Because of a budget crisis, the employer denied enrollment to non-eligible students and all other non-resident, non-tuition paying children, including prohibiting employees from enrolling their children without paying tuition and/or costs. The employer unsuccessfully argued that the decision to limit enrollment was a budgetary necessity. “We appreciate all of those concerns. However, Board Policy 5111 specifically provides that there shall be no increase in the size of faculty or staff and no class to which employees children shall be assigned will contain more than the desired number of pupils as determined by the principal and policy. Thus, the policy itself protects the Board’s interests in those areas and continuation of the policy would therefore not significantly interfere with the determination of those educational policies.” Winslow Township Board of Education, 36 NJPER ¶86 (NJ PERC 6/24/10).

IV. PERMISSIVE BARGAINING SUBJECTS

A. Educational Issues.

1. Implementing Trimester Schedule. The employer lawfully implemented a new five-period trimester schedule (replacing the seven-period semester schedule) that significantly increased student contact time and teacher workload. The employer implemented this change because of a significant budget shortfall, higher than usual student failure rates, and increased graduation requirements. The Board noted that
“the educational calendar is a permissive subject of bargaining. . . . However, student contact time is a mandatory bargaining subject. In addition, the amount of such work required in a defined period of time concerns workload, a mandatory subject.” The Board then held that, “The District’s decision to adopt this schedule concerned a permissive subject of bargaining – the educational calendar. At the same time it changed the educational calendar, the District also changed two mandatory subjects of bargaining – it increased teachers’ workload and the amount of time they had contact with students. We find no inextricable link, however, between these two changes. To the contrary, the District could have altered the student calendar in such a way that would not affect teacher working conditions. For example, the District could have created a trimester system and a seven-period day in which students spend additional periods in study halls supervised by non-licensed staff. At most, the District’s actions regarding the educational calendar, teacher workload, and student contact time were taken simultaneously.” However, the employer was obligated to bargain over the effects of the decision. The Board held that the employer properly notified the union of its intent to change to the trimester system nine months before it took effect, pursued bargaining with the union (and even extended the deadline for concluding negotiations), and implemented the trimester system only after completing the statutory negotiations period. Three Rivers School District, No. UP-16-08 (Ore. ERB 3/29/10).

2. Reassigning Departing Teacher’s Workload. When a high school special education teacher left his employment, the employer lawfully increased the workload of the remaining special education teachers. The employer successfully argued that the union failed to present evidence either that the caseloads handled by the special education teachers or the hours that they worked per week were substantially greater after the teacher’s departure than in the preceding school years; therefore, the union failed to establish a fixed and definite prior practice. “Although the union presented evidence that the weekly work hours of three of the special education teachers had increased by ten to fourteen hours after [the teacher’s] departure, there was no evidence that the increased number of hours was substantially greater than the number of hours per week that they had worked in previous school years. Indeed, the only evidence regarding the workload of the special education teachers in prior years established that, from the 2001-2002 school year through the 2003-2004 school year, the caseload of three of the special education teachers had ranged from five special education students per teacher to twenty-one students. This caseload was not substantially lower than the caseload of the special education teachers after [the teacher’s] departure . . . . Moreover, even if we were to assume that the average caseload per special education teacher was somewhat greater after [the teacher’s] departure than in previous years, that would not necessarily mean that the average workload was greater. The students could have had fewer needs or . . . the teachers could simply have spent less time servicing each student, within the parameters set by state and federal special education law and the school board's educational policy. . . . Although we recognize that a sudden, unanticipated and substantial increase in workload may cause significant difficulties for an employee in the short term, the defendants have provided no authority for the proposition that, if an increased workload was not a substantial departure from a fixed and definite prior practice, the increase nevertheless can constitute an unlawful unilateral change because of its
timing, or the fact that it was unanticipated.” Board of Education of Region 16 v. State Board of Labor Relations, 299 Conn. 63; 7 A.3d 371 (2010).

C. Discontinuing Operations.

1. Disbanding Police Force. Because the employer lawfully disbanded its entire police force, the Board upheld the dismissal of an unfair labor practice charge. “[I]t is within an employer’s managerial prerogative to cease providing discretionary services, regardless of the underlying motivation, as long as the cessation is complete and permanent. . . . [A]n employer may not under any guise avoid its . . . duty to bargain by subsequently directing its employees or others to resume any of the duties principally performed by the bargaining unit. Rather, if the employer wishes to resume those duties, it must reinstate the bargaining unit employees and bargain with their representatives.” The Board added that, “[T]he Charge does not allege that the Township is presently directing its employees or others to provide police services. The Board has held that it will not speculate as to whether an employer intends to resume provision of services in the future.” Rye Twp., No. PF-C-10-119-E (Pa. LRB 8/18/10).

