



# PREPARING TO ARBITRATE DISCIPLINARY GRIEVANCES

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The 1990 amendment's mandated arbitration of school employees' disciplinary grievances places new responsibilities, and new uncertainties, on all boards of education. It is important to remember, however, that employees' right to arbitrate disciplinary determinations<sup>1</sup> does not, in any way, inhibit school management from exercising its legitimate authority to monitor the quality of its staff performance and conduct or initiate legal forms of discipline. The amendment simply provides employees with a new forum to appeal disciplinary determinations which affect them.

Boards of education and school administrators cannot be intimidated by the possibility of arbitration. Rather, they must keep in mind that the ability of employees to challenge board decisions is not a novel development. For years, boards have defended their personnel actions before the courts and administrative agencies, such as the Commissioner of Education and the Public Employment Relations Commission. Arbitration is just one additional, new forum to litigate disciplinary determinations. Boards must then continue to meet their responsibilities to manage their districts and their staff, but they also must become prepared to deal effectively with their employees' new forum of appeal.

Arbitration is governed by its own set of rules and traditions. This article will highlight the special considerations that can assist boards of education to be well-prepared to respond to a request to arbitrate a disciplinary grievance.

## Assessing the Arbitrability of the Grievance

Not all grievances that characterize an action as unjust discipline are automatically arbitrable under the law. Rather, the law authorizes arbitration only of issues that are deemed to truly constitute discipline and restricts arbitration over issues that implicate management's right

to evaluate staff performance.<sup>2</sup> The law also provides procedures which can be used to determine which grievances are, and are not, arbitrable. Boards should carefully monitor their employees' and associations' requests to submit grievances to arbitration and be prepared to initiate appropriate procedures available to restrain arbitration. While arbitrators may be experts in interpreting contract language and labor agreements, they generally lack an understanding and appreciation of schools' instructional environment and of boards' responsibility to evaluate staff. Therefore, it is important for boards to be actively involved in selecting the most appropriate forum of review and that frequently involves the fundamental step of seek a restraint of arbitration.

## Seeking a Restraint of Arbitration

Grievances can be restrained from arbitration either because they are not legally arbitrable or because they are not contractually arbitrable. Understanding the well-defined and distinct procedures that must be pursued to obtain an appropriate and timely restraint of arbitration is important to boards' effective response to grievances alleging discipline.

**Questions of Legal Arbitrability** Whenever a board disagrees with a grievance's claims of unjust discipline and believes that its action involves an evaluative judgment, the board is raising an issue of legal arbitrability. Questions of legal arbitrability must be brought to PERC, who has primary jurisdiction to resolve disputes over the scope of negotiability and arbitrability. It is expected that most disputes over the arbitrability of grievances arising from the mandated arbitrability of disciplinary actions will involve basic disputes over legal arbitrability and will be submitted to PERC. In addition, since the specific language of the Act charges PERC with the responsibility of determining the appropriate forum to appeal teaching staff members' withholdings, it is expected that boards will be filing many petitions with the Commission.

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1 For a full discussion of the provisions of the 1990 discipline amendment, please see the article "Discipline of School Employees Under the PERC Law" in this section of *The Negotiations Advisor Online*.

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2 For a full discussion of what constitutes discipline, please see the article "Discipline of School Employees Under the PERC Law" in this section of *The Negotiations Advisor Online*.

*Filing of Petitions with PERC* Boards of education that question the legal arbitrability of a demand for arbitration should file a scope of negotiations petition with PERC. This is the procedure to be followed whether the board's concern rises out of its belief that the grievance addresses a topic that is outside the scope of negotiations and therefore not arbitrable or that the grievance is challenging an action that does not constitute discipline and thus not legally required to proceed to binding arbitration.

Any petition to restrain arbitration must be filed before the issuance of an arbitration award. PERC will not entertain post-arbitration petitions unless questions of legal arbitrability are referred to the agency by the courts. Further, in the belief that questions of legal arbitrability are generally fundamental issues in disputes, courts tend to frown upon boards that delay their arguments until the issuance of an adverse arbitration award. Therefore, boards are well-advised to seek a restraint of arbitration before the issuance of an arbitrator's award.

