I. REMOVING WORK FROM THE BARGAINING UNIT

A. Subcontracting.

1. Security Work. In Teamsters Local Union No. 17 v. Port of Seattle, 2004 WL 2524552 (Wash. App. 2004), aff’d, Dec. No. 7271-B, 2003 WL 1712538, (Wash. PERC 2003), rev’d, 7271-A, 2002 WL 129829 (Wash. PERC ALJ 2002), the employer was prohibited from entering into a contract with a private firm to lease its ship port facilities where the lessee provided its own personnel to perform security. This change coincided with a dramatic increase in the number of passenger ships using the port. The court, agreeing with the Commission, held that: (a) the employer previously had assigned police officers to perform security work at the pier; and (b) the general security work and promotional opportunities associated with that work would have increased commensurate with the increase in passenger traffic moving through the port facilities. However, the court, disagreeing with the Commission, held that the employer’s substantial expenditures to upgrade the port facilities to accommodate the increased passenger ship traffic constituted a fundamental change in the employer’s business. Nevertheless, the court held that bargaining was required, based upon a burden-benefit analysis. “Based on the Port’s past practice of assigning bargaining unit members to general security positions during cruise ship operations, the bargaining unit could have legitimately expected more general security assignments … corresponding to the significant increase in cruise ship operations after the home port change. Instead, the CTA contract resulted in a loss of general security assignments for POSPD officers. The issue here is not whether the Port must bargain over its decision to become a home port or contract with CTA, but whether it must bargain over its decision to include bargaining unit security work in the CTA contract…. The Port did not demonstrate either that CTA required the Port to include bargaining unit work in the contract or that bargaining unit employees could not continue performing the general security work despite the change to a home port…. There is no evidence that bargaining with the Union over the general security work would cause an undue hardship for the Port.”

*The presentation of decisions from Administrative Law Judges that have not been affirmed by their respective state labor boards/commissions is done for informational purposes only. The reader should be aware that such decisions may not be binding precedent in those jurisdictions.
2. Ferry Service. In *Skagit County*, Dec. No. 8746-PECB, 2004 WL 2247884 (Wash. PERC ALJ 2004), the employer unlawfully subcontracted work performed by a ferry crew when the employees refused to work an alternative schedule that had been imposed by the employer after the U.S. Coast Guard had ordered the elimination of the previous schedule. The employer’s argument that it was permitted to subcontract because of an emergency (i.e., the refusal of part-time employees to cover the 3.5-hour shifts) was rejected. “[T]he employer failed to bargain or even mention that it was considering contracting out work. Employers are generally obligated to bargain decisions to contract out bargaining unit work. The employer might have lawfully [subcontracted] in the event of an impasse after notice and bargaining on the contracting out, but the employer never started that process. The … employer could have adopted the [union’s] proposed 6-hour schedule on a temporary basis at less cost than the services of the [subcontractee]…. The employer illegally implemented the 10/3.5 shift schedule, which caused the employees’ refusal to work. The employer’s self-created emergency and unilateral change of the schedule does not excuse the employer’s failure to bargain the contracting out of unit work.”

