BALANCING MANAGEMENT RIGHTS WITH THE PERC LAW

The ability of management to act unilaterally is significantly limited by the existence of a labor relations law imposing a duty to bargain. However, labor relations laws do not eliminate management rights. While New Jersey's PERC Law requires public employers to engage in collective negotiations over terms and conditions of employment, it does not abolish public employers' rights and responsibilities to manage the delivery of public services. Rather, the PERC Law establishes a balance between the rights of management and the obligation to negotiate.

Unfortunately, this delicate balance is frequently unclear. Boards of education, as well as other public employers, have frequently misunderstood their legal rights to act unilaterally. Some boards, intimidated by union demands to negotiate over a planned board action, or by threats to grieve or to file an unfair practice charge, have dropped their intention to implement a necessary, and legal, managerial decision. Other boards, refusing to be limited by the union's presence, have taken unilateral, but illegal, action and have become embroiled in unnecessary and costly litigation. Neither approach recognizes the board's rights under the PERC Law; neither approach benefits the district. To effectively manage their districts and their labor relationships, boards of education must understand the extent of their right to act under the PERC Law. This is not a simple task as the scope of employers' negotiations obligation is subject to continuous interpretation by PERC and the courts. To assist boards to balance their rights and obligation, this article will attempt to clarify the general principles which govern employers' ability to act and will suggest guidelines that can facilitate implementation of necessary and desirable board decisions.

Illegal Unilateral Action: Mandatory Topics of Negotiations

The cornerstone of any labor relations system is the employer's duty to negotiate in good faith over mandatory topics of negotiations. Thus, under the PERC Law, boards of education cannot legally change mandatorily negotiable terms and conditions of employment without prior negotiations. A list of mandatory topics appears in the "Scope of Negotiations" article in this section of *The Negotiations Advisor.* However, ***as the definition of scope of negotiations is constantly changing, please consult with your attorney, labor relations consultant, or the NJSBA Labor Relations Department to assure that your contemplated action does not implicate a newly defined mandatory issue.***

Unilateral employer alteration of mandatorily negotiable topics cannot occur during the ongoing labor relationship. For example, the employer cannot change terms and conditions:

During the Term of the Contract When there is a contract in effect, the employer cannot unilaterally change terms and conditions of employment covered by the contract. A union does not have to agree to reopen negotiations during the term of a contract upon the demand of the employer to change a term and condition covered by that contract. Without that agreement by the union, the employer is prohibited from making the proposed change. This is true for terms and conditions explicitly covered by the specific language of the contract as well as implicit terms of the district's binding past practice. (A narrow exception to this rule may occur when compelling educational reasons so require; please see discussion on "Policy Determinations" later in this article.)

After the Contract Has Expired When a contract expires without a successor contract in place, the employer must maintain all terms and conditions defined by the old contract until a new negotiated agreement is reached. In certain situations, the requirement to maintain the *status quo* may include an obligation to pay increments on an expired guide if a new contract is not reached before the employees' new work year.[1]

[1] In *Neptune Township Board of Education,* 144 *N.J.* 16 (1996), the New Jersey Supreme Court held that boards are prohibited from paying increments to teaching staff members at the expiration of a three-year contract. In *East Hanover Board of Education,* PERC No. 99-71, 25 *NJPER* 30052, PERC held that labor law compelled an extension of the *Neptune* holding to all noncertificated staff who are included in the teachers' bargaining unit. Note that these decisions do not address the expiration of one or two-year contracts covering teachers' units, nor do they apply to contracts covering only noncertificated employees. Check with your resources to verify your obligations and for possible changes in this developing body of case law.