2. Abolishing Internal Operating Division. The employer lawfully abolished its Plant Engineering division after it bargained the effect of the decision. The employer successfully argued that its conduct amounted to a reorganization that was not subject to any bargaining duty. “It is well settled that reorganization decisions that eliminate positions and reassign job functions to existing or newly created positions are within the scope of management prerogative and are not a mandatory subject of bargaining.” Moreover, the possible loss of overtime compensation due to the reorganization also was not bargainable. “[I]t has long been held that overtime may be reduced by an employer as a part of its right to regulate and control its operations.” City of Detroit, 23 MPER ¶30 (Mich. ERC 4/29/10).

D. Placement on Medically-Limited Duty for ADD. The employer lawfully implemented an internal protocol in which troopers diagnosed with Attention Deficit Disorder (ADD) or taking medication for ADD would be placed on medically-limited duty. “The implementation of fitness for duty standards falls within an employer’s managerial prerogative and is not a matter that must be bargained with the employee representative. Here, the troopers that are diagnosed with ADD or are taking medication for ADD are placed on a medically-limited duty and the Commonwealth evaluates whether those troopers are able to adequately perform their duties while on ADD medication. The Commonwealth’s policy clearly falls within its managerial prerogative to set forth standards to determine a trooper’s fitness to discharge his or her duties. . . . There is nothing more fundamental to the interests and safety of the public than the good health and physical fitness of those charged with the responsibility of enforcing the laws.” Commonwealth of Pennsylvania State Police, No. PF-C-10-121-E (Pa. LRB 8/18/10).

E. Assignments

1. Disqualification Due to Negative Media Attention. The employer’s directive that a police officer no longer be allowed to work special detail assignments at the Town’s
public schools because of negative media coverage was not mandatorily negotiable. The employer’s decision responded to the school administration’s request that they did not want the officer to enter their schools because of a *Rolling Stone* magazine article, which alleged that the officer had verbal contact with a student who allegedly was involved with a teacher (which the officer denied). The union unsuccessfully argued that the dispute involved the allocation of overtime among qualified personnel. The Commission responded that, “Disputes over overtime allocation among qualified employees are mandatorily negotiable and legally arbitrable. In this case, however, the Chief has determined that the grievant is not qualified to perform duties at the Town’s schools. This judgment was not based on any finding of misconduct. It was not a disciplinary determination. It was based on the Chief’s overall judgment that the department would be better served by not opening itself up to criticism for assigning grievant to duties at the public schools.” *Town of Hammonton*, PERC No. 2011-50 (NJ PERC 12/16/10).

2. **Completing Assignments.** The employer lawfully required field training police officers (FTOs) and field training police sergeants (FTSs) to complete the field training of some probationary officers after they stopped participating in the training program. “[A] public employer may unilaterally exercise control and discretion over its organization and operations. The Commission has interpreted this provision to include the assignment and reassignment of employees to perform tasks that are within the scope of basic employment duties they were hired to perform. The job description for a police officer states that an essential duty of police officers is to serve as a FTO and the sergeant’s job description requires them to monitor their subordinates work activity, including reports, to ensure compliance with departmental regulations. There has been no change in the duties and responsibilities of the FTO’s and the FTS’s. Thus, the requirement of the FTO’s and FTS’s to complete their assignment in phase three and the mandatory assignment of the FTO’s and FTS’s to complete the silent phase of the field training program is a management right. Thus, the City was not required to bargain over its decision to assign their work. This also leads to the conclusion that the Police Chief has the authority to assign FTO’s and FTS’s to the three PPO’s who are waiting their field training program.” *City of Miami Beach*, 36 FPER (LRP) ¶127 (Fla. PERC 5/4/10).

3. **Eliminating Summer Work/Compensation.** The employer lawfully eliminated summer work hours and compensation for certain employees (with their former duties to be handled by administrators and technology staff) and assigned those employees additional uncompensated work during the school year. “Where school district employees have a work year that extends beyond the regular school year, reductions in the work year and the compensation employees are paid involve mandatorily negotiable and legally arbitrable terms and conditions of employment. This case, however, does not involve a reduction in a 12-month work year. The disputed work has been characterized by the parties as Additional Summer Work. . . . [T]he determination of whether and to what extent a board needs the services of 10-month, non-administrative employees during the summer is within the Board’s managerial prerogatives.” However, the employer’s apparent transfer of work out of the bargaining unit was mandatorily negotiable. Also bargainable was impact of the transfer on employee workload. “[C]laims by the affected employees that the
elimination of their summer work and the directive that it be performed during the regular school year involves mandatorily negotiable workload issues. Thus, the Association may argue to an arbitrator that employees experienced uncompensated workload increases.” Flemington-Raritan Regional School District Board of Education, 36 NJPER ¶141 (NJ PERC 9/23/10).