3. Transportation Services. In *Interurban Transit Partnership*, 17 MPER ¶40 (Mich. ERC 2004), the employer unlawfully subcontracted its “on demand” transportation system that formally had been performed by bargaining unit employees. “The employer’s decision to subcontract night and weekend public transportation services in the instant case was a mandatory subject of bargaining. Respondent did not significantly alter the scope and nature of its basic operation. The ITP remains in the business of providing public transportation to individuals within the Grand Rapids metropolitan area, including operation of the PASS service during weekdays. More importantly, there has been no significant change in the service available to the ITP’s customers on night and weekends. Suburban passengers who would otherwise be unable to utilize the regular line-haul system are still being provided with access to public transportation during those off hours. The only significant change is that non-unit employees of an independent contractor are now driving these runs. Although there are no longer any scheduled PASS routes on nights and weekends, the record establishes that the ITP continues to serve the same customers in the same geographic area it is using, at least in part, the same vehicles previously driven by bargaining unit members…. Furthermore, the scheduling of night and weekend runs continues to be handled by the ITP…. There is nothing in the record to establish that the subcontracting decision involved capital investment, or is there any suggestion that [the subcontractor’s] drivers have unique skills or require specialized training to perform this work. Moreover, it seems clear that the employer subcontracted the unit work for purely economic reasons…. The fact that there was no direct evidence of any significant detriment to the members of Charging Party’s bargaining unit as a result of the subcontracting is not relevant to a finding of a duty to bargain in this case…. [A]n employer could be required to bargain over this type of subcontracting even though no employee lost his or her job as a direct result.”
4. **Work Performed by Another Employer.** In *Township of Denville*, 30 NJPER ¶ 148 (N.J. PERC 2004), a union grievance claiming that three police officers lost an overtime opportunity when the police chief permitted two police officers from another municipality and a school board security guard to work a security detail did not involve a mandatory bargaining subject. The Planning Board of an adjoining township scheduled a meeting in the employer’s township because it could not accommodate the crowd in its own facility. The police chief from the adjoining township discussed paying for having the employer’s police officers cover the event. After agreeing that ten officers would be needed, the parties decided that two officers from the adjoining township and a school security guard to work with seven of the employer’s police officers. Consequently, three officers working for the employer were removed from the overtime list. This case involved neither subcontracting nor the transfer of work out of a bargaining unit. “What this case doesn’t involve is the negotiations and contractual relationship between two municipal neighbors seeking to cooperate in meeting an unusual demand. In entering this relationship, [the employer] was acting as a governmental entity, not as an employer. Applying the negotiability balancing test to the unusual facts of this case, … The Township’s decision to enter into a contract permitting [the adjoining township] and the school to provide a portion of the security services and not to provide more than seven of its own police officers was a governmental policy decision not subject to mandatory negotiations or binding arbitration. The employees’ interest in negotiating over the exclusion of [the adjoining township’s] police officers and the school security guard from the security detail does not outweigh the employer’s interest in deciding what level of police service it would provide and whether to permit another township and a school board to provide its own security services within [the employer’s township].”

5. **Police Services.** In *Town of East Hartford*, Dec. No. 3853-A (Conn. SBLR 2004), the employer unlawfully subcontracted its emergency response and traffic enforcement duties. The emergency response duties were assumed by a regional emergency response team that included the employer and several other towns while the traffic enforcement responsibilities were assumed by a regional traffic unit consisting of other municipalities plus the State Police and the division of motor vehicles. With respect to the emergency response work, the type of work being performed on a regional basis was exactly the kind of work performed exclusively by the town’s own emergency response team. In addition, the town’s participation in the regional program varied significantly from past established practice because the town had always maintained its own internal SWAT team to perform the same work now assigned to the regional unit. After joining the regional program, the town disbanded its own SWAT team. Moreover, the change had a significant impact on the bargaining unit because being on the SWAT team was considered a prestigious employment and members of the SWAT team were viewed favorably for promotion. There also was a legitimate concern of future encroachment of bargaining unit work because it was not the type of situation in which a special function was performed for a limited period or where it was difficult or impossible to imagine the practice being enlarged. With
respect to the traffic enforcement work many of the same concerns were applicable. It mattered not that the town suspended its participation after a period of time because there was no evidence why the suspension occurred and whether the reasons for the suspension still remained.

6. Waste Collection. In Town of East Haven, Dec. No. 3965 (Conn. SBLR 2004), the employer lawfully contracted the collection of its bulky waste. While the subcontracting involved bargaining unit work and was a significant departure in kind and degree from the parties’ past practice, there was no evidence of an adverse impact upon the bargaining unit. “[T]he work in question was performed for a limited period of about three months every year. At least once in the past, the work was performed on an ‘as needed’ or ‘call’ basis. When the work was performed regularly, about 40 bargaining unit members were involved spending approximately 80 days per year on this work with minimal overtime. Since the subcontracting of the work, the bargaining unit has been assigned to perform other work that was not being performed due to lack of personnel. There have been no lay offs or other decreases in hours or overtime as a result of the change. Further, this not the kind of change that is likely to engender fear of future encroachment on bargaining unit work. Trash collection is a finite function. The everyday portion of this function has been subcontracted at all relevant times. The subcontracting was specifically directed at alleviating a situation created by the mandatory closure of the landfill and does not lend itself to being enlarged at a later date. The Town could not use its actions to justify contracting out other unrelated functions.”

