



# DISCIPLINE OF SCHOOL EMPLOYEES UNDER THE PERC LAW

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**T**he New Jersey Employer-Employee Relations Act, commonly referred to as the “PERC Law” (Public Employment Relations Commission), together with the case-by-case determinations of the courts and PERC, establishes a framework that attempts to balance the right of local school districts to discipline its employees with the right of employees to seek appeals from disciplinary actions. The challenge in achieving this balance is complicated by the requirement of certain disciplinary determinations affecting school employees being subject to binding arbitration. Accordingly, this article will identify PERC Law provisions which affect a school district’s ability to discipline its employees, and identify situations where PERC has held the discipline is subject to review through arbitration.

Understand tenure charges are separate and distinct, and are not covered by the PERC Law. As such, this article will not discuss tenure charges. For more information regarding how tenure charges are brought, the standards, and what type of actions warrant tenure charges, please contact the NJSBA’s Legal Department.

## The Provisions of the Perc Law

The right to impose disciplinary sanctions on employees has been a traditionally well-accepted employer function. The PERC Law’s recognition of this essential managerial prerogative is embodied in *N.J.S.A. 34:13A-5.3*, which provides in part:

*Nothing herein shall be construed as permitting negotiations of the standards or criteria for employee performance.*

Moreover, the PERC Law provides school boards with the authority to take “any disciplinary sanction which is authorized and not prohibited by law.”<sup>1</sup> In addition, *N.J.S.A. 34:13A-24(b)* grants school boards the authority to negotiate other forms of minor discipline including a schedule of acts and omissions for which the negotiated penalty can be imposed.

Although the PERC Law authorizes public employers

to take disciplinary action, it also provides employees with a right to appeal the discipline. In fact, with the exception of school district employees, all other public employees may negotiate disciplinary review procedures, including binding arbitration. However, binding arbitration cannot be granted when another statutory appeal mechanism exists (such as civil service appeals or tenure charges).

In the school context, school employees are afforded even greater protection than just having the right to negotiate disciplinary review procedures. Specifically, *N.J.S.A. 34:13A-29* provides that the grievance procedures negotiated between school boards and its unions:

*shall be deemed to require binding arbitration as the terminal step with respect to disputes concerning imposition of reprimands and discipline as that term is defined in this act.*

Further, *N.J.S.A. 34:13A-22* broadly defines discipline to include “all forms of discipline, except tenure charges filed pursuant to...*N.J.S. 18A:6-10 et seq.* or the withholding of increments pursuant to *N.J.S. 18A:29-14.*” However, increments withheld for predominately disciplinary reasons are subject to review through binding arbitration, which is discussed in detail later in this article.

Many questions and concerns exist among school board members and administrators regarding employee discipline. Generally, these questions and concerns revolve around: how employees can be disciplined; what decisions are subject to review; and who shall review the discipline.

While this article will explore these issues in light of existing case law, this is nonetheless a volatile area marked by evolving interpretations of what constitutes discipline. Please consult with your legal and labor resources, including the NJSBA Labor Relations Department and the NJSBA website at [www.njsba.org](http://www.njsba.org) for the latest developments.

## Defining Arbitrable Discipline

A definition of “discipline” is essential to understanding the parties’ rights and obligations under the PERC Law. In the school context, the statutory definition is as follows:

*Discipline includes all forms of discipline, except tenure charges filed pursuant to the provisions of subsubarticle 2 of subarticle B of Article 2 of chapter 6 of Subtitle 3 of Title 18A*

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<sup>1</sup> *N.J.S.A. 34:13A-24(a)*. However, note *N.J.S.A. 34:13A-25* prohibits boards from transferring employees to another work-site for disciplinary reasons. See discussion of this topic later in this article.

of the New Jersey Statutes, N.J.S. 18A:6-10, et seq., or the withholding of increments pursuant to N.J.S. 18A:28-14.<sup>2</sup>

Unfortunately this statutory definition is not extremely illuminating. Accordingly, PERC and the courts have undertaken a process of defining discipline on a case-by-case basis. This process has resulted in a body of case law which provides a number of useful principles in determining whether a board's action will be found to be disciplinary and subject to arbitration.