F. Vehicle Usage. A grievance challenging a detective’s loss of use of an employer’s vehicle for commuting purposes, and demanding reassignment of a vehicle, was not mandatorily negotiable; however, the claim for offsetting compensation due to loss of the vehicle was mandatorily negotiable as a lost economic benefit. The employer successfully argued that that the deployment of County vehicles was a managerial prerogative. “The Prosecutor has a managerial prerogative to assign County vehicles.” Consequently, the union could not arbitrate its claim for reassignment of a vehicle. Union County Prosecutor’s Office, 36 NJPER ¶83 (NJ PERC 6/24/10).

G. Changing Minimum Qualifications of Class Specification. The employer lawfully changed the minimum qualifications of the fire captain class specification to expand the pool of eligible candidates. Specifically, the employer eliminated the requirement that candidates possess and maintain a local fire engineer certification and driver certification for currently employed firefighters. The change allowed currently employed fire engineers who had not received the certification to apply for fire captain. Applying the traditional three-part test, the Commission held that: (1) “a change in the minimum qualifications to expand the pool of eligible candidates does not affect the promotional opportunities of bargaining unit employees in this case and is therefore not a significant and adverse effect on the wages, hours, or working conditions of the bargaining unit”; (2) “the determination of minimum job qualifications is a matter of fundamental managerial prerogative that is not within the scope of bargaining,” noting that “the determination of minimum qualifications for the position of fire captain affects the health and safety services provided by the City to the public” and that “[t]he City has a strong interest in hiring qualified employees to provide fire safety and protection services to the public”; and (3) “there is no evidence that bargaining over the expansion of the candidate pool for fire captains would outweigh the City’s need to determine qualifications necessary to provide public fire protection services to its citizens.” City of Alhambra, Dec. No. 2139-M (Cal PERC 10/26/10).

H. Staffing.

1. Failing to Fill Vacancies. The employer’s decision not to fill vacancies in the Master Probation Officer (MPO) title was not mandatorily negotiable. “The number of MPOs the Judiciary employs and the decision to fill MPO vacancies are non-negotiable staffing decisions.” The union unsuccessfully argued that the issue actually involved compensation levels because the parties previously had settled a gender-based pay discrimination dispute by establish a maximum number of MPOs. The Commission held that the employer was not obligated to maintain the maximum number of MPOs. “An employer has a managerial prerogative to determine its staffing levels. An employer also has a prerogative to decide that the promotional vacancies will not be filled.” State of New Jersey Judiciary, PERC No. 2011-38 (NJ PERC 10/28/10).
2. **Minimum Staffing Levels.** The employer’s decision to decrease certain minimum staffing levels and set certain standards for the filling of vacancies was not mandatorily negotiable. The employer decreased the minimum staffing on the day tour from 13 to 12; required captains to act as deputy chiefs to fill-in for a deputy chief vacancy; and required a senior line firefighter to act as a captain to fill-in for a captain vacancy. “The City has a non-negotiable managerial prerogative to determine the staffing levels for the department. Minimum staffing levels are not permissively negotiable.” Thus, the employer’s staffing reduction from 13 to 12 officers on day tour could not be arbitrated. However, the employer’s requirement that firefighters and captains act up in rank rather than call-in a deputy chief or captain on overtime was mandatorily negotiable. “Officers have a negotiable interest in performing work in their own job titles before that work is offered to other officers working out of title. Thus, the City could have legally agreed to call in deputy chiefs or captains on overtime rather than have captains and firefighters act up. That kind of agreement is mandatorily negotiable.” *City of Orange Township*, 36 NJPER ¶119 (NJ PERC 8/12/10).

3. **Covering Vacancies.** An employer’s policy that denied overtime opportunities due to the use of on-duty Traffic and Communications Bureau officers to cover vacancies in the Patrol Division was not mandatorily negotiable. The policy provided that if staffing fell below the established minimums in the Patrol Division, on-duty officers from the Traffic Bureau and/or the Communications Bureau would be redeployed to the Patrol Division. The Traffic Bureau is contained within the Patrol Division and the Communications Bureau is within the Operations Division. “[T]here was no allegation that the officers covering the vacancy were working out-of-title or rank or that work had been assigned to non-unit employees. Traffic and Communications Bureau officers are trained police officers who are equipped in the responsibilities of the Patrol Division, and all officers can request overtime in the Patrol Division. . . . [W]hen a Communications or Traffic Bureau officer is used in the Patrol Division to cover a vacancy, it is a temporary reassignment and the officer retains his or her regularly assigned work hours. . . . [O]fficers have a negotiable interest performing work in their own job titles, work for which they are presumably the most qualified, before that work is offered to officers working out of title. The employer’s interest in using lower-ranked employees in an acting capacity is primarily in saving money; an interest that can be addressed through the collective negotiations process. This case is distinguishable because the employer is filling police officer vacancies with other police officers working within their own job titles.” *Township of Wayne*, 36 NJPER ¶¶118 (NJ PERC 8/12/10).