7. Cafeteria Services. In Matawan-Aberdeen Regional Board of Education, 29 NJPER ¶173 (N.J. PERC 2003), the employer was not required to negotiate its decision to subcontract cafeteria services, and the union could not grieve and arbitrate the employer’s decision to do so. Based upon State supreme court precedent, “a public sector employer may not negotiate over a decision to subcontract with a private sector company to have that company take over governmental services…. [T]he employees’ vital interest in not losing their jobs … was outweighed by the employer’s interest in determining whether governmental services are provided by government employees or by contractual arrangements with private organizations and making business judgments about how worker services should be performed to best satisfy the concerns and responsibilities of government. No negotiations duty attaches even if a subcontracting decision is based solely on a desire to save money and even if employees will lose their jobs as a result. In such instances, however, public employees can seek a contractual provision requiring the employer to discuss (rather than negotiate) economic issues, thus giving them a chance to show that they can do the work at a price competitive with that charged by a private sector subcontractor.” The union’s allegation that the employer’s decision was made in bad faith did not make the subcontracting decision arbitrable.

8. Public School Non-Instructions Support Services. In Detroit Public Schools, 17 MPER ¶14 (Mich. ERC 2004), the employer lawfully laid off an
entire bargaining unit of machinists to alleviate ongoing financial problems, and subcontracted with a third party for those services. “While ordinarily the subcontracting of bargaining unit work constitutes a mandatory subject of bargaining, public school employers are subject to the restrictions of [Public Employment Relations Act]. Under that [statute], a public school employer is prohibited from bargaining over its decision to contract with a third party for non-instructional support services, as well as the impact of the contract on individual employees or the bargaining unit.”

B. Transferring Bargaining Unit Work.

1. Criminal Investigations. In County of Suffolk, 36 NYPER ¶4597 (N.Y. PERB ALJ 2003), the employer lawfully assigned members of a different law enforcement bargaining unit the responsibility of investigating fifth degree arson cases. This criminal offense had recently been established by statute. The union failed to prove that all arson investigations had been performed only by bargaining unit members before the new criminal offense had been enacted because: (a) investigation of a fire began with a first responder, and that person, such as a fire chief, fire marshal or officer at the scene, would inspect and observe and, if appropriate, safeguard evidence; (b) those people might also interview witnesses and ascertain damages; and (c) the bargaining unit’s arson squad was not informed of all fires, since those fires which are not considered “suspicious” in nature may never be referred to the arson squad and would be investigated by other law enforcement officials.

2. Additional Confidential Duties. In Cairo Community Unit School District No. 1, 20 PERI ¶2 (Ill. ELRB ALJ 2003), the employer unlawfully added confidential duties to the bargaining unit position of Head Computer Operator and removed that position from the bargaining unit. The ALJ held that the employer’s action concerned wages, hours and terms or conditions of employment. The employer’s action also was a matter of inherent managerial authority because, “an employer’s decision to confer confidential duties on a position is a decision of how to structure its workforce to obtain assistance in negotiations.... Moreover, this decision is akin to the direction of employees....” In addition, “An employer’s decision to create a position and/or transfer bargaining unit work is a matter of inherent managerial authority when it has engaged in a legitimate reorganization or when it establishes a bona fide supervisory position. A legitimate reorganization occurs when, among other things, the nature and essence of a position has been substantively changed so that the employees holding that position no longer perform the same functions, have the same qualifications, or have the same purpose or focus as the previous employees.” The balancing of the interests, however, favored bargaining. “Bargaining could benefit the District’s decision-making process by permitting the Association to propose alternatives to the transfer of bargaining unit work out of the unit, such as re-distribution of the work that was transferred or the hiring of an additional bargaining unit employee to perform that work.... The only burdens bargaining would impose on the
District’s authority are those that it imposed on itself by changing the duties of an existing position, rather than by creating a truly new confidential position.”