Boards' petitions to restrain arbitration are required to be accompanied by a brief which states and supports the board's position that the dispute predominantly involves a nonarbitrable evaluative determination which reflects its assessment of employee performance.

*Supporting the Petition: The Board's Brief* Scope petitions, including requests to restrain arbitration, are usually resolved through the facts and arguments presented by the parties' written submissions. Therefore, in all scope petitions, boards' briefs should be prepared to go beyond simple reliance on case-law precedents and to provide specific and clear examples of the applicability of those principles to the specific circumstances of the grievance at hand. In disputes involving questionable discipline, boards will be well-served by demonstrating as clearly as possible the relationship between the board's action and the intent to improve employee performance. In withholding disputes, boards seeking to restrain arbitration will need to support their decisions with evidence that relates the action to its evaluation of the individual's performance. In withholding disputes, boards should be prepared to submit a copy of the reasons given to the staff member for their decision to withhold the increment—and it is obvious that a board asserting that the withholding is not based on discipline needs to provide reasons that are predominantly related to the employee's performance deficiencies.

It is also obvious that to prevail in its scope petition before PERC, a board must depend upon consistent application of established appropriate personnel practices that can provide the documentation necessary to support its claims. Existing supportive case law will bolster a board's argument, but the specific circumstances of each case will be given great weight by PERC as it applies its *Holland Township* and *Scotch Plains-Fanwood* standards to the dispute at hand.<sup>3</sup>

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<sup>3</sup> For a full discussion of these standards, "Discipline of School Employees Under the PERC Law" in this section of *The Negotiations Advisor Online*.

PERC's decision may grant, or deny, the board's request to restrain arbitration. It may also result in a partial restraint that permits only those portions of the grievance found to relate to discipline to proceed to binding arbitration. It is important to remember that PERC's decision is limited to the abstract assessment of whether the grievance can legally proceed to binding arbitration. A PERC decision does not, in any way, establish the merits of the board's action, the validity of the employee's claims, or the arbitrability of the grievance under the specific provisions of the locally negotiated contract.

**Questions of Contractual Arbitrability** In circumstances not involving mandated arbitration of disciplinary grievances, a negotiated agreement can define the final step of the grievance procedure. As such, as long as the issue involves a topic that is within the legal scope of negotiability and arbitrability, the parties are free to agree to authorize, or to prohibit, submit challenged actions of management to binding arbitration. Whenever a board believes that its negotiated agreement precludes arbitration of a grievance, it is raising an issue of contractual arbitrability.

Disputes over arbitrability under the contract will not be resolved by PERC. The Commission has consistently held that its jurisdiction is limited to determining arbitrability under the law and that claims of nonarbitrability under the terms of a negotiated agreement must be resolved by either the courts or an arbitrator. Boards can thus file petitions with the court seeking an enforcement of contractual provisions and a restraint of arbitration. Alternatively, while this approach does not prevent arbitration, many boards have traditionally chosen to refer their questions of arbitrability under the terms of a negotiated agreement to an arbitrator.

**Choosing the Appropriate Forum** A board's choice of forum can expedite or delay resolutions of arbitrability dispute. PERC has the primary jurisdiction, well-recognized and respected by the courts, to resolve disputes which are based on the claims that legal provisions (including statutes, regulations and case-law) preclude or prohibit binding arbitration. An initial filing of a legal arbitrability dispute to the courts will result in a referral to the Commission's jurisdiction and expertise and thus in a delayed, protracted result which will increase a board's legal fees. Obviously, it is to boards' interests to file disputed issues of legal arbitrability directly with PERC.

On the other hand, PERC will not automatically refuse to entertain scope petitions whose fundamental arguments claim contractual arbitrability. Rather, these board requests will be processed through PERC's normal procedures as delineated in *N.J.A.C. 19:13-1.1. et seq.* Given its jurisdiction, PERC will predictably issue a decision which defers the definition of contractual arbitrability to either the courts or an arbitrator. Thus, once again, a misguided initial finding can also result in a delayed, protracted and expensive proceeding. Therefore, when the argument is based solely on contractual limitations, boards should consider either the judgment of the courts or of an arbitrator.