The discipline case law has led to an interesting dichotomy between the rights of school employees who are covered by statutory tenure and those who are not but may negotiate contractual job security. Therefore, to understand the scope of arbitrability of disciplinary determinations, the board must be fully aware of the affected employee's classification. In some situations, all school employees who are covered by a collective bargaining agreement will have statutory access to binding arbitration, but in others the employee's eligibility for statutory tenure rights will prevent binding arbitration.

A balancing test to determine arbitrable discipline was established by PERC in its seminal Holland Township<sup>3</sup> decision. In that case, PERC reasoned it was not the label placed on the action but rather the intent. Meaning if the action was designed to improve the teaching performance, it would be considered as a nonarbitrable evaluation action. However, if it was not designed to enhance the teaching performance, then the action would be deemed to be disciplinary and subject to arbitration. While the Holland Township decision was addressing teachers, this standard has been applied to all public employees,<sup>4</sup> and has set forth the guiding principles in defining all aspects of arbitrable discipline.

## Employer Actions

**Letters of Reprimand** Letters of reprimand which have been deemed to criticize school employees for misconduct, unrelated to improving teaching performance, have been found to constitute arbitrable discipline. For example, PERC refused to restrain arbitration of letters of reprimand which addressed a school employee's: unprofessional and uncooperative conduct at meetings with supervisors;<sup>5</sup> unauthorized absences and insubordination;<sup>6</sup> failure to comply

with district policies and state regulations;<sup>7</sup> speaking at a board meeting;<sup>8</sup> and circulating an email that endorsed a school board candidate.<sup>9</sup>

However, a letter of reprimand criticizing a teacher's classroom control, linked to the teacher's professional development plan, was found to be evaluative and designed to improve the teacher's performance. As such, this letter was found to constitute a nonarbitrable evaluative decision.<sup>10</sup> Likewise, letters regarding a teacher's supervision of students has also been found to be evaluative and intended to improve the teacher's performance.<sup>11</sup>

**Evaluations** While evaluation reports are presumed to not be disciplinary, PERC's case-by-case review has scrutinized the comments and ratings in evaluation reports to determine whether the contents of evaluations were predominantly disciplinary or evaluative. In so doing, PERC has found that the contents of evaluations which included nonpunitive comments on attendance<sup>12</sup> or noted deficiencies in employee performance without threats of future punitive action, such as loss of earnings,<sup>13</sup> were evaluative personnel actions which could not be submitted to binding arbitration. Also found not subject to binding arbitration are: comments regarding a teacher's failure to contribute summary of classroom activities for school newspaper;<sup>14</sup> noting that the employee has a pending disciplinary action;<sup>15</sup> and non-instructional issues related to interaction with colleges.<sup>16</sup>

PERC has also held that an annual evaluation report, which contained specific objectives to improve performance, including compliance with district policies, was not rendered disciplinary because it included a recommendation to withhold an increment.<sup>17</sup>

However, comments addressing misconduct rather than teaching performance have been deemed to be dis-

2 N.J.S.A. 34:13A-22.

3 *Holland Township Board of Education*, PERC No. 87-43, 12 NJPER 17136, *aff'd unpub.* App. Div. Dkt. No. A-2053-86T8 (October 23, 1987).

4 See *State of New Jersey (Office of Employee Relations)*, PERC No. 98-8, 14 NJPER 19216.

5 *Union Beach Board of Education*, PERC No. 87-44, 12 NJPER 17317.

6 *Freehold Township Board of Education*, PERC No. 89-80, 15 NJPER 20044; *North Hunterdon-Voorhees Regional H.S.*, PERC No. 98-147, 25 NJPER 29149. *Bergenfield Board of Education*, PERC No. 99-122, 25 NJPER 30145.

7 *Englewood Board of Education*, PERC No. 91-118, 17 NJPER 22153; *Bloomfield Board of Education*, PERC No. 92-68, 18 NJPER 23024.