Even after exhausting all established impasse procedures, boards of education in New Jersey may "not unilaterally impose, modify, amend, delete or alter any terms and conditions of employment without specific agreement of the union."[2]

When Establishing Rules of Employment The PERC Law specifies that new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established.[3] Therefore, an employer must negotiate proposed new rules or modifications of existing rules governing working conditions before they are established, even if the contract is silent on the issues involved. If the employer announces an intended change in working conditions not covered by the contract and seeks negotiations but the union fails to respond, the union *may* be deemed to have waived its right to bargain, and the employer would be free to implement his changes.[4]

When Exercising Statutory Discretion When a statute or a regulation grants discretionary authority to an employer, the employer can exercise its statutory discretion through negotiations.[5] For example, *N.J.S.A.* 18A:29-9 establishes that teachers' initial placement on the guide may be determined by the board of education; since the statute does not mandate unilateral board action, negotiations over initial placement on the guide is permitted. Similarly, a statute that grants a minimum level of benefits to employees (such as the 10 sick days required by *N.J.S.A.* 18A:30-2) does not permit a negotiated agreement to provide a lower level of benefits than that required by the law. However, those statutes are seen as providing boards with the discretion to negotiate a level of benefits that exceeds the minimum set by law. Any negotiated agreement over these discretionary issues must be honored by the employer and cannot be changed without prior negotiations.

Summary

Unilateral employer modifications of terms and conditions of employment under all the above conditions have been found to be violations of the PERC Law. The proscription against an employer's unilateral action affecting mandatory topics of negotiations applies regardless of the nature of the change. Even if an employer's unilateral act results in an additional benefit, that unnegotiated change is considered an unfair labor practice.[6] In *Hunterdon County,* PERC held that the employer's eventual rescission of a unilaterally implemented benefit, following the union's filing of unfair practice charges, also violated the Act: the discontinuation of the benefit was seen as an illegal retaliation for the union's exercise of protected activity. Further, PERC ruled that an employer who, contrary to its statutory negotiations obligation, unilaterally grants a favorable benefit to a bargaining unit may not unilaterally terminate the benefit without the union's request to do so. Therefore, both the unilateral grant and the unilateral rescission of a mandatorily negotiable benefit constitutes an unfair labor practice.

Clearly, in the context of collective negotiations, all matters relating to mandatory topics of negotiations must be the subject of bargaining with the majority representative. This rule, however, does not apply to the determination of policies.

Legal Unilateral Actions

New Jersey's public sector labor law recognizes that certain employment decisions must be reserved to the public employer. These decisions are considered to be outside the scope of negotiations; the employer's right to take unilateral action within the sphere of its statutory managerial rights will be protected by PERC and the courts. Unilateral employer actions are permissible when they represent managerial prerogatives established by statute or regulation, involve the determination of educational or governmental policy, or are specifically permitted by the local agreement.

Statutes and Regulations When a statute or regulation imperatively authorize employer action, the employer is free to make unilateral changes in these areas. Unlike statutory discretionary authority, imperative authority does not leave room for negotiations. Thus, in accordance with *N.J.S.A.* 18A:30-6, school boards can unilaterally, on a case by case review, choose to grant or not to grant extensions of sick leave, and boards can, in accordance with *N.J.S.A.* 18A:29-14, unilaterally determine to withhold the increment of a teaching staff member. Similarly, because of specific statutory authority, boards of education can unilaterally, for reasons of efficiency or economy, decide to institute a reduction in force.

Policy Determinations The New Jersey Supreme Court in *Ridgefield Park,* 78 *N.J.* 144 (1978) established that policy determinations must, in a democratic society, be reserved for the public employer. Boards of education may therefore unilaterally determine issues of educational policy such as class size, teaching assignments, academic calendar, student discipline and so on.[7]

[2] P.L. 2003, c. 126, enacted July 10, 2003 to amend C. 34:13A-1 *et seq.*

[3] *N.J.S.A.* 34:13A-5.3.

[4] *New Brunswick Board of Education,* PERC No. 78-47, 4 *NJPER* 4040; *County of Morris,* PERC No. 83-31, 8 *NJPER* 13259. Also see *East Brunswick Board of Education,* PERC No. 86-109, 12 *NJPER* 17132, where PERC held that the employer must seek negotiations prior to implementing changes in rules of employment.

[5] *State Supervisory,* 78 *N.J.* 54 (1978); *Bethlehem Township Board of Education,* 91 *N.J.* 38 (1982).

[6] *Hunterdon County,* 116 *N.J.* 322 (1989).