Traditionally, most boards have relied on arbitrators to determine their authority under the contract. When a contract is exceedingly clear, or the standards to determine arbitrability have been clearly defined by the courts (see discussions of *Northvale*, *Pascack Valley* and *Marlboro*, later in this article), then an arbitrator's decision in this area may be the most appropriate and expedient resolution. However, when the issue is less than clear and involves new territory or new issues (such as those raised in *Northvale*, *et al*), boards are increasingly finding that a court determination is to their best interest. Further, in *Camden Board of Education*, 181 N.J. 187, 2004, the court advised that disputes over disputed contractual arbitrability should be resolved by judicial interpretation of contractual provisions. (Note: The area of judicial interpretation may be subject to further modification as the PERC Law was amended in January 2006 to impose a presumption in favor of binding arbitration. Please check with your legal and labor resources to obtain the latest developments in this area.)

### **Arbitrability of Specific Alleged Disciplinary Determinations: Terminations, Non-Renewals and Withholding of Increments Provisions**

Since the enactment of the 1990 amendments this has been a very volatile area of case-law development. For a number of years following the mandate for binding arbitration of disciplinary actions affecting school employees, PERC held that the law superseded and invalidated locally negotiated procedures relating to issues that were presumed to constitute discipline. For example, while the nonrenewal of teachers and secretaries who had not yet achieved tenure under school law was found to not constitute discipline under the PERC law and thus still precluded and insulated from binding arbitration,<sup>4</sup> the nonrenewals of noncertified school staff not eligible for statutory tenure was deemed to be arbitrable under the law. The nonrenewals of these employees, as well as the withholding of their increments were also presumed to be clear disciplinary determinations. Similarly, the mid-contract terminations of all school employees was characterized as arbitrable discipline under the law.

However, a series of significant court decisions reversed this line of cases and redefined the validity of locally negotiated arbitration provisions.

**Mid-contract terminations and contractual arbitration** In *Northvale Board of Education* ( App. Div. Dkt No. A-2778-04T2, decided October 25, 2005) and *Pascack Valley Regional Board of Education* (App. Div. Dkt. No. A-2599-04T5, decided October 25, 2005) an Appellate Division panel held that terminations based on a board's exercise of its right under an individual employment contract to terminate employment upon giving the specified notice, did not constitute a disciplinary action, but, rather, an exercise of the board's "clearly enunciated

contractual right." As such, the court held that these board actions were not subject to mandated arbitration and that arbitrability would depend upon the terms of the locally negotiated agreement.

The court further found that the these parties' contract did not specifically and expressly authorize binding arbitration of terminations based on notice provisions of an individual employment contract. As such, the court held that these particular grievances were also not arbitrable under the parties' contracts.

These holdings apply to both certificated and non-certificated staff. The *Northvale* dispute arose in the context of the board seeking the court's enforcement of the negotiated contract in a grievance challenging the mid-year termination of a non-tenured teacher. The *Pascack Valley* decision involved a dispute over the authority of an arbitrator to award reinstatement to a nontenured custodian who had been terminated during the school year in accordance with the terms of his individual employment contract. Therefore, in the absence of negotiated language specifically authorizing binding arbitration of grievances arising out of terminations arising from the provisions of an individual employment contract, these disputes will not be seen to be contractually arbitrable nor legally arbitrable under the discipline provision of the PERC Law.

(Note: both decisions have been appealed to the N.J. Supreme Court. Therefore, as of December 2005, this area remains subject to further developments. To remain alert of the latest status of these decisions, please check with your legal and labor relations resources, including the NJSBA Labor Relations Department, the NJSBA website at [www.njsba.org](http://www.njsba.org). Updates will be posted on that site as well as in the NJSBA's subscription service, *The Negotiations Advisor Online*.)

**NonRenewals and contractual arbitration** The arbitrability of boards' nonrenewal decisions affecting employees on fixed-term or annual contracts has been a hotly debated and disputed issue. The first area to be clarified was the status of the renewals of employees who were eligible for, but had not yet achieved, tenure status under school law. In this area, PERC held that the 1990 amendments to the PERC Law were not applicable and that, as part of a larger tenure scheme, these nonrenewals were not *legally* arbitrable.<sup>5</sup> Accordingly, PERC has consistently issued permanent restraints of arbitration of any dispute involving the nonrenewal of tenure eligible employees.