I. **Reduction of Field Officer Training Districts.** The employer’s reduction of field training officer districts from over a dozen to about six was not subject to bargaining. Because of the change, Field Training Officers had to decide whether to transfer elsewhere to maintain their pay level or remain in their home districts and suffer a pay reduction. The employer successfully argued that “limiting the training of probationary police officers to fewer districts which have a better representation of issues present throughout the city will provide better training of probationary employees” and that training new employees was a matter of inherent managerial authority. Drawing upon prior decisions that an employer’s decision to cross-train existing employees is a matter
of inherent managerial authority the Commission held that “the means of improving the quality of training probationary employees is a matter of inherent managerial authority.” The Board added that “Reference to decisions in other jurisdictions shows that, in analogous situations involving training, the balance usually tips in favor of managerial authority.” Indeed, “[i]n the training decisions addressed in these cases differ from that currently in issue in that the City is here not altering or supplementing the training of bargaining unit members, but seeking to improve the training of new hires outside the bargaining unit. We find the managerial authority is even stronger in this context, and conclude that the burden on the managerial authority to determine how best to train its new hires outweighs the benefits bargaining would provide to the decision-making process.” City of Chicago (Police Department), 26 PERI ¶115 (Ill. LB LP 10/13/10)

J. Installing Surveillance Cameras in Non-Public Areas. The employer was not obligated to negotiate before installing three visible security cameras in a non-public area, i.e., the police department radio room. The cameras captured digital images only. They did not capture audio signals. The system was activated only when there was movement in the Radio Room. The employer installed the cameras, after notifying (but not negotiating with) the union, to respond to problems in the Radio Room concerning police and civilian personnel in the Radio Room. The employer specifically was concerned about a case involving criminal complaints that a civilian employee and police officer had brought against each other arising from an alleged physical altercation between them in the Radio Room and allegations made by a police officer that civilian personnel, rank-and-file police officers and sergeants were occasionally sleeping while on duty in the Radio Room. The cameras were used in two Internal Affairs cases: one sustaining the charges and one exonerating the charged party. Applying the traditional balancing test, the Commission held that, “the employer’s interest involves two common examples of workplace misconduct: two employees got into a physical altercation and other employees were alleged to have been sleeping while on duty. However, what makes this case different is that it involves a Radio Room where 911 calls are received and police and fire services are dispatched. The employer has a significant interest in making sure that employees are not fighting or sleeping in the Radio Room. Any delay in the delivery of services could have serious public health or safety implications. Thus, under these facts, a restriction on the employer’s right to install the surveillance cameras would significantly interfere with the determination of governmental policy. We note that the employer has recognized that this case involves a challenge to the installation of the cameras, not the impact of the installation on negotiable terms and conditions of employment.” City of Paterson, 36 NJPER ¶114 (NJ PERC 8/12/10).

K. Promotions.

1. Decision to Deny vs. Reasons for Denying. An employer’s decision to deny a promotion is not mandatorily negotiable, but the union’s efforts to obtain statements of the specific reasons why the employees were deemed unqualified for promotion was mandatorily negotiable. The employer failed to fill a promotional position with one of three currently-employed applicants and placed outside advertisements for it. “Grievances asserting that candidates for promotion have met the required qualifications and should be appointed to vacant positions are not legally arbitrable . . . . However, . . . [p]rocedures relating to the promotion process, including the right
to know why an employee’s application was rejected, are mandatorily negotiable and legally arbitrable.” Ocean County Utilities Authority, 36 NJPER ¶143 (NJ PERC 9/23/10).