3. **Athletic Director.** In *Anna-Jonesboro Community High School, District No. 81*, 20 PERI ¶3 (Ill. ELRB ALJ 2003), the employer unlawfully replaced the bargaining unit position of Athletic Director with the non-bargaining unit position of Athletic Supervisor. The employer’s action in removing or transferring bargaining unit work affected the wages, hours and working conditions of the bargaining unit. However, the employer’s decision to create the athletic supervisor position is a matter of inherent managerial authority. “The District created the non-bargaining unit Athletic Supervisor position because they felt there had been a lack of supervision over the coaches by the past athletic directors.... The District’s creation of the Athletic Supervisor position in order to supervise coaches and eliminate the effort the school board members were putting into the athletic program falls under the District’s discretion to determine its functions and discretion to determine its organizational structure.” Finally, the balancing of interests favored bargaining. “The District could have feasibly bargained the position while bargaining the current contract and still filled the position” by the deadline it had established.

4. **Water Emergency Response Work.** In *City of Seattle*, Dec. No. 8313-A-PECB, 2004 WL 725778 (Wash. PERC ALJ 2004) aff’d, Dec. No. 8313-B-PECB, 2004 WL 1718873 (Wash. PERC 2004), the employer unlawfully transferred certain water emergency response work from the police bargaining unit to the firefighters bargaining unit. The employer unsuccessfully contended that the assignment of work represented a *de minimis* change in working conditions, stressing that the harbor patrol and the police bargaining unit responded to hundreds of water-related emergencies each year, while the Union presented only a handful of examples where the search was performed by members of the firefighters bargaining unit. “[T]he primary negative affect on the [union] is anticipatory. The [union] has reasonable grounds for concern about a threat to the integrity of the bargaining unit it represents.... That if the [assignment] is left unchallenged, the fire department and the employer could, in the not too distant future, claim that the fire department had been responding to all fresh water-related emergencies for years, and that the [union] had waived (by inaction) its right to sole jurisdiction over the work.”

5. **Eliminating Level of Supervision.** In *Commonwealth v. Labor Relations Commission*, 60 Mass. App. Ct. 831, 806 N.E.2d 457 (2004), the employer unlawfully eliminated middle-level supervisors and transferred that work out of the bargaining unit. “[T]he transfer of bargaining unit work, even when accompanied by no apparent reduction in the total number of bargaining unit positions, constituted a detriment to the bargaining unit because it could result in the eventual elimination of the bargaining unit through gradual erosion of bargaining unit duties. There were fewer [supervisory] positions to which an increasing number of [lower-lever supervisors] could aspire, including three
vacant positions formally occupied by [second-level supervisors] who had been laid off.”

6. Police Patrol. In *City of Marengo*, 20 PERI ¶99 (Ill. LBSP 2004), the employer unlawfully transferred work from its patrol officers’ bargaining unit to non-unit, part-time officers. The employer unsuccessfully argued that its actions were justified because it did not have an adequately staffed police department and needed to quickly hire part-time police officers to compensate for the loss of manpower without going through the one year process of hiring a full time officer. The transfer of bargaining unit work affected wages, hours, and working conditions of the bargaining unit. “The decision to transfer work of a bargaining unit causes that unit to lose actual or potential work, wages, and hours associated with the transferred-out positions.” Further, the diminution of unit work weakens the collective strength of the bargaining unit, impacts the Union’s ability to effectively deal with the employer, and can adversely effect the unit’s viability. In addition, the transfer did not involve a matter of inherent managerial authority. “An employer’s decision to transfer a bargaining unit worked when a newly created position is a matter of inherent managerial authority under two circumstances: 1) when it has engaged in a legitimate reorganization; or 2) when it establishes a *bona fide* supervisory position.” Neither of those events had occurred. Finally, even if the employer had acted within its managerial prerogative, the balancing of the parties’ interest favored collective bargaining. “The [employer] has failed to establish that requiring it to bargain regarding its decision would have imposed a significant burden on its authority. It has not explained why it could not hire certified, trained, full-time officers.”

7. Eliminating Assistant Mechanic. In *Shelton School District*, Dec. No. 8729-PECB, 2004 WL 2247880 (Wash. ERC ALJ 2004), the employer unlawfully eliminated the bargaining unit position of assistant mechanic, established the non-bargaining unit position of utility person, and provided that position with similar duties and reporting responsibilities because: (a) the work had never been performed before by non-bargaining unit employees; (b) “It is clear that the tenure of the assistant mechanic was significantly impaired, and the evidence supports an inference that there was a direct connection between the layoff of the assistant mechanic and the creation of the utility position;” (c) “The only reason given by the employer for this transfer of work related to economics of the mechanics performing ‘unbillable’ work;” (d) “The employer did not provide an opportunity for bargaining prior to this transfer of work.”

