



AN OVERVIEW OF IMPASSE PROCEDURES

The PERC Law provides a system of required impasse procedures that are to be used in the event an agreement over the terms of a successor contract has not been reached. Like most other public sector labor laws, New Jersey's statute provides for the introduction of a third party neutral to assist the parties to reach a negotiated settlement. As amended in July 2003, the PERC Law's procedures for impasses in school districts include: mediation (where the third party neutral tries to persuade the parties) as well as factfinding and super conciliation (where the parties try to persuade the neutral.) The neutrals assigned to oversee and conduct these procedures are granted a great deal of leeway to help and encourage the parties to reach agreements. However, neutrals assigned to a school district impasse do not have the authority to impose a settlement. Mediation, factfinding and super conciliation are advisory impasse procedures and the parties to school negotiations retain the responsibility and authority to reach a mutually acceptable settlement.¹

Mediation

When face-to-face negotiations appear to have reached a deadlock, either or both parties may file a request with PERC to initiate mediation. PERC will assign a neutral third party to conduct mediation of the negotiations impasse and will bear the cost of the mediator's service.

Mediation is a process in which a neutral attempts to help the parties to reach their own agreement. A mediator has no authority or power to make recommendations which will be binding on either party. Rather, the role and function of the mediator is to help and encourage both parties to find their mutually acceptable point of agreement. The mediator is not concerned with the fairness, equity or implications of the parties' agreement: the neutral's single purpose and focus is simply to get the parties to settle their differences. The mediator will use a variety of conflict resolution techniques to encourage the parties to find their own solution to their disagreement. (For a complete discussion of the mediation process, please consult the article on "Mediation" in *The Negotiations Advisor*.)

Factfinding

When mediation does not lead to a negotiated agreement, the continued disagreement triggers the process of factfinding. As a result of a July 2003 amendment, the PERC Law now requires both parties to participate in mandatory factfinding, conducted by a neutral who is also under PERC's jurisdiction.

Factfinding is a process that requires both parties to gather any and all relevant objective information in order to present a persuasive argument to a third party neutral who will then analyze the facts and issue a written report and advisory recommendations for settlement. In practice, unless both parties object, the factfinder will first function as a mediator and attempt to resolve the dispute without "donning the robes" of a factfinder. If this "informal" stage does not result in a settlement, the factfinder will move to a more formal process which involves: the conducting of hearings, where the parties support their arguments with factual documentation; the parties' submission of briefs; and, ultimately, to the factfinder's issuance of written advisory recommendations for a settlement..

In spite of the procedure's name, the report will not necessarily reflect a finding of facts but will be far more grounded on the factfinder's perceptions of what will be acceptable to both parties. Factfinders' recommendations are advisory and non-binding on either party. Thus, the factfinder's "success" lies in fashioning recommendations that can be supported and accepted by both parties. The factfinder's experience, and the application of unwritten but well-accepted criteria, will guide the neutral's sense in fashioning a recommended settlement.

The PERC Law, even as amended in 2003, does not contain criteria or guidelines upon which the factfinder must base his recommendations. Absent statutory criteria, factfinders have formulated their own standards which are tailored to the dispute in question and the parties' bargaining history. Generally, comparability is the criterion that is most utilized and of most importance to factfinders as this most frequently establishes a basis for the parties' ability to find the recommendations acceptable. (For a complete discussion of the process, including the criteria used by factfinders, please consult the article on "Factfinding" in *The Negotiations Advisor*.)

¹The PERC Law also provides a special impasse procedure to police and firefighters, which requires that unresolved negotiations for these employees be submitted to binding interest arbitration.

In accordance with the 2003 amendment, after completion of the hearings, a factfinder is to issue a report to the parties. Although the factfinder's recommendations are non-binding, they narrow the differences between the parties and frequently lead to both parties' mutual acceptance or to a new basis for productive continued negotiations that pave the way for a settlement. The report is to be made available to the public within 10 days of the parties' receipt of the recommendations. The law then requires the parties to continue to negotiate for at least 20 days after the issuance of the factfinder's report. If a settlement is not reached by that time, then PERC is required to appoint a "super conciliator" to further assist the parties to reach a mutual agreement.

Super Conciliation

The 2003 amendment to the PERC Law requires parties who have not reached an agreement within 20 days after the issuance of the factfinder's report to submit their dispute to super conciliation. Super conciliation, a process which resembles mediation and factfinding, had previously been used by PERC in attempts to resolve crisis situations that arose in prolonged and other-wise intransigent negotiations. Under the new law, however, the process will become a codified, statutorily required procedure when post-factfinding negotiations does not produce a mutual agreement.²

The law authorizes the PERC-appointed super conciliator to schedule investigatory proceedings to: investigate and acquire all relevant information regarding the dispute; discuss with the parties their differences; utilize means and mechanisms, including but not limited to requiring 24-hour negotiations, until a voluntary settlement is reached; and provide recommendations to resolve the parties' differences. The super conciliator may also modify or amend the factfinder's report for the parties' reconsideration as one of the efforts to achieve a voluntary

settlement and may institute any other non-binding procedures found to be appropriate by the neutral.

If the actions taken fail to resolve the dispute, the super conciliator will issue a final report. That report is to be made available to the public within 10 days after it has been received by the parties.

Summary

Mediation, factfinding and super conciliation are part of the statutory collective bargaining process. They are designed to assist the parties to reach their own, voluntary and mutually agreeable settlement. Neither the mediator, factfinder or super conciliator has the authority to impose a settlement on the parties to negotiations. All of the neutrals assigned to the different levels of impasse procedures will be interested in only one factor: a settlement. None will be concerned with the equity of the agreement or its impact on a board's ability to manage its school or to fund the settlement. That responsibility remains with the board of education.

In facing impasse procedures, boards of education will be well-served by fully understanding the particular stages of the process. Understanding the criteria that are likely to be used in the issuance of reports and recommendations will be most helpful to boards' preparation of their briefs and positions for factfinding and super conciliation. If you need assistance in understanding impasse procedures or in any aspect of your preparation for the process, please call NJSBA's Labor Relations Department. The Department maintains a file of the "track record" of the neutrals used in impasse procedures. In addition to its expertise and experience, the Department can provide you with examples of briefs filed in the formal stage of factfinding. The Labor Relations Department is also your resource for the latest information and developments of the impasse procedures as expanded by the 2003 amendment.

² PERC is expected to develop rules and regulations to administer this additional impasse procedure in the fall of 2003.