L. Transferring Supervision Responsibilities. The employer lawfully transferred the supervision of street sweeping and snow removal work from members of the supervisor bargaining unit represented by the union to classifications in another bargaining unit. The employer transferred work from the solid waste division that had been supervised by the union’s foremen to the street maintenance division. After the transfer, the work was performed by the street maintenance division, whose supervisors were represented by a different union. The supervised employees in both divisions were members of the same bargaining unit that was represented by a third union. The Commission rejected the union’s argument that “its bargaining rights were violated because work performed by its subordinates was placed under the supervision of members of a different labor organization,” holding that, “While the transfer of work within a bargaining unit may give rise to an obligation to bargain with the representative of that unit, we decline to hold that it gives rise to an obligation to bargain with the representative of another unit. Following the transfer of work of the solid waste division to the street maintenance division, Charging Party’s members continued to supervise employees in Respondent’s solid waste division. Their work of supervising solid waste division employees was diminished, not transferred. . . . Respondent had no duty to bargain with Charging Party regarding the reassignment of work within the bargaining unit represented by” a different union. City of Detroit, 23 MPER ¶60 (Mich. ERC 7/15/10).

M. Eliminating Checkpoints. The employer lawfully prohibited unionized foremen supervising one-man collection routes from continuing a practice of using checkpoints to monitor the work of their subordinates and threatened discipline for non-compliance. Foremen were instructed to make contact with subordinates on their assigned routes rather than at checkpoints. The employer implemented this change after receiving complaints from the public that refuse collection trucks were standing idle. “The . . . foremen check on their subordinates and assist them with problems. How they perform these duties is to be determined by their employer.” The employer, however, had to bargain the effects of its decision, because “to substitute route checks for checkpoints under threat of discipline for failure to comply with that substitution represents a material change in working conditions.” City of Detroit, 23 MPER ¶60 (Mich. ERC 7/15/10).

N. Altering Early Work Hours for Safety/Operational Reasons. The employer’s decision to alter an employee’s early work schedule for safety and operational reasons was not mandatorily negotiable. “While the grievant has an interest in maintaining her early schedule, on balance, the Library’s ability to deploy its personnel to meet the governmental policy goals of increased efficiency and security outweighs Local 108’s interest in negotiating a work schedule preferred by the grievant.” The Commission reasoned that, “[T]he Library has articulated operational efficiency reasons to justify the grievant’s schedule change. First, the grievant’s job responsibilities do not warrant an alternate work schedule. Those responsibilities include contacting vendors who do not open before 9 a.m. and dealing with other staff members who do not begin work until 10 a.m. Therefore, the Library determined that the grievant could more efficiently perform her duties during normal, operating hours. Further, the Library has experienced an
increase in patrons. To meet the increased demand on its resources, the Library determined that all staff must work during the hours the Library is open to the public. The Library has also raised safety and minimum staffing concerns in addition to its operational efficiency arguments. The grievant was the only library employee working the 8 a.m. to 3 p.m. schedule. The grievant and the Reference Librarian are the only employees on the lower level of the Library. Therefore, when one of the employees is on a break or at lunch, the other employee is responsible for the security and safety of the entire lower level. The prior schedule resulted in leaving the grievant alone in the building from 8 a.m. to 10 a.m. and the Reference Librarian alone on the lower level from 3 p.m. to 5 p.m. This created a safety issue for the employees and a security issue for the Library. In addition, in light of the increase in patrons, the Library has determined that it requires two employees on its lower level during its hours of operation.” *Oakland Public Library*, 36 NJPER ¶48 (NJ PERC 4/29/10).

O. Changing Evaluation Procedures Due to Conflict of Interest. The employer’s change to the evaluation procedures because of a perceived conflict of interest was not mandatorily negotiable. An officer who received three or more marks of marginally below standard traditionally met with the police chief to discuss ways to improve the officer’s evaluation. When the police chief’s son received three marginally below standard ratings, he designated a captain to conduct the meeting. “A majority representative of police officers may normally arbitrate alleged violations of procedures pertaining to personnel decisions. To do so does not generally limit government’s policymaking powers. However, under the particular facts of this case, the Chief had a managerial prerogative to determine that it would be unethical for him to discuss the evaluation completed by his son. An arbitrator cannot second-guess that determination.” *Borough of Tinton Falls*, 36 NJPER ¶136 (NJ PERC 9/23/10).

P. Firehouse Closures. An interest arbitrator’s award that imposed procedural restrictions on its decisions to close firehouses impermissibly interfered with the employer’s managerial prerogatives. One procedure required the employer first come to agreement with the Union over the effects of a fire company closure before implementing the closure and follow a prescribed course of action of several steps, which included grievance arbitration, if such an agreement with the union is not reached. The second procedure – called an ALS Engine Pilot Program – would allow paramedics to rotate to engine duty which, apparently, is comparatively less stressful than the work performed as part of a medic unit.