[7] For a complete listing, please consult the "Scope of Negotiations" article in this section of *The Negotiations Advisor.*

A negotiated agreement cannot impede boards' ability to determine matters of educational policy. Thus, employers may determine the hours during which their services will operate and the staffing level necessary to their operation; however, within those constraints, employees' individual work schedules and compensation are negotiable.[8] Thus, PERC held that a contractual definition of the starting and ending time of the teachers' workday could not stand in the way of a board's decision to provide basic skills instruction before and after the students' normal day.[9] Under the particular facts of that case, PERC found that the decision involved an educational policy goal of not removing students from their regularly scheduled classes to receive remedial instruction.

It is important to note, however, that PERC's standards in permitting a unilateral change in a negotiated agreement involve two components. First, the ability to act unilaterally may still trigger a negotiations obligation over the impact of management's decision on terms and conditions of employment. (See the discussion below on "The Split Employer Action: Policy v. Terms and Conditions.") In addition, these unilateral changes are permitted *only* when the motivating factor is based on reasons of *educational* policy. PERC has rejected a board's argument that it had the right to unilaterally change the negotiated work shifts of its custodians to offer appropriate custodial coverage in the school buildings. PERC found that the reason for the change was not based on an educational policy decision but on a desire to reduce labor costs. Finding that the board had in the past, and could in the future, provide that coverage through volunteers or through overtime, PERC held that the board did not have the right to unilaterally change a term and condition of employment.[10]

Reasons of economies can, however, be related to governmental policy decisions in specifically defined circumstances. As noted above, boards have a statutory right to initiate a RIF for reasons of economy. In addition, the Court has held that the decision to subcontract is a governmental policy that must be exclusively reserved for public employers. Decisions to subcontract unit work to an outside private contractor for reasons of economy or efficiency are not negotiable; although the employer may have an obligation to "consult" the union, the employer may unilaterally determine its need to subcontract.[11]

Contractual Authorization An employer is free to act unilaterally on any issue if that authority has been granted through negotiations.[12] For example, a contract which establishes a seven hour workday but permits the employer to determine the starting and ending time of the workday represents specific contractual authority for unilateral action in this area.

However, the Courts and PERC have held that a contractual waiver of the negotiations obligation must be unmistakably established. Contractual language alleged to constitute a waiver will not be read expansively but must be clear on its face.[13] The general language of a "zipper" or "fully bargained" contractual clause does not offer sufficient evidence of a conscious and deliberate waiver of the union's right to negotiate over specific changes in terms and conditions of employment.[14]

The sphere of permissible unilateral employer action recognizes both the parties' negotiated agreement and the role and responsibilities of the public employer. It recognizes that while the public employer has an obligation to negotiate with its employees' unions over terms and conditions of employment, the employer has a concurrent obligation to determine and to implement public policy and to remain accountable to the public.

The Split Employer Action: Policy v. Terms and Conditions

The line between permissible unilateral employer actions and illegal, nonnegotiated acts is not always clear. Case law establishes that while some employer decisions may be taken unilaterally and need not be subject to negotiations, the effect of the decision on terms and conditions of employment may need to be negotiated. Although these distinctions must be made on a case-by-case review,[15] there are accepted standards which guide these determinations. Based on judicially established tests of nego-tiability, the standards involve an assessment of: whether the issue predominantly involves a policy determination, as opposed to terms and conditions of employment; and whether negotiations over the issue would significantly interfere with the employer's ability to determine policy. The application of these standards has resulted in "split decisions" which sever the nonnegotiable aspects from the negotiable component of a decision.

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[8] *Hoboken Board of Education,* PERC No. 91-15, 19 *NJPER* 23200.

[9] *Wood-Ridge Board of Education,* PERC No. 98-45, 23 *NJPER* 28285.

[10] *Bloomfield Board of Education,* PERC No. 98-84, 24 *NJPER* 29037.

[11] *Local 195,* 88 *N.J.* 393 (1982). For a full discussion of case law surrounding subcontracting, please see the article "Labor Relations Issue Summary: Subcontracting" in the References section of *The Negotiations Advisor.*

[12] See, for example, *Sussex-Wantage Board of Education,* PERC No. 86-57, 11 *NJPER* 16247.

[13] *Red Bank Reg.,* 78 *N.J.* 122 (1978); *East Brunswick Board of Education,* PERC No. 86-109, 12 *NJPER* 17132.

[14] *City of Newark,* PERC No. 88-38, 13 *NJPER* 18313.