The issue of the nonarbitrability of the nonrenewal of employees who are not eligible for, or protected by, statutory tenure is, however, more complicated as job protection for these staff members can be a matter of contractual rights. PERC's initial rulings held that, absent a RIF, all nonrenewals of non-tenurable employees were disciplinary determinations that could legally proceed to binding arbitration. However, subsequent court decisions established the significant principle that not all renewals

<sup>4</sup> See for example, *Englewood Board of Education*, PERC No. 92-78, 18 NJPER 23040 and *Ridgefield Park Board of Education*, PERC No. 98-55, 23 NJPER 28303.

<sup>5</sup> See for example, *Englewood*, *supra* and *Ridgefield Park Board of Education*, *supra*.

of fixed-term contracts could be considered arbitrable discipline.<sup>6</sup> The dispute was finally resolved by the New Jersey Supreme Court in *Camden Board of Education*, 181 N.J. 187 (2004).

In *Camden*, the Court held that boards have the legal right to renew, or not to renew, fixed-term contracts of noncertified employees for non-arbitrary and non-capricious reasons, without being subject to review by an arbitrator. The Court also held that an arbitrator could review these actions *if* the parties' negotiated contract contained a "clear and unmistakable waiver" of the board's statutory right through an agreement that *specifically and expressly authorized binding arbitration of nonrenewals*. However, *absent* such clearly enunciated contractual provisions, the Court ruled that arbitrators did not have the authority, under the law or the negotiated agreement, to review a board's decision to not renew these fixed term contracts. The Court stressed that its standard for arbitrability was applicable to all nonrenewals, including those that were alleged to be a form of discipline.

The Court also concluded that in the public sector, a dispute over contractual arbitrability required a court's assessment of the negotiated agreement's provisions to determine whether the contract provided a clear and unmistakable waiver of the board's statutory right to not renew an employee and specifically authorized binding arbitration of the disputed decision.

Given this background, it is clear that the issue of nonrenewal of noncertificated employees will continue to be seen as a contractual matter and that PERC will, thus, continue to permit an arbitrator to review the parties' rights under the negotiated agreement. A court, however, guided by the *Camden* ruling, will interpret the parties' agreement to determine if arbitration can or cannot proceed under the specific terms of the negotiated contract. Keep in mind, however, that the aforementioned 2006 amendment to the PERC Law could modify future court decisions. Remain aware of developments in this new area of the law by checking with your legal and labor resources, including the NJSBA Labor Relations Department and postings on the NJSBA website at [www.njsba.org](http://www.njsba.org) and continuous updates in the NJSBA subscription service *The Negotiations Advisor Online*.

**The Nonarbitrability of Withholdings** The courts' interpretation of the 1990 amendments in *Randolph Township Board of Education* (App. Div. Docket No. A-2541-98T3, March 1, 2000, rev'g PERC No. 99-45, cert. den., June 7, 2000), reversed nearly a decade of PERC decisions which held that noncertificated staff had a legal right to appeal all withholdings to binding arbitration. Rather, the courts held that the legislature granted noncertificated school employees the legal right to use binding arbitration only when their increments were withheld for

predominantly disciplinary reasons. The court further held that these employees could and should continue to appeal performance-based withholdings through their locally negotiated grievance procedures.

The court also found that PERC had the jurisdiction, under the law, to determine the underlying reason for the withholding of a noncertificated employee's withholding and should exercise that authority when faced with a disputed withholding. Accordingly, the court remanded the grievance back to the Commission for its assessment of the predominant reason underlying two secretaries' withholding. As of December 2005, PERC has not issued a decision in this matter and whether PERC will continue to find that even predominantly evaluative withholdings continue to be legally arbitrable is not resolved as of this writing. However, under *Randolph*, a negotiated contract can preclude binding arbitration of withholdings that are based on an evaluation of noncertificated staff's performance. Boards can, therefore, identify the appropriate mechanism that is available to their noncertificated staff's appeal of predominantly evaluative withholdings by carefully reading the contracts negotiated with those units.

## Arbitration as a Forum of Appeal

Whether reviewed by the Commissioner of Education or an arbitrator, personnel actions that are based on rational and consistent application of district policies are likely to be sustained. In either forum, the board's right to initiate statutorily authorized, as well as traditionally accepted, forms of discipline is rarely under review. Rather, the issue under appeal is generally the process and the procedures used by the board to impose the challenged discipline. Nevertheless, each forum relies on distinct standards of review, and familiarity with the criteria of arbitral review is important to the preparation of an appropriate and effective defense.