8 *Pequannock Township Board of Education*; PERC No. 2008-28, 33 NJPER 105.

9 *Pequannock Township Board of Education*, PERC No. 2008-17, 33 NJPER 91

10 *Lincoln Park Board of Education*, PERC No. 87-45, 12 NJPER 17318.

11 *Wanaque Board of Education*, PERC No. 2000-7, 25 NJPER 20161; *Somerdale Board of Education*, PERC No. 98-40, 23 NJPER 28280.

12 *Ridgefield Park Board of Education*, PERC No. 92-66, 18 NJPER 23022; *Marlboro Township Board of Education*, PERC No. 77-121, 23 NJPER 28133.

13 *Old Bridge Board of Education*, PERC No. 88-129, 14 NJPER 19165; *Woodstown-Pilesgrove Regional Board of Education*, PERC No. 2000-103, 26 NJPER 31122.

14 *Bergenfield Board of Education*, PERC No. 99-112, 25 NJPER 30145.

15 *Monmouth County Sheriff's Office*, PERC No. 2008-64, 34 NJPER 51.

16 *Manalapan-Englishtown Board of Education*, PERC No. 97-15.

17 *Englewood Board of Education*, PERC No. 91-118, 17 NJPER 22153.

ciplinary rather than teaching performance.<sup>18</sup> This is so even though the comment may not be accompanied by punitive action.

In the wake of the implementation of TEACHNJ,<sup>19</sup> there have been questions regarding the impact of evaluations on tenure arbitration. This law provides evaluations are reviewable by an arbitrator only when the teacher is subject to tenure charges based upon a failure to achieve a rating of “effective”. However, the law specifically provides that an arbitrator can only determine whether: (1) the district adhered to the evaluation process; (2) the rating was based upon a mistake of fact; (3) there was a discriminatory intent; and (4) the district acted arbitrarily or capriciously. The arbitrator may not second guess the evaluator’s determination of the teacher’s classroom performance.

## Non-Renewals and Terminations of Employees Eligible for Statutory Tenure

Tenure laws provide statutory job protection to certain employees, thereby meaning job protections for tenurable employees are neither negotiable nor arbitrable. In fact, *N.J.S.A. 34:13A-22* was specifically amended to make it clear that tenure charges are excluded from the law’s definition of discipline. The PERC Law’s disciplinary arbitration does not extend to disputes involving statutory tenure rights.<sup>20</sup> However, other actions resulting in the loss of employment have led to frequent disputes as to whether tenurable school employees have, as a matter of law, the right to bring these disputes to binding arbitration.

**Non-renewals** – Absent specific contract language allowing such, neither the denial of tenure to a teaching staff member nor a decision to not renew a nontenured teacher can be submitted to binding arbitration.<sup>21</sup> Moreover, PERC has also held a board’s decision to not renew a secretary after two years of employment was not arbitrable, as the board’s decision was within the statutory tenure scheme provided for school secretaries. However, PERC refused to restrain binding arbitration of the portion of the grievance that claimed that the nonrenewal violated negotiated procedures.<sup>22</sup>

18 *Washington Township Board of Education*, PERC No. 90-109, 16 NJPER 21134 (It is important to note PERC did not permit arbitration of the entire evaluation but limited the arbitrator’s review to the portion of the evaluation which was deemed to be disciplinary.

19 P.L. 2012, Chapter 26

20 Although tenure charges are now subject to arbitration pursuant to TEACHNJ, this does amend the PERC law’s definition of “discipline” which does not include tenure charges. Arbitration of tenure charges is a function of New Jersey’s tenure laws, not the PERC Law.

21 *Englewood Board of Education*, PERC No. 92-78, 18 NJPER 23040; *Long Branch Board of Education*, PERC No. 92-79, 18 NJPER 23041.

22 *Ridgefield Park Board of Education*, PERC No. 98-55, 23 NJPER 28303.