[15] *Local 195,* 88 *N.J.* 393 (1982); *Woodstown-Pilesgrove,* 81 *N.J.* 582 (1980); *Mount Laurel,* 215 *N.J. Super.* 108 (1987).

Once again, *case law in this area is subject to change and boards are urged to consult with their resources* to establish the most current definition of their bargaining obligation. Generally, a dichotomy has been established in the following areas:

Criteria vs. Procedure Criteria for employee performance and for employment decisions are deemed to be expressions of governmental or educational policies and are thus generally nonnegotiable and the subject of permissible unilateral employer action.[16] Thus, the establishment and application of evaluation criteria are generally reserved to the employer's unilateral determination.[17]

However, the procedures that will be followed in the application of the criteria are deemed to predominantly and intimately affect the work and welfare of employees and are thus negotiable. Evaluation, assignment, promotion and transfer procedures have all been held to be mandatorily negotiable.[18]

Assignment vs. Work Load Assignment of teachers, during the normal workday, to tasks involving student safety and supervision is seen as a basic managerial prerogative to deploy staff to carry out the employer's public mission.[19] As such, the decision to assign teachers to supervise or instruct students during the normal workday is reserved as a nonnegotiable employer action.[20] However, if the assignment within the normal school day results in additional work load, the *effect* of the assignment on the teachers' terms and conditions of employment may require negotiations. Unless the contract clearly authorizes the board to increase work load, work load increases have been deemed to be severable from the nonnegotiable assignment decision when:

- the assignment decreases contractually guaranteed duty-free time;[21]
- the assignment results in increased pupil-contact time;[22]
- the assignment represents a change from a noninstructional period to an instructional period;[23] and
- the assignment results in a change from a duty-free period to an assigned period.[24]

Boards' nonnegotiable decision to assign staff may, therefore, carry a severable negotiations obligation over the issue of increased work load. The precise demarcation of such negotiations obligations, however, is unfortunately neither constant nor consistent. The application of new case law to certain specific situations results in an ever-changing environment. For example, until the fall of 1987, it appeared that *Maywood,* 168 *N.J. Super*. 45 (1979) insulated boards of education from negotiating over any increased work load which affected remaining staff because of a reduction-in-force. However, in September 1987, PERC held in *Rahway Board of Education,* PERC No. 88-29, 13 *NJPER* 18286, that boards did have an obligation to negotiate over increases in the number of instructional periods which resulted from a RIF. While PERC affirmed boards' statutory right to unilaterally decide to reduce staff, it found that the issue of increased work load for remaining staff could be severable from the nonnegotiable managerial decision. PERC found that such negotiations would not interfere with management's right to make the decision but would establish a balance between the interests of the affected employees and those of the board.

It is important to remember that case law which establishes a severable, negotiable component to an employer's decision does not prevent the board from making the decision unilaterally. The board remains free to exercise its managerial authority; that exercise of authority may, however, carry a negotiations obligation. Thus, while boards have the unilateral right to decide to enter into subcontracting arrangements at any time, a number of issues (i.e., severance pay, recall rights, and notice) surrounding the effect of the decision on displaced employees are negotiable. *To assess the most current interpretation of your negotiations obligation, please consult your labor relations resources.*

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[16] The one exception to this rule may be when the application of the criteria results in an economic benefit. *Essex County,* PERC No. 86-149, 12 *NJPER* 17201, aff'd App. Div. Docket No. A-5803-85T7, decided June 30, 1987, holds that evaluation criteria that led to merit pay are both negotiable and arbitrable.

[17] *Hazlet Board of Education,* App. Div. Docket No. A-2875-78, decided March 27, 1980.

[18] *Fair Lawn Board of Education,* PERC No. 79-88, 5 *NJPER* 10124; *New Jersey Institute of Technology,* PERC No. 87-23, 12 *NJPER* 17281, etc.

[19] Boards' unilateral right to assign is not unlimited. Teachers' noninstructional assignments, such as custodial duties, which do not involve student safety, security or control are generally negotiable. (*Byram Township Board of Education,* 52 *N.J. Super.* 12, 1977.) But nonteaching duties not directly related to student control but incidental to teachers' primary duties are nonnegotiable, although work load increases attached to those assignments are negotiable. (*Bayonne Board of Education,* PERC No. 87-109, 13 *NJPER* 18111.)