### The Burden of Proof

When the Commissioner of Education reviews the withholding of a teaching staff member's increment, the burden of proof rests with the teacher. However, in arbitration, it is commonly accepted that in all disciplinary disputes the burden of proof falls on the employer. This traditional standard of review has been codified by *N.J.S.A. 34:13A-29 b.* which specifically and imperatively places the burden of proof on the employer seeking to impose discipline.

Thus, in arbitration, the board of education must prove to the arbitrator that the discipline was not only justified but appropriate. In other words, the responsibility of convincing an arbitrator rests with the board. To that end, it is important to provide full documentation of the employee's most recent misconduct as well as a complete employment record. Evidence of well-established and well-communicated expectations of employee conduct, accompanied by a record of consistent enforcement of these standards, is usually a fundamental requirement in persuading an arbi-

<sup>6</sup> See, for example, *Marlboro Township Board of Education*, 299 NJSuper 283 (1997), cert. den. 151N.J. 71(1997) and *Wayne Township Board of Education*, App. Div. Dkt. No. A-2749-97T5, cert. den. March 31, 1999.

trator to support the board's disciplinary determination. However, the most important consideration in boards' ability to carry the burden of proof is an awareness of the standards an arbitrator will use to assess the evidence.

### The Standard of Proof

In reviewing the validity of an increment withholding, the Commissioner of Education has traditionally relied on the *Kopera*<sup>7</sup> standard that a board's decision may not be overturned unless the evidence demonstrates that the decision was arbitrary, without rational basis or induced by improper motives. Arbitrators, however, are not bound by the Commissioner's traditional standard; rather, their standard will be found in the traditions of labor relations and they are likely to assess the evidence based on their application of the well-established standards of "just cause."

Just cause is a standard commonly used in assessing the merits of a disciplinary determination which occurs in the work place. This standard has been accepted by many school districts and a just cause provision has been included in a large number of school employee contracts. (For a full discussion of this standard, please see "The Meaning of Just Cause" article in the Selected Topics Affecting Negotiations section of *The Negotiations Advisor Online*.) Boards whose contracts include a just cause clause can expect that their arbitrators will apply the just cause standard in assessing a disciplinary dispute.

However, even in the absence of a contractual just cause clause, many arbitrators will frequently apply this well-established standard to assess the merits of a disciplinary determination. This well-accepted has been recognized and approved by the New Jersey Supreme Court. In *Scotch Plains-Fanwood Board of Education*, 139 N.J. 141 (1995), the Court found that an arbitrator's reliance on the just cause standard was reasonable, when the parties had not agreed to any standard for the imposition of discipline, as that criteria reflects a well-settled standard of "industrial justice." Thus, to convince an arbitrator of the validity of their disciplinary determinations, boards must be prepared to demonstrate that their action comports either with their negotiated standards or with the just cause standard.

In addition, it must be kept in mind that just cause is a standard to assess the imposition of discipline. In accordance with *Wayne and Camden, supra.*, a just cause clause cannot be read to confer a guarantee of renewed employment when the board has not agreed to provide contractual job security. Further, the withholding of a noncertificated employee's increment for predominantly evaluative reasons that is arbitrable, based on the parties' contract, may not be subject to the same standard that would be used to review a disciplinary withholding.

### Preparing for Arbitration

The possibility of arbitration should not deter boards

from taking necessary disciplinary actions. However, the potential of arbitration should encourage boards to develop protective approaches that assure that their disciplinary actions will be sustained. The best protection rests in thorough preparation that includes helpful contract language, effective personnel practices, familiarity with limitations on arbitrators' authority, and informed participation in the selection of an arbitrator.