**Midyear Terminations** - For many years, PERC had held mid-contract terminations of non-tenured but tenure eligible employees was subject to binding arbitration but the arbitrator’s award could not grant tenure to the employee. However, there have been several court decisions addressing mid-contract terminations which could ultimately affect this long standing principle, including the Supreme Court’s decision in *Northvale Board of Education*.<sup>23</sup>

In *Northvale*, the Supreme Court affirmed the Board’s mid-contract termination of a teacher for performance reasons was not subject to arbitration. The teacher was terminated based upon the notice provisions of the individual contract. The Court held the termination decision was not a disciplinary action within the meaning of the law, and there was no language in the collective bargaining agreement specifically supporting grievance and arbitration proceedings for mid-contract terminations. In the absence of such specific contractual entitlement, the Court found the board had the right to terminate the employee consistent with the terms of the individual employment contract.<sup>24</sup>

Subsequent to *Northvale*, the Supreme Court issued its decision in *Mt. Holly Township Board of Education*<sup>25</sup>, which further addressed the issue of arbitrability of mid-contract terminations. While *Mt. Holly* dealt with a custodian, it is important in the tenure eligible teacher context as well. In *Mt. Holly*, the Supreme Court held that to the extent provisions in an individual employment contract conflict or interfere with rights provided by the collective bargaining agreement, the language in the individual contract must yield to the collective bargaining agreement. The Court reasoned requiring arbitration is consistent with the Legislature’s amendment to *N.J.S.A. 34:13A-5.3*, which provides “arbitration is a favored means of resolving labor disputes.”<sup>26</sup>

An understanding of the *Mt. Holly* decision is essential, as it makes clear any ambiguity or uncertainty regarding whether a mid-contract termination is subject to the grievance procedure will result in the courts and PERC finding a presumption in favor of arbitration exists. Thus, if a board does not wish for mid-contract terminations to be subject to arbitration, it must have clear language which exempts these situations from arbitration.

## Non-Renewals and Terminations of Employees Not Eligible for Statutory Tenure

School law does not provide tenure protection to a large number of noncertificated school employees, such as:

23 *Northvale Board of Education v. Northvale Ed. Ass’n.*, 192 N.J. 501 (2007).

24 *Northvale*, supra, 192 N.J. 501 (2007).

25 *Mount Holly Township Board of Ed. v. Mount Holly Twp. Educ. Ass’n.*, 199 N.J. 310 (2009).

26 *Mount Holly*, supra, 199 N.J. at 333.

custodians on fixed-term contracts; bus drivers; aides; cafeteria workers; or security guards. In the absence of a preemptive scheme of statutory tenure, these employees may negotiate forms of job security.

**Nonrenewals** In *Camden Board of Education*,<sup>27</sup> the New Jersey Supreme Court held boards have a statutory right to decide whether or not to renew the employment contracts of noncertificated staff because those employees are not protected by tenure rights and are hired on fixed-term contracts. The Court held unless the negotiated contract includes a clear and unmistakable waiver of this board right, nonrenewals cannot be reviewed by an arbitrator. The Court further held that disputes over the arbitrability of these issues should be resolved by judicial interpretation of contractual provisions. Finally, the Court held this ruling applied to *all* renewals, whether or not the decision was alleged to be a fundamentally disciplinary action.

However, boards must not assume their decisions to not renew a support staff employee will, as a matter of law, be exempted from arbitration. Indeed, determining the arbitrability of local nonrenewal decisions must be done on a case-by-case basis, and requires a close reading of the district's negotiated agreement and consultation with your board attorney and labor relations resources. Even the slightest ambiguity or misunderstanding about whether the decision is subject to arbitration will result in PERC finding the matter arbitrable in light of the presumption in favor of arbitration set forth in *N.J.S.A. 34:13A-5.3*.