[20] Assignment to extracurricular activities, occurring after the normal school day, is mandatorily negotiable. However, the establishment of qualifications for the assignment is a nonnegotiable managerial function. *N.J.S.A.* 34:13A-23.

[21] See, for example, *Wanaque Board of Education,* PERC No. 82-54, 8 *NJPER* 13011.

[22] See, for example, *Bridgewater-Raritan Board of Education,* PERC No. 83-102, 9 *NJPER* 14057.

[23] See, for example, *Andover Regional Board of Education,* PERC No. 87-4, 12 *NJPER* 17225.

[24] See, for example, *Kingwood Board of Education,* PERC No. 85-94, 11 *NJPER* 16084.

Employment Determinations and the PERC Law

Another important function of public employers is to monitor the quality of the public work force. *N.J.S.A.* 34:13A-5.3 clearly establishes that none of the provisions of the PERC Law "shall be construed as permitting negotiations of the standards or criteria for employee performance." Boards of education can thus evaluate staff performance and can determine the need to discipline an employee, in accordance with statutorily prescribed methods, without seeking negotiated authorization. However, boards' minor disciplinary determinations, as defined in *N.J.S.A.* 34:13A-22 *et seq.* may be appealed to binding arbitration in accordance with *N.J.S.A.* 34:13A-29.[25] Boards of education may not use in-between work-site transfers as a means of disciplining employees as *N.J.S.A.* 34:13A-25 specifically prohibits disciplinary transfers of school employees.

Many board members and administrators fear that the PERC Law prevents them from taking legitimate employment decisions which involve union activists as they believe that the law provides special protection to these employees. Yet, PERC and the courts have consistently held that the Act offers protection only in the exercise of union activities but does not shield individuals from the consequences of poor job performance. Public employers are free to evaluate, discipline, promote or discharge any employee, including union activists, as long as these decisions are based on uniform standards of job performance.

Employers' employment decisions must be made completely within the environment of the individual's role as an employee and must totally ignore the individual's activity, or inactivity, in the union.[26] In other words, the employer must treat all employees alike and must have a legitimate business reason for taking the employment action. Under these circumstances, the PERC Law does not inhibit the exercise of management rights.

Yet, a management decision may be challenged on the grounds that it was illegally motivated and was taken in retaliation for the employee's exercise of activities protected under the Act. In these situations, the dispute will be determined by the application of the judicial standards established in *Bridgewater Township,* 95 *N.J.* 235 (1984): the employee must first establish that protected activity was the substantial motivating factor in the employer's decision; once the employee has proven his case, the burden then shifts to the employer, who must establish that the action was based on legitimate business reasons and would have occurred even in the absence of protected activity.

In its application of the *Bridgewater Township* standard, PERC has sustained employment decisions which were based on consistent application of uniform employment standards and were indeed supported by the employer's legitimate business reasons.[27] However, when the employer has not been able to sustain his contention that the action was a legitimate exercise of managerial rights and would have occurred in the absence of protected activity, PERC has found the employer's action to be pretextual and to be illegally motivated.[28]

Guidelines for Implementing Employer Actions

Although the PERC Law does not prohibit all types of unilateral employer action, the Act does limit boards' ability to act without consideration of their labor relations obligations. How, then, should boards proceed to implement actions they deem desirable or necessary? The following guidelines can assist boards to balance their right to act with their duty towards their unionized employees.

Develop Consistent, Uniform Personnel Practices Employer actions that are rationally connected to the job functions of the employees and to the employer's purpose are far less vulnerable to challenges than decisions which are impulsive and based on individual considerations. Even in the absence of the PERC Law, boards of education's decisions would be limited by other statutes, the standards of the Commissioner of Education, as well as the realities of good personnel relations. Arbitrary, capricious or discriminatory acts do not enhance management's authority or its credibility. On the other hand, sound personnel practices, which are based on employee performance and which ignore personal preferences, including union affiliation or activity, work to develop trust and respect for the employer's exercise of authority. Within a labor relations environment, this attitude can, and does, create a climate which encourages mutuality and cooperation.

Understand Current Case Law Boards' ability to act unilaterally and their negotiations obligation are, obviously, very much dependent upon current case law and the existing definition of mandatory topics of negotiations.