### Negotiating Helpful Contract Language

An arbitrator's primary role is to interpret and enforce the agreement negotiated by the parties. Therefore, achieving contractual language that protects and supports the administration's ability to monitor the performance and conduct of the district's staff is an essential step in preparing for arbitration. The potential damage of arbitrating disciplinary grievances can be mitigated by a number of contractual clauses including: a clearly defined scope of arbitrability; a contractual alternative to the just cause standard; a clause that establishes the board's right to not renew a nontenurable employee; and limitations on the arbitrator's contractual authority. These issues, fully addressed in other articles in *The Negotiations Advisor Online*, can be quickly summarized as:

**a clear and precise definition of contractual arbitrability** A clearly defined arbitration clause that includes limitations on an arbitrator's contractual authority to review grievances has always been a helpful tool for school management. This clarity is even more important in light of the new January 2006 amendment to the PERC Law. This new provision imposes a presumption in favor of arbitration to courts' interpretations of the extent of arbitrators' contractual authority. For a full discussion of this issue, please see the article on grievance procedures in the Selected Contract Clause section of the NJSBA's subscription service *The Negotiations Advisor Online*.

**a contractual alternative to the just cause standard** Although the "just cause" standard is the most widely recognized arbitral standard to assess the reasonableness of disciplinary determinations, it is not a legal requirement to resolve disciplinary grievances.<sup>8</sup> Rather, the standard that will be used to assess the merits of discipline is a contractual term which is established, and can be modified, through negotiations.

Boards that have agreed to a contractual just cause clause will be bound by that standard as long as it continues to appear in the negotiated agreement. However, existing just cause clauses, as well as new union just cause proposals, can be modified to provide a less stringent standard. Every aspect of the clause is negotiable, and boards can propose a clause which limits the disciplinary actions that will be subjected to just cause review as well as the classification of employees that will be covered by the negotiated standard. Further, the just cause standard is not the only

7 *Kopera v. West Orange Board of Education*, 60 N.J. Super. 288 (1960).

8 *Montclair Board of Education*, PERC No. 92-62, 17 NJPER 23018; *Scotch Plains-Fanwood Board of Education*, 139 N.J. 141 (1995).

possible criteria to assess the merits of discipline. Boards can, and have, agreed to other contractual standards which establish that discipline shall not be imposed “without good reason” or “arbitrarily or discriminatorily.” Arbitrators are bound by the parties’ specific contract language, and thus these less stringent standards provide the arbitrator with an inescapable alternative to just cause. (For a full discussion of the negotiability of the just cause standard, please see the article “The Meaning of Just Cause” elsewhere in *The Negotiations Advisor Online*.)

**retaining the board’s discretion to renew and terminate employment contracts** Given recent case law developments,<sup>9</sup> neither nonrenewals of noncertificated employees’ contracts nor terminations of any fixed-term contracts are not automatically considered arbitrable, disciplinary determinations. Boards should therefore assure that their contracts do not subject the board’s authority to make these employment decisions to arbitral review. This can be achieved in a number of ways.

First, boards should avoid (and resist) specific contractual language that authorizes binding arbitration of challenged nonrenewals of fixed-term contracts and terminations in accordance with the terms of an individual employment contract. Boards should also avoid contractual provisions that provide forms of job security, such as guarantees of continued employment after a given number of fixed-term contracts. Boards that have inherited such contractual commitments should raise their own bargaining proposals to eliminate or modify these provisions. A “grandfathering” approach that retains the old assurances for certain currently employed staff, but precludes applicability of these provisions to newly hired staff can be a productive approach that restores a board’s discretion and authority in these decisions. (For a full discussion of negotiations with noncertificated employees, please see the article “Special Bargaining Issues of Support Staff Employees” in the Bargaining Units section of *The Negotiations Advisor Online*.)

While the issue of the arbitrability of nonrenewals generally involves noncertificated staff, it cannot be forgotten that this issue may also arise in the context of the nonrenewal of teachers’ assignments to extracurricular activities. A clause that precludes from arbitration, a “decision to not renew an employee in a position for which tenure is not statutorily available,” may establish that an arbitrator does not have the authority to resolve a grievance challenging the board’s decision to not renew a teacher’s extracurricular appointment.

**excluding evaluative withholdings from binding arbitration** According to *Randolph, supra.*, binding arbitration of predominantly evaluative withholdings of support staff’s increments is not mandated by law. Boards can therefore rely on existing contractual procedures that preclude binding arbitration of noncertificated withholdings

to argue that the arbitrator does not have the authority to resolve disputes arising from this type of withholding. Boards that do not have this type of exclusionary language can raise new proposals that would provide a different contractual appeal mechanism to review predominantly evaluative withholdings affecting support staff employees.