8. Clerical Duties. In *Metropolitan District Commission*, Dec. No. 3995 (Conn. SBLR 2004), the employer did not unlawfully transfer work out of the bargaining unit. At issue where the positions of Administrative Clerk (non-bargaining unit) and Administrative Analyst (bargaining unit). Although at least some of the work performed by the Clerk is bargaining unit work of the Analyst, the Union failed to show that the transfer of work in question varied significantly in kind or degree for what has been customarily between these two positions.” Indeed the union’s witnesses acknowledged that the work currently performed by
the Clerk is the same work that was performed by the former Clerk before he became the Analyst.

9. **Staffing Coordinator.** In *County of Essex (Hospital)*, 30 NJPER ¶60 (N.J. PERC ALJ 2004), the union unsuccessfully alleged that the employer had eliminated the bargaining unit title of Staffing Coordinator and transferred that position’s duties to the non-unit Assistant Directors of Nursing and the Director of Nursing. Although the employer’s decision to use non-unit employees to do work previously performed by the Staffing Coordinator involved a mandatory subject of bargaining, the employer was not obligated to bargain in this instance. “An employer does not incur a duty to negotiate with the majority representative where … the disputed duties were historically performed by non-unit personnel exclusively or in conjunction with unit employees…. In this instance, the disputed duties were historically shared between the Staffing Coordinator and non-unit personnel. Certain duties performed by the Staffing Coordinator during the first shift were performed by non-unit employees during the second and third shifts, which were then reviewed by the Staffing Coordinator. Non-unit employees also perform the Staffing Coordinator’s duties when she was sick or on vacation. Finally, the Staffing Coordinator and the Director of Nursing had certain overlapping duties regarding nurse staffing, overtime reports and monthly schedules.

10. **Non-Certificated Teaching Duties.** In *Laconia School District, SAU #30* Dec. No. 2004-028 (N.H. PERLB 2004), the employer lawfully removed from a teacher bargaining unit certain positions (LAB Supervisor and Technology Specialist) that did not require the persons holding those positions to hold a teaching position issued by the State Board of Education. “[T]he Association failed to establish that these individuals met the existing criteria of those employees certified to be members of the bargaining unit. Therefore, the Association has failed to prove that the District violated any provisions of the statute when it entered into employment contracts with the individuals in these positions as they were not certified members of the bargaining unit at the time.”

11. **Yardman Duties.** In *Town of Wallingford*, Dec. No. 3999 (Conn. SBLR 2004), the employer did not unlawfully eliminate the position of Yard Man Dispatcher and transfer the duties to non-bargaining unit employees. “To the extent that the record reveals that non-bargaining unit members performed some of [the laid-off employee’s] duties, that situation is no different than existed while [the employee] was working.” However, the employee’s lay-off was retaliatory.

12. **Nursing Duties.** In *State of Connecticut, UConn Medical Center*, Dec. No. 4002 (Conn. SBLR 2004), the employer did not unlawfully lay-off certain employees and transfer their work to non-bargaining unit employees. At issue was the employer’s decision to eliminate the position of Correctional Medical Attendant, and assign the work formerly performed by persons in that position to nurses in the facilities. “[T]he record is very clear that all work performed by the CMAs had always been performed by other non-bargaining unit personnel…. 
[T]he nurses performed all the same work performed by the CMAs at all relevant times. As such, the Union cannot prove that this transfer varied significantly in kind or degree from past established practice.”

II. LEGAL IMPEDIMENTS TO ESTABLISHING MANDATORY SUBJECTS OF BARGAINING

A. Parity Clause.

In Township of Middletown, 29 NJPER ¶163 (N.J. PERC 2003), the union attempted to enforce an illegal parity clause. The contract provision the union sought to enforce granted the union the right to any additional increase over 3.25 percent if such an increase was negotiated between the employer and another bargaining unit. “Clauses that automatically extend to one unit any increases in salary or benefits negotiated by other units are not mandatorily negotiable. However, clauses extending to unit employees benefits unilaterally conferred upon non-unit employees are mandatorily negotiable. Similar clauses permitting the reopening of negotiations in the event of increases and salaries or other benefits negotiated by other units.” The union could not seek to obtain an automatic pay increase; however, the union was permitted to arbitrate a claim that the contract requires the re-opener of the wage provision because another bargaining unit received greater salary increases.