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[25] For a full discussion of discipline of school employees, please see the article "Discipline of School Employees Under the PERC Law" in the Selected Topics Affecting Negotiations section of *The Negotiations Advisor.*

[26] *Black Horse Pike Regional Board of Education*, PERC No. 82-19, 7 *NJPER* 12223.

[27] See, for example, *Black Horse Pike Regional*, PERC No. 83-70, 9 *NJPER* 14017; *Fair Lawn Board of Education*, PERC No. 84-46, 9 *NJPER* 14288.

[28] See, for example, *Bradley Beach Board of Education*, PERC No. 81-4, 6 *NJPER* 11188; *Pine Hill Board of Education*, PERC No. 86-126, 12 *NJPER* 17161.

Therefore, before boards implement any considered action, they should consult with their board attorneys, their labor relations professional, or the Labor Relations Department of the NJSBA. An understanding of the current balance between boards' managerial rights and their bargaining obligation can guide a board's implementation of changes within the context of the bargaining law and can prevent predictable and avoidable labor relations difficulties. An understanding of current case law can allow you to achieve your desired change without incurring labor problems and costly litigation.

Be Familiar With Your Existing Contracts Your ability to act without prior negotiations is also dependent upon the negotiated terms and conditions of your contracts. The specific and express language of your contracts can provide, or prevent, your ability to act. In the face of contractual silence, examine your district's practice to determine if you are obliged to honor a binding past practice.[29] An understanding of the written and unwritten terms which govern your employment relationship, in the context of current case law, can establish your local board's restrictions on your ability to act unilaterally.

Notify the Union of Your Intended Action Whether or not your actions will carry a negotiations obligation, notifying the union is a good, and wise, personnel practice. If your action represents a return to the express language of your contract which has been ignored by your district's practice, alerting the union of your intent to abide by the contractual terms not only prevents future misunderstandings but also acknowledges your recognition of the union's status in your ongoing employment relationship. If your intended action represents an implementation of policy, but will involve a deviation from your district's past operational procedures, the union should be aware of the anticipated change. Indeed, case law as well as your contract may require notification to the union prior to your implementation: *Local 195,* 88 *N.J.* 393 (1982) requires that public employers who are considering subcontracting services for reasons of economy "consult" with the union prior to implementing their nonnegotiable right to subcontract; the Court in *Old Bridge Board of Education,* 98 *N.J.* 523 (1985) upheld the validity of a contractual notice provision of RIFs; although such provisions cannot be used to prevent boards from reducing their work force, they pose an obligation on boards to provide prior notice; similarly, contractual notice for assignments, transfers and other decisions may be binding upon boards although they cannot be used to prevent the nonnegotiable board action. Again, this decision/notice dichotomy represents a balance between the rights of management and those of organized employees: the employer is not prevented from taking action, but an untimely decision may result in a compensatory award to the employee whose procedural rights to prior notice have been violated by the employer's delayed action.

Notifying the union is also a necessary component in decisions which may hold a negotiations obligation.

Be Ready to Negotiate Notice to the union allows it to request negotiations over its perceptions that the decision affects terms and conditions of employment. However, the burden to seek negotiations over proposed changes does not always rest on the union. PERC has held that the employer has the burden to seek negotiations before it implements a change in rules governing working conditions.[30] The union's failure to demand negotiations over the issue in this instance is not seen to relieve the employer from its negotiations obligations since the PERC Act specifically mandates such negotiations.

In other situations, however, PERC has held that the burden to seek negotiations is upon the union. When the board's action represents an exercise of its managerial functions, such as establishing a new position, PERC has held that the union must directly request negotiations over the compensation for the new position. Neither the filing of a grievance nor of unfair practice charges are deemed to constitute a request for negotiations; in the absence of a direct union request to negotiate over the mandatorily negotiable aspects of management's nonnegotiable decision, PERC has refused to find that the employer failed to negotiate in good faith.[31] Therefore, boards' notification to the union of anticipated actions should include, where and when appropriate, an offer to negotiate the issue.