**Terminations** The Supreme Court's decision in *Pascack Valley Regional*<sup>28</sup> was issued in 2007, and the repercussions continue to be felt. There, the Court held where the collective bargaining agreement broadly defines discipline and the board's mid-year terminations of an employee falls within that broad definition, the employee is entitled to the protections of arbitration. The decision in *Pascack* centered upon a custodian who was terminated by the board pursuant to the notice provision of his individual contract. The Supreme Court focused its decision upon the specific language of the contract regarding "just cause" which stated "any dismissal...shall be considered a disciplinary action and shall at the option of the custodian...be subject to the grievance procedure." The Court held this language meant the parties had specifically negotiated and agreed that such disciplinary actions would be grievable at the employee's option. Under these circumstances, the Court reasoned the protections of the collective bargaining agreement superseded the terms of the individual employment contract which allowed termination on notice.<sup>29</sup>

Subsequent to *Pascack*, the Supreme Court again addressed this issue in its June 2009 *Mount Holly*<sup>30</sup> deci-

sion. There, the Court held that to the extent provisions in an individual employment contract conflict or interfere with rights provided by the collective bargaining agreement, the language in the individual contract must yield to the collective bargaining agreement. In *Mount Holly*, the language of the collective bargaining agreement broadly defined discipline and specifically provided the determination of whether just cause existed was a matter subject to the grievance procedure, which included binding arbitration as the final step. The Court reasoned requiring arbitration in this case is consistent with the Legislature's amendment to *N.J.S.A. 34:13A-5.3*, which reaffirmed the principle that "arbitration is a favored means of resolving labor disputes."<sup>31</sup>

The Appellate Division has given an even more expansive reading of the presumption of arbitration. In its unpublished decision involving *Medford Township Board of Education*,<sup>32</sup> the Appellate Division found a mid-contract termination was subject to binding arbitration, even though the agreement's just cause provision did not include a reference to "discharge" or "termination", which was included in *Mount Holly*. The Appellate Division rejected the *Medford Board's* contention that the case was different than *Mount Holly*, and held discharge "constitutes a 'claim' of loss or injury... as a result of the misinterpretation of misapplication of the terms of the Agreement." The Appellate Division reasoned since such a provision "of a collective bargaining agreement should be broadly construed... we conclude that the significance of the omission of 'discharge' or other comparable term in the just cause arbitration provision of the parties' agreement presents an issue of contract interpretation that is within the purview of the arbitrator to decide." In short, courts may now give arbitrator's even greater leeway in determining the scope of their authority.

**Summary** The New Jersey Supreme Court's decisions in *Camden*, *Pascack Valley*, *Northvale*, and *Mount Holly* have established new standards for determining arbitrability of employee terminations. While there is no per se legal requirement to arbitrate midcontract terminations of nontenured personnel, these decisions have also made it abundantly clear that whether arbitration will be required relies specifically on the language of the collective bargaining agreement. Moreover, if there is any uncertainty or ambiguity as to whether the collective bargaining agreement provides for arbitration, in almost all cases arbitration will be required based upon the presumption afforded it by *N.J.S.A. 34:13A-5.3*. However, binding arbitration is typically not required for grievances arising from a board's decision to not renew the employment of nontenured employees (unless the board clearly and explicitly agrees to binding arbitration in the labor contract).

27 *Camden Board of Education v. Alexander*, 181 N.J. 187 (2004).

28 *Pascack Valley Regional High School Board of Education v. Pascack Valley Regional Support Staff Ass'n.*, 192 N.J. 489 (2007).

29 *Pascack Valley*, *supra*.

30 *Mount Holly*, *supra*, 199 N.J. 310.

31 *Mount Holly*, *supra*, 199 N.J. at 333.

32 *Medford Township Board of Education v. Medford Education Association and James Baptiste*, A-5580-05 (May 18, 2010).

## Withholding of Increments

What type of review is available to employees for a board's decision to withhold an increment is dependent upon certain factors. The determination depends not only upon whether the employee is certificated or not, but also upon the basis for the withholding.<sup>33</sup>

**I. *Noncertificated Staff Withholdings*** A withholding which is based predominately on disciplinary reasons is subject to mandatory binding arbitration.<sup>34</sup> For predominately evaluative withholdings, non-certified staff may appeal through the grievance procedure of the collective negotiations agreement, which might include binding arbitration. Whether predominately evaluative withholdings are subject to binding arbitration depends entirely on the language of the collective negotiations agreement.