In Village of Hempstead, 37 NYPER ¶4503 (N.Y. PERB ALJ 2004), the employer unlawfully refused to ratify a tentative agreement containing enhanced health and optical benefits because those enhanced benefits would have to be provided to another bargaining unit under a parity clause and that other bargaining unit’s collective bargaining agreement. The employer violated its bargaining obligation because it had entered into and gave effect to an improper parity clause with another bargaining unit, thus effectively impeding the ability of the union to engage in effective negotiations on behalf of its members. With respect to the legality of parity provisions, “[a] parity agreement is improper only to the extent that it trespasses upon the negotiation rights of a Union that is not a party to the agreement. It does so by making it more difficult for the non-party Union to negotiate some benefits for employees it represents or imposing upon it a burden of negotiating for employees who it does not represent.” In this particular case, “[t]he clear effect of this clause … was to impede the ability of [the union] to effectively negotiate the increased health, dental and optical benefits on behalf of its membership. The clause in issue makes it more difficult for [the union] to enter into an agreement for the employees it represents, and in fact prevented an agreement from coming true for wishing, imposed a burden on [the union] based upon employees it does not represent, and was entered into without [the union’s] consent.”

B. Tape Recording Internal Investigations. In City of Pullman, Dec. No. 8086-A-PECB, 2003 WL 23354426 (Wash. PERC 12/17/03), aff’g, Dec. No. 8086-PECB, 2003 WL 21419640 (Wash. PERC ALJ 5/30/03), the employer unsuccessfully argued that a state statute that required consent of all parties to tape recording conversations authorized it to implement a policy precluding the tape recording of internal investigation interviews. The State’s collective bargaining law prevailed over conflicting statutes. Moreover, “[t]he Legislature has neither required tape recording in all investigatory
interviews nor altogether prohibited tape recording of such meetings. Instead, the
officials acting on behalf of the employer have discretionary authority to grant or
withhold consent to tape record investigatory interviews in which they participate.”
Consequently, “public entities must satisfy their statutory bargaining obligations in
exercising their discretionary authority as to any mandatory subjects of collective
bargaining.”

C. Increasing Retiree Health Benefits. In Township of Winslow, 29 NJPER ¶178 (N.J. PERC 2003), a union proposal to increase retiree health benefits did not
interfere with State law requirements that such benefits be provided uniformly to all
employees because the Union’s proposal would delay implementation of any proposed
changes until any uniformity requirements were met.

D. Eliminating Longevity Increment. In Borough of Waldwick, 30 NJPER ¶9
(N.J. PERC 2004), an employer’s proposal to eliminate longevity pay for new hires, but
grant current employees longevity until they retire, did not constitute an impermissible
pension ruling. “Pension statutes and regulations do not automatically preempt proposals
relating to terminal leave, longevity or holiday pay, even though those proposals may
trigger questions about how the compensation will be treated for pension purposes.…
The Borough is proposing to eliminate longevity for new hires, a mandatorily negotiable
compensation issue. It is not proposing to affect the pensions of current employees who,
under its proposal, will continue to receive longevity. [The State pension statute] does
not bar consideration of the proposal simply because, if awarded, the proposal might
trigger a pension ruling on, or different pension treatment of, current employees’
longevity.”