**limitations on the arbitrator’s contractual authority**

An arbitrator derives his authority from the four corners of the contract. Therefore, a locally negotiated agreement can place limitations on the arbitrator’s authority to review certain disputes which arise under the contract as well as upon the extent of the arbitrator’s remedial authority. (A number of possibilities in both of these areas are fully discussed in the article “An Analysis of a Grievance Procedure Clause” in the Selected Contract Clauses section of *The Negotiations Advisor Online*.)

While the 1990 amendments mandate arbitration over disciplinary disputes, the law does not address the extent of the arbitrator’s remedial authority. Thus, this issue can still be resolved through locally negotiated agreements. For example, nothing in the law would appear to preclude a negotiated agreement that fully or partially restricted an arbitrator’s authority to reinstate an employee. It would appear that the only impediments to the possibility of such agreements would be the parties’ ability to agree.

### Effective Personnel Practices

Effective practices are based on the consistent application of established criteria for staff performance and conduct. Like protective contract language, rational practices do not prevent disputes over discipline but they can establish and support the validity of the disciplinary action. Effective personnel practices begin with standards that are related to the district’s mission and to the employee’s functions within the district. Standards should comply with relevant laws and regulations and should be widely disseminated among employees. However, the best contract language and the most reasonable standards become meaningless if they are not implemented and, worse, can be damaging if they are administered haphazardly and inconsistently. To be truly effective in the arbitration of disciplinary grievances, personnel practices must be marked by consistent and uniform application.

Established district standards must consistently guide all personnel decisions, including evaluations and disciplinary determinations. Consistent personnel and contract administration can be encouraged by boards of education by providing in-service training for all administrators. Well-developed supervisory skills, including skillful evaluations and knowledgeable contract administration, will become important in defending a district’s disciplinary actions. Districts that provide their administrators with an understanding of their rights and obligations, and training on what constitutes reasonable discipline under the contract’s standards, are far more likely to prevail in arbitration than those who accept haphazard personnel practices. In turn, boards must support the imposition of discipline which complies with the district’s standards. Reversing a rea-

9 See, for example, *Northvale Board of Education, Camden Board of Education, supra.* Also see *The Negotiations Advisor Online* article “Disciplining School Employees Under the PERC Law.”

sonable administrative decision that is in accordance with district practices simply because of the fear of arbitration will undermine your district's consistent application of its personnel policies.

**Familiarity With Legal Limitations on Arbitrators' Authority** Thorough preparation for arbitration also involves an appreciation of the limitations that case law places on arbitrators' authority. Raising these issues in arbitration can frequently have a significant affect on the arbitrator's award. For example, arbitrators may well be influenced by a board argument that cites *County College of Morris*, 100 N.J. 383 (1985). In that case, the court vacated an arbitrator's award as it held that, since the arbitrator had found that the employer had reason to impose discipline, the arbitrator did not have the authority to impose a lesser discipline than that selected by the employer, because the contract did not contain a system of progressive discipline.

In addition, it may be helpful to remind arbitrators of any contractual and legal limitations on their authority, such as the decision which holds: that arbitrators do not have the authority to reinstate a teacher when such an award would impermissibly interfere with the Board's

prerogative to grant or deny tenure unilaterally;<sup>10</sup> or that an arbitrator could not reinstate a teacher if that action had the effect of granting another annual employment contract.<sup>11</sup>

### Selecting an Arbitrator

Knowledgeable contract administration, consistent application of policies and practices, in accordance with negotiated or accepted standards of review, can clearly increase the board's chances of success in arbitration. Your chances of prevailing in arbitration can also be enhanced by selecting arbitrators who have consistently reliable "track records" in assessing reasonable discipline. Since most school contracts in New Jersey provide that the arbitrator will be selected in accordance with the rules of the American Arbitration Association (AAA) or of PERC, districts participate in the selection of arbitrators. Before indicating your preference on the list submitted by the agency in your contract, please consult with your labor relations specialist, your attorney, or the NJSBA. The NJSBA Labor Relations Department

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10 Hunterdon Central Regional High School, PERC No. 92-92, 18 NJPER 23064

11 High Bridge Board of Education, PERC No. 97-140, 23 NJPER 28161.