In short, boards of education are permitted to negotiate an enforceable appeal mechanism, other than binding arbitration, for the review of noncertificated staff's predominately evaluative withholdings, but all disciplinary based withholdings are subject to mandatory binding arbitration.

**II. *Certificated Teaching (Professional) Staff Withholdings*** PERC's role in assessing contested withholding actions affecting teaching staff members involves a determination of the appropriate forum of review. If PERC finds the underlying predominant reasons for withholding involve an assessment of teaching performance, then PERC will hold the appeal legally belongs before the Commissioner of Education.<sup>35</sup> However, when PERC finds the predominant reason involves discipline, then it will find binding arbitration to be the legally authorized forum to resolve the dispute.

***The Appropriate Forum to Appeal Withholdings of Teaching Staff*** While the specific facts of each case will determine the appropriate forum, a body of case law has emerged to provide guidance as to what benchmarks will be used to determine whether a withholding is evaluative or disciplinary. PERC's process in determining the appropriate forum begins with a careful review of the factual record submitted by the parties. There is no presumption that comments in an evaluation report are simply evaluative as PERC will go beyond the parties' characterization of the withholding.<sup>36</sup> Simply put, PERC will scrutinize the record to establish the primary reason underlying the withholding.

In defining the appropriate forum of appeal for classroom teachers and other instructional staff, PERC examines the record to determine whether the with-

holding was based on an evaluation of *actual* performance in the classroom. Withholdings have been found to be predominantly evaluative when the board's reasons are based on demonstrated deficiencies in classroom performance. Conversely, withholdings not based predominantly on deficiencies observed in the classroom will typically be found to be disciplinary and arbitrable actions.

***Evaluative Withholdings*** PERC has found the types of withholding which require the expertise of the Commissioner of Education are those based on an assessment of classroom performance, including concerns over: long-standing deficiencies in classroom management<sup>37</sup>, teaching skills, and inappropriate language within the classroom;<sup>38</sup> inappropriate methods of disciplining students;<sup>39</sup> deviations from the established curriculum;<sup>40</sup> grading of students.<sup>41</sup>

When the reasons for a withholding include concerns for both deficient classroom performance and conduct outside the classroom, PERC will scrutinize the board's underlying and predominant motive for its action. When the preponderance of the reasons relate to an assessment of teaching performance<sup>42</sup>, or when concern with instructional problems was more significant in substance and timing than cited instances of misconduct, PERC has found the withholding to be predominantly evaluative.<sup>43</sup> However, when the record indicated the increment would not have been withheld simply because of performance concerns, PERC determined the predominant action was disciplinary and legally arbitrable.<sup>44</sup>

***Disciplinary Withholdings*** Withholdings are found to be predominantly disciplinary and legally arbitrable when PERC determines the primary reason for the action does not relate to an assessment of classroom performance. Thus, under the specific circumstances of various disputes, PERC has authorized arbitration of withholdings based on: a teacher's deficiencies in supervising students during her noninstructional periods<sup>45</sup>; violations of district policies and procedures<sup>46</sup>

33 *Scotch Plains –Fanwood*, PERC No. 91-67 (1990).

34 *N.J.S.A. 34:13A-27c*.

35 *N.J.S.A. 34:13A-27d*.

36 *Holmdel Board of Education*, PERC No. 92-6, 17 NJPER 22178; *Passaic County Regional H.S.*, PERC No. 92-125, 18 NJPER 23156.

37 *Dumont Board of Education*, PERC No. 2007-1, 32 NJPER 134.

38 *Upper Saddle River Board of Education*, PERC No. 91-69, 17 NJPER 22059.

39 *Tenafly Board of Education*, PERC No. 91-68, 17 NJPER 22058.

40 *Holmdel Board of Education*, PERC No. 92-6, 17 NJPER 22178; *Passaic County Regional H.S.*, PERC No. 92-125, 18 NJPER 23156.

41 *Mahwah Township Board of Education*, PERC No. 2008-71, 34 NJPER 93

42 *Board of Education of the Vocational Schools in County of Bergen*, PERC No. 91-70, 17 NJPER 22060.