Your negotiations obligation in this one-issue-bargaining does not differ from any good faith bargaining. The obligation to negotiate does not mean that there is an obligation to concede to the union's positions; exploration of alternatives, compromises, or the continued absence of an agreement are all acceptable forms of the process. In the absence of a bilateral agreement on the one issue under negotiations, mediation can be invoked. When impasse procedures have been exhausted, the employer may impose his last and best offer as negotiations continue to resolve the dispute.

Be Ready to Exercise Your Rights It is important to remember that negotiations cannot present significant interference with boards' ability to effectuate their educational policy decisions. Boards should not be deterred by the possibility of a concurrent negotiations obligation. Further, pending negotiations cannot be a block

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[29] Please consult the "Past Practice" article in the Selected Topics section of *The Negotiations Advisor* to help you assess the effect of your district's practice.

[30] *East Brunswick Board of Education*, PERC No. 86-109, 12 *NJPER* 17132.

[31] *Trenton Board of Education*, PERC No. 88-16, 13 *NJPER* 18266; *Monroe Township Board of Education*, PERC No. 85-35, 10 *NJPER* 15625; *Colts Neck Board of Education*, PERC No. 98-157, 24 *NJPER* 29164.

to the timely implementation of a change in educational policy. The board's negotiations efforts, prior to and after implementation, may avoid findings of bad faith negotiations if implementation was necessary to the district's continued operations.[32] However, a board of education considering implementation during the pendency of negotiations must be ready to offer strong support to its position that the change was absolutely necessary to the district's operational and educational programs. The burden of demonstrating that a failure to act, or to delay implementation, would have presented *significant* interference with the board's ability to provide a safe environment for its students or an effective educational program will fall on the board of education.

Further, any decision which is firmly grounded on educational or governmental policy can be implemented prior to the conclusion of negotiations. The decision itself, as an exercise of managerial prerogative, is not negotiable; only the severable issues of compensation for any alleged increase in work load can be subject to negotiations. Boards may, for example, unilaterally assign teachers to supervise the lunch room; however, negotiations over compensation and procedures for assignments are expected.[33] A failure to negotiate these issues may result in grievance arbitration or in unfair labor practice charges.

Readiness to implement necessary decisions requires a full understanding of applicable and most current case law. Boards of education contemplating such actions should consult with their legal and labor relations resources before implementing their desired change.

Be Prepared for Union Challenges Employer actions which change the *status quo* are frequently challenged by the union. Following the above guidelines will not guarantee protection from grievances, arbitration, or unfair practice proceedings. However, following these guidelines should increase your ability to prevail in those proceedings. PERC will restrain arbitration of educational policy decisions and will, generally, not find a board who has, in good faith, initiated negotiations over the changes in terms of employment to have violated the Act. Rather, PERC will seek to:

> *maintain the proper balance between the rights of employees, through their majority representative, to negotiate work load and the managerial prerogative of the employer… The necessary accommodations between these rights must be accomplished in a manner which protects both.*[34]

Summary

In balancing their management rights with their labor relations obligations, boards should do the following:

- develop uniform standards of employee performance;
- check PERC and court decisions;
- look for limitations in the present contract in either specific or general clauses;
- notify the union in as timely a fashion as possible of the intended changes so that, if any negotiations obligation exists, it can be met in an effective manner.

Remember that negotiations is a very valuable problem-solving mechanism. Significant changes in district operations can usually be implemented amicably if both parties operate honestly and constructively. A board's technical legal rights to take unilateral action in certain cases can be useful in negotiations, but it should not become a blockade to productive discussion with employee organizations over matters of mutual and legitimate concern. Similarly, a board of education should not let a potential negotiations obligation deter it from determining and implementing changes which are necessary for the students' educational program or for the district's operations. The PERC Law does not eliminate management's ability to act; it simply requires that management's rights be placed in balance with employees' rights under the law.

[32] See, for example, *Warren Hills Regional Board of Education*, PERC No. 78-69, 4 *NJPER* 4094 and *Edison Township Board of Education*, PERC No. 78-53, 4 *NJPER* 4070. Also see Bayonne Board of Education, PERC No. 91-3, 16 *NJPER* 21184.

[33] *Atlantic Highlands Board of Education*, PERC No. 87-28, 12 *NJPER* 17286.

[34] *New Jersey Institute of Technology*, PERC No. 80-27, 5 *NJPER* 10202.