Regarding the effects bargaining procedure, the court held that, “[T]he procedure a public employer adopts for making essential decisions on managerial matters is no less significant than the decision on substance that the employer ultimately reaches. As to decisions regarding fire company closures, . . . the Award takes from the City the complete control it had over of its own decision-making process as to a subject that indisputably lies within its sole discretion . . . . That is, [the Award] modifies the decision-making process the City has heretofore followed in decommissioning fire companies and imposes a further procedure upon the City that it must undertake, before a fire company can be closed. Under this provision, decisions of closure cannot be made upon the City’s analysis alone, but only after what the Union considers a proper evaluation, and eventual arbitration, of the impacts of the closures. In addition, . . . the
City is not permitted to put its closure plan into place until after it has completed the specified multi-step process. Even if no change is made to the City’s initial closure plans because of those requirements, the fact remains that the City is precluded from moving forward with its plan in the timeframe that City officials believe would implement closure in an economical and efficient manner and best serve its citizens. This is no small matter in times of public fiscal economic scarcity, such as the City unquestionably faces now. Further, because [the Award] inserts the Union as a participant into the City’s decision-making process and requires that the City bargain with the Union over a proposed closure’s effects prior to implementation, the provision has the capacity to assert a profound influence over the City’s closure decisions, and ultimately, the City’s policy judgments as to spending, budgeting, levels of fire protection and emergency medical services it should provide, and the prioritization and allocation of competing essential services.”

Regarding the rotation procedure, the court held that, “We certainly do not discount the seriousness of the problem of stressful working conditions and attrition among the City’s paramedic corps. But, the difficulty with [the Award] is that it usurps the City’s essential managerial responsibilities to determine the types and levels of medical emergency protection it deems necessary to provide and to select and direct its financially-strapped resources and personnel. Again, the issue involves far more than simply working conditions. As the City indicates, . . . it must now secure ALS-equipped engines that it does not have; it must alter the way that it assigns firefighters and paramedics who will be providing medical services; and it must abandon its plan to meet an increased need for BLS services among its residents. Notably, even the Union itself touts the ALS Engine Pilot Program as a more efficient way of delivering services and managing a work force, demonstrating its implicit recognition that the program implicates managerial prerogatives.” City of Philadelphia v. International Association of Firefighters, Local 22, 999 A.2d 555 (Pa. 2010).

Q. Scheduling.

1. **Adding Duties to One Employee.** The employer lawfully changed an employee’s work schedule (from 7:30 a.m.-12:15 p.m. to 6:30 a.m.-11:45 a.m.) to assign her the new duty of calling substitute teachers. The union unsuccessfully argued that the employer’s action constitutes a severable change in wages, hours and working conditions because the employer changed the schedule of a single employee. “The law is well established that the determination of the workload and the assignment of duties to a public employee falls within the public employer’s managerial prerogative . . . . Indeed, requiring the District to bargain over the impact of its decision on [the employee’s] schedule would essentially allow the Association to bargain over the District’s managerial decision to assign a new duty to her. As such, the Association has failed to demonstrate that the District’s decision to assign a new duty to [the employee] has a severable impact on her wages, hours or working conditions.” Lackawanna Trail School District, 41 PPER ¶48 (Pa. LRB 4/20/10).
R. Waiver of Bargaining Rights.

1. Authority to Make Mid-Term Changes to Health Insurance Benefits. A bargaining proposal that provided the employer with a broad range of flexibility to make midterm changes to the bargaining unit’s health insurance benefits constituted a permissive bargaining subject because the proposal resulted in the union’s waiver of its right to bargain over a mandatory subject. The proposal allowed the employer to change carriers (including whether to self-insure), polices and benefit levels upon appropriate advance notice to the union and opportunity to provide suggestions. Any grievance over the changes would be limited to determining whether the changes were justified. The union successfully argued that the proposal required the union to waive its statutory right to bargain. “[B]road zipper clauses that cut off parties’ ability to bargain over unknown or unanticipated matters that may arise during the life of an agreement are permissive subjects that cannot be forced to impasse. Contrary to the Employer’s assertion, . . . the proposal grants the Employer an extremely broad range of flexibility to make midterm changes to the bargaining unit’s health insurance benefits. The Union does not and cannot know what changes could occur to its bargaining unit employees’ health insurance benefits during the term of the contract. No sooner than the contract is signed, the Employer could drastically increase deductibles for its non-union employees (or, as the Union suggested, bargain with another unit for higher wages and commensurately higher deductibles) and apply those changes to the bargaining unit employees. This broad authority granted to the Employer under the proposal results in the Union’s abdication of its right to bargain over a mandatory subject. The potential changes that the proposal anticipates are not required to be at all similar to the health insurance benefits in place at the time of the agreement; the changes need only be substantially similar to the benefits of other City employees. Such a provision leaves the bargaining unit employees subject to, among other changes, potential increases in health insurance costs that the Union could not have anticipated at the time of the agreement. Because the language of the Employer’s proposal allows for such broad discretion in changing health insurance benefits (so long as the changes remain commensurate with non-bargaining unit employees), the Union could only grieve changes to the health insurance benefits that are not ‘substantially similar to the coverage and benefits that are provided to the City’s other full-time employees (who are not members of the bargaining units represented by the Union) . . .’ This use of external indicia to determine the health insurance benefits of bargaining unit employees amounts to a waiver of a statutory right, and therefore is a permissive, not mandatory, subject of bargaining.” City of Danville, 26 PERI ¶32 (Ill. LRB GC 4/28/10).