43 *Southern Gloucester County Regional H.S.*, PERC No. 93-26, 19 NJPER 23218.

44 *Morris School District*, PERC No. 93-50, 19 NJPER 24023.

45 *Hunterdon Central Regional High School*, PERC No. 92-72, 18 NJPER 23028.

46 *Greater Egg Harbor Regional High School*, PERC No. 92-9, 17 NJPER 22181.

or supervisory directives;<sup>47</sup> and excessive absenteeism when the record did not indicate concerns with teaching performance<sup>48</sup> or where the concerns with an employee's inability to perform were related to the employee's absenteeism.<sup>49</sup>

**III. Assessing Withholdings of Nonteaching Professional Staff** As the law speaks of "teaching performance" to define predominantly evaluative increments, reviewing the withholdings of principals, nurses and other non-teaching certified staff was left unguided by the statute. This has resulted in PERC establishing a different standard to determine the evaluative nature of professional staff whose job functions do not involve teaching responsibilities. In these cases, PERC examines the specific professional responsibilities of the position to determine whether the action related primarily to the board's assessment of the quality of professional performance.

Under this broader standard, PERC has held the Commissioner of Education is the appropriate forum to review the withholding of a principal's increment as it found the reasons for the action stemmed directly from the board's assessment that the principal had not satisfactorily discharged his responsibilities and had not provided the effective leadership required of his position.<sup>50</sup> Similarly, PERC has found a psychologist's withholding based on failure to improve deficient organizational skills was an assessment of his professional responsibilities as his deficiencies jeopardized the district's compliance with educational law mandates and local policies.<sup>51</sup>

Conversely, withholdings not related to evaluations of professional performance are deemed to be arbitrable discipline. Thus, PERC permitted arbitration of a withholding primarily based on concerns that a school psychologist was in violation of district policies by continuing to see a district student in her private practice, as PERC found the reasons did not involve a subjective assessment of professional performance as a psychologist in the district.<sup>52</sup>

## Transfers

While *N.J.S.A.* 34:13A-25 prohibits boards from transferring employees between work-sites for disciplinary reasons, the law does not prevent boards from effectuating other

types of transfers. Boards remain free to transfer employees, within buildings and between buildings, for educational reasons. Further, boards can continue to use transfers within the same work-site as a form of discipline. However, the rules and standards governing employees' appeal mechanisms differ based on the nature of the transfer.

**Illegal Between Work-Site Transfers** The PERC Law itself does not offer a definition of what constitutes "between work-sites." Therefore, PERC has interpreted the law's "between work-sites" term to mean transfers from one building to another.<sup>53</sup> If discipline was the underlying reason for teachers' transfers from one building to another facility in the district, PERC will find the transfer violated the law. In these situations, PERC has ordered the board to rescind the transfer and to return the teachers to their former positions.<sup>54</sup>

Illegal work-site transfers must be appealed through the Commission's contested transfer petitions and not through binding arbitration. PERC has restrained arbitration of challenged between work-site transfers because the law prohibits negotiations and arbitration of transfers involving a change in school buildings.<sup>55</sup> In processing these petitions, PERC may waive its procedural rules for filing the petition if it finds the board deliberately delayed an action to restrain arbitration to prevent the employee from meeting the 90-day timeline to initiate the appropriate procedure for appealing the transfer.<sup>56</sup>

**Defining Disciplinary Transfers** The law does not prohibit boards from transferring employees from one school building to another for non-disciplinary reasons. Therefore, defining what constitutes discipline is important in determining whether an inter-building transfer is permitted or prohibited by law. In addition, the general principle that board decisions to transfer employees are not arbitrable does not apply when transfers within the same building are taken as a disciplinary action and those transfers may be challenged through the statutorily mandated arbitration process (as opposed to PERC). Understanding the criteria used by PERC to determine the disciplinary nature of all transfers is important to school management.

PERC will find a transfer did not constitute discipline when the board demonstrates its decision was based on legitimate educational reasons, such as the employee's performance or qualifications for the assignment and/or the district's curricular and educational needs, its enrollment

47 *Franklin Township Board of Education*, PERC No. 2000-90, 26 NJPER 31106.