E. Health Benefits Changed by Higher Authority. In Geauga County Sheriff,
SERB 2004-001, 21 OPER ¶68 (Ohio SERB 2004), SERB was asked to rule upon the
obligation of a county sheriff to negotiate over the effects of a new health care coverage
and benefits program – resulting in increased employee contributions and/or reduced
benefits levels – that had been implemented by the county commissioners for all county
employees. SERB already had dismissed an unfair labor practice charge against the
county commissioners for lack of jurisdiction, reasoning that the charge did not allege an
unfair labor practice because the county commissioners had acted in its role as a
legislative body and not as a public employer. SERB rejected the employer’s argument
that it did not have a bargaining obligation on this topic because only the county
commissioners were statutorily authorized to contract for health benefits. SERB
responded that it “cannot prohibit a [legislative body] from enacting legislation …
because such a remedy exceeds SERB’s jurisdiction; SERB must focus on the public
employer’s implementation of those legislative enactments.” Because the employer had
bargained over a certain level of health benefits at a certain level of cost to the
employees, the employer was obligated to maintain those benefits/costs or negotiate the
effects of any such change. SERB also commented that, “The relationship among the
employee organization, the public employer, the legislative body, and the binding nature
of the collective bargaining agreement under § 4117.10(C) … is one that might be more
fully explored by the Ohio General Assembly. Under Chapter 4117, if a legislative body
takes an action that might arguably constitute a repudiation of a term of the collective
bargaining agreement, how is the legislative body held accountable? Or does the binding nature of the collective bargaining agreement extend to the legislative body only to the extent that it is required to fund the agreement? Under what circumstances is a public employer entitled to additional funding during the term of a collective bargaining agreement? If no adequate remedy exists, either under Chapter 4117 or in a common pleas court action to enforce the terms of the collective bargaining agreement, perhaps a mandamus action against the legislative body is necessary."

F. Pension Ordinance. In *Wilkes-Barre Township*, Case No. PF-C-03-155-E (Pa. LRB 11/16/04) the employer unlawfully adopted a pension ordinance. The ordinance: (1) eliminated vesting rights; (2) eliminated the ability to purchase non-intervening military service; (3) set member contributions in excess of that agreed to in the collective bargaining agreement; (4) excluded unused personal and compensatory time; and (5) limited the amount of unused vacation time from the employee’s final salary for calculation of pension benefits. The employer unsuccessfully argued that the Board lacked authority to find an unfair labor practice based upon a properly enacted ordinance. “A local ordinance may not be used as a ‘guide’ to side step bargaining obligations ….”

The employer was equally unsuccessful in arguing that the contract provision covering employee pensions was illegal under State law, thus allowing the employer to pass the pension ordinance. “As a matter of law and labor policy, the Township is bound by its prior agreement with the Association despite its alleged illegality ….” Once the employer agreed to a term in a collective bargaining agreement, it may not later unilaterally alter that term on the claim that the law requires otherwise."

G. Internet Use Policy. In *Johnston School Committee v. Rhode Island State Labor Relations Board*, 2004 WL 877619 (R.I. Super. 2004), the employer’s argument that federal and state law authorized it to unilaterally implement an Internet use policy was rejected. The policy warned that violations of its terms, including casual personal use, subjected employees to disciplinary action or criminal prosecution. The employer first argued that the policy was authorized by State law that enumerated the general duties and obligations of the Committee, including the authority to “develop education policies,” “provide for the location, care, control, and management of school facilities and equipment,” and “establish standards for conduct.” The court responded that, “Not only has the implementation of the Policy exceeded these general requirements, but it has also violated the very substance of [the statute]. The duties and obligations enumerated in [the statute] are specifically limited to ensure the protection of the teachers’ right to bargain. [The statute] states ‘[n]othing in this section shall be deemed to limit or interfere with the rights of teachers and other school employees to collectively bargain … or to allow any school committee to abrogate any agreement reached by collective bargaining.’” The employer next relied upon the federal Children’s Online Protection Act (“COPA”), which requires an Internet safety policy be adopted by all schools which are provided with discounted Internet service. The court responded that, “[T]he Committee has exceeded the conditions proscribed by COPA. The restrictions imposed by COPA are limited to the protection of students from obscene material, including child pornography. COPA does not seek to restrict the casual personal use of the internet. Nevertheless, such a restriction is included in the Policy implemented by the Johnston School Committee. The Policy states: ‘[i]t is expected that staff and faculty members in
Johnston Public Schools will use the Internet for research and/or instructional purposes.... [Furthermore,] Johnston Public Schools’ networks ... must be [used] in support of the educational goals and objectives of Johnston Public Schools and the State of Rhode Island.’ The specific goal of COPA is to combat the growing problem of ‘distribution over the Internet of obscene material, child