2. Zipper Clause. An employer’s proposed zipper clause, which provided that each party “unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, including the impact of the Village’s exercise of its rights as set forth herein on wages, hours or terms and conditions of employment” was permissive. “[A] broad zipper clause is a permissive subject of bargaining, whereas a sufficiently narrow zipper clause is a mandatory subject of bargaining.” The Board rejected the employer’s reliance upon decisions that have construed narrowly waiver of negotiations provisions. “The Employer attempts to use those cases as support for
the proposition that, regardless of the actual degree of clarity in the language it proposed, the language must be interpreted narrowly, and thus the proposal concerns a narrow zipper clause and a mandatory subject of bargaining. The application of the principle in this fashion – to say unclear language must be clearly narrow language only because any lack of clarity would force a narrow application – is obviously invalid. If waiver of statutory rights is to be clear and unequivocal, it is the actual language of the proposal that must be clear and unequivocal, not the end result after application of a gloss required by its natural ambiguity.” Village of Slokie, 26 PERI ¶17 (Ill. LRB GC 3/20/10).

3. Ability to File Grievances. An employer’s proposal seeking to limit the union’s statutory right to file a grievance constituted a permissive bargaining topic. The proposal excluded from the definition of a “grievance” “any dispute or difference concerning a matter or issue subject to the jurisdiction of the Skokie Police and Fire Commission . . . unless specifically provided in this Agreement.” “Whether the remaining proposal at issue concerns a mandatory subject of bargaining depends on whether the Union has a statutory right to file a grievance.” The employer unsuccessfully argued that the union did not have such a statutory rights because: (a) the Public Labor Relations Act only expressly reserves the right of a union to “settle grievances;” and (b) the Act expressly reserves the right of employees to present grievances without the collective bargaining representative. “[A] statutory scheme that requires exclusive representatives to enter collective bargaining agreements that contain grievance and arbitration provisions likely contemplates that those same exclusive representatives would be able to use those procedures in order to enforce the agreement. This seems particularly true where these representative are assessed part of the cost of that procedure. In contrast to the Employer, . . . the legislature felt compelled to expressly provide that employees have a right to use the grievance procedure is fully compatible with a right of exclusive representatives to file grievances; indeed, such a provision seems more likely against a backdrop of union-filed grievances. . . . [T]he exclusive bargaining representative has a statutory right to file a grievance, and . . . the Employer’s proposal seeking to limit that right by retaining the language used in prior agreements is a permissive subject of bargaining, not a mandatory subject of bargaining.” Village of Slokie, 26 PERI ¶17 (Ill. LRB GC 3/20/10).

S. Discipline.

1. Disciplinary Transfers. The employer’s decision to move, transfer or reassign officers in lieu of discipline or reprimand was not mandatorily negotiable. The union contended that the reassignment of an employee was disciplinary (or a demotion) and resulted in a reduction in the officer’s compensation. The employer responded that it reassigned the officer because of staffing needs and its goal of matching the best qualified employee to a particular job function, and that the reassignment was within its managerial prerogative to determine staffing levels and assignments. The Commission held that a State statute authorizing agreements to arbitrate minor disciplinary disputes of police officers did not extend to reassignments of police officers. “Police officers who believe that they have been unjustly reassigned as a
form of discipline must file a Superior Court action . . . .”  County of Hudson, 36 NJPER ¶18 (NJ PERC 2/25/10).

T. Reporting Requirements.  An employer’s directive that county sheriff’s officers appear at headquarters prior to court appearances was not mandatorily negotiable; however the directive that such officers return to headquarters after court appearances did not interfere with managerial authority.  On-duty officers were required to be appropriately dressed when attending court or hearing proceedings.  The employer issued the directive because off-duty officers had reported to court unkempt, dressed out of uniform and unshaven (which the union disputed).  The employer also required officers to report to headquarters after a court appearance to ensure that employees accurately account for their overtime.