48 *Scotch Plains-Fanwood*, *supra*.

49 *Middlesex Board of Education*, PERC No. 2000-86, 26 NJPER 31089.

50 *Middletown Board of Education*, PERC No. 92-54, 18 NJPER 23010.

51 *Readington Township Board of Education*, PERC No. 95-38, 21 NJPER 26022; *Parsippany-Troy Hills Board of Education*, PERC No. 98-153, 24 NJPER 29160.

52 *State-Operated School District of the City of Jersey City*, PERC No. 97-98, 23 NJPER 28083.

53 *Mt. Arlington Board of Education*, PERC No. 98-4, 23 NJPER 28211. (In this case PERC held a teacher's transfer from the 5th grade to a Basic Skills assignment in the same building did not constitute an illegal between work-site transfer.)

54 See, for example, *Camden Board of Education*, PERC No. 2001-9, 26 NJPER 31148; *West New York Board of Education*, PERC No. 2001-41, 27 NJPER 32037.

55 *Hamilton Board of Education*, PERC No. 2001-39, 27 NJPER 32035.

56 *Hamilton Board of Education*, PERC No. 2001-74, 27 NJPER 32103.

pattern and its operational needs.<sup>57</sup> Similarly, if the transfer does not implicate punitive actions and is not related to displeasure with a teacher's conduct, it will typically be found to be non-disciplinary.<sup>58</sup>

However, transfers will be seen as disciplinary actions if the board does not provide elaboration for its assertion that the transfer served the district's best interests or does not "delink" the action from earlier disciplinary determinations.<sup>59</sup> Transfers based predominantly on the board's displeasure with the employee's conduct or parental complaints, but are otherwise unrelated to legitimate educational reasons, will also be found to be disciplinary.<sup>60</sup>

## Summary

The PERC Law mandates binding arbitration of discipline affecting school employees. The law also precludes arbitration of certain determinations which are related to the boards' ability to evaluate the performance of their staff. The primary responsibility of determining which disciplinary grievances can be legally submitted to binding arbitration rests with the Public Employment Relations Commission ("PERC").

Keep in mind PERC's decisions can be appealed to the Courts. As a result, the definition of what constitutes legal arbitrability has been an active area of evolution as the courts have redefined PERC's initial interpretations in a number of significant areas, including the nonrenewal and terminations of school staff employment.

In addition, PERC's jurisdiction does not include a determination of the contractual arbitrability of certain adverse employment decisions. The interpretation has been left to arbitrators or the courts. Court decisions have also clarified the standards regarding the authority to review challenged employment decisions through arbitration, such as mid-contract terminations and non-renewals, by requiring clear and explicit contract language.

This active interaction between PERC and the courts, as well as the judicial authority to enforce negotiated contracts, has led to a very volatile environment of defining discipline. The changing nature of this area of the law may also be intensified by legislative action as a number of bills designed to expand the scope of negotiations and arbitration are introduced in almost every legislative session. It is therefore imperative for board members and their

administrators to be continuously alert to the potential for change and to consult with their legal and labor relations resources, including the NJSBA Labor Relations Department, to remain aware of the latest development in this area.

That being said, board members and administrators cannot let the constantly changing state of the law interfere with, or detract from, their management obligations.

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57 See, for example, *Irvington Board of Education*, PERC No. 98-94, 24 NJPER 29056; *Sea Girt Board of Education*, PERC No. 91-75, 17 NJPER 22065; *Ridgefield Park Board of Education*, PERC No. 92-67, 17 NJPER 23023; *East Orange Board of Education*, PERC No. 2002-49, 28 NJPER 33053.

58 *Middle Township Board of Education*, PERC No. 99-3, 24 NJPER 29187.

59 *West New York Board of Education*, PERC No. 91-94, 17 NJPER 22113.

60 *West New York Board of Education*, PERC No. 2001-74, 27 NJPER 23037; *Hamilton Township Board of Education*, PERC No. 2001-74, 27 NJPER 32103.

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61 N.J.S.A. 34:13A-27d.