With regard to pre-court reporting, the Commission held that the decision involved managerial prerogative.  “A police officer’s uniform relates to the manner and means of delivering police services and as such is not mandatorily negotiable.  The uniform’s aura of authority applies to an officer called to court proceedings on behalf of the County.  Here, the County wishes to inspect officers appearance and uniforms prior to court appearances at which they will be representing the County. . . . We recognize that the reporting requirement may increase the time required to fulfill court or hearing appearance duties, but – on balance – the employer’s interest in ensuring officers are appropriately dressed outweighs the employees interest in minimizing the off-duty time required to complete a court appearance. . . . The County has a governmental policymaking reason for ensuring that officers are complying with uniform requirements when they are representing the County in court proceedings.  Arbitration over the requirement to appear at headquarters prior to court appearances would substantially limit that governmental policymaking power.”

However, the employer did not establish a managerial regarding the post-court reporting requirement.  “Management has a prerogative to establish timekeeping procedures to verify that employees are at work when they are required to be.  We need not reach the question of whether that prerogative extends to requiring an officer to return to headquarters after a court appearance on his or her day off because we find that the grievance is at least permissively negotiable, as it would not substantially limit the County’s governmental policymaking powers.  The County set forth one reason to substantiate the reporting requirement after a court appearance – to verify employee’s overtime hours.  But no facts have been presented to show an issue with employees abusing time.  Moreover, no facts have been presented to explain why the County would be unable to verify employees time through alternate means that may have less of an impact on employees free time on their day off.”  County of Hudson, 36 NJPER ¶53 (NJ PERC 4/29/10).

U. Interest Arbitration Ballot Initiative.  The employer was not obligated to bargain over its placement of a ballot initiative – which sought to amend a ballot initiative submitted by the union – regarding interest arbitration.  The Union’s initiative sought to amend the County Charter to require the employer and specified unions to submit disputes regarding wages, hours and other terms and conditions of employment to binding interest arbitration.  The employer’s responsive initiative proposed to add two provisions if the
voters approved the union’s initiative: (1) sending an interest arbitration award to the voters if the award resulted in “greater cost” to the employer than its last offer; and (2) permitting the employer to reject an arbitration award if it determined the award would substantially interfere with the employer’s ability to manage its financial affairs. The voters rejected both initiative. Relying upon a recent court decision, which dismissed a lawsuit against the employer for improperly spending public funds for partisan political purposes when bargained for the union’s non-support of the original initiative, the Commission held that the “interest arbitration provisions in general, and the . . . Initiative in particular, are permissive subjects of bargaining.”  County of Santa Clara, 34 PERC ¶109 (Cal. PERC 6/25/10); County of Santa Clara, 34 PERC ¶97 (Cal. PERC 6/8/10).

V. Converting Part-Time to Full-Time Positions Due to Restructuring. The employer lawfully reorganized its Academic Computer Labs so that 21 part-time lab assistant and/or technician positions would be converted into eight full-time Technical Analyst positions. The union unsuccessfully challenged the employer’s decision to hire additional student workers, claiming that the student workers performed the duties of the former part-time employees. “The creation and elimination of positions is . . . a matter of inherent managerial authority. . . . [T]he Act specifically lists an employer’s organizational structure as a matter of inherent managerial policy. In creating and eliminating positions, an employer determines what its organizational structure will be. . . . An employer will function best if it able to freely determine what configuration of positions will enable it to best provide educational services, given its resources. Therefore, the creation and elimination of positions is not a mandatory subject of bargaining.”  Joliet Junior College, 26 PERI ¶96 (Ill. ELRB 8/19/10).

W. Home Visit to Verify Sick Leave. An employer lawfully conducted a home visit to verify sick leave of an employee who was on leave for more than five days. Thus, a challenge to that decision was not mandatorily negotiable. The employee was home when the check was performed and no discipline was imposed. “A public employer has a non-negotiable managerial prerogative to establish a sick leave verification policy and to use reasonable means to verify employee illness or disability. Sick leave verification serves a non-negotiable management interest in ensuring that employees do not abuse contractual sick leave benefits. It does not impinge upon a union’s ability to negotiate sick leave benefits or an individual’s ability to use sick leave for proper purposes, or prevent an employee from arbitrating a grievance asserting that such leave was improperly denied. . . . [T]his case is not about burdensome reporting requirements, but instead about conducting a home visit to verify an employee’s injury. Prohibiting the employer from conducting a home visit simply because the employee was out for five or more consecutive days would substantially limit the employer's ability to determine if sick leave abuse was occurring.”  Township of Maplewood, 36 NJPER ¶135 (NJ PERC 9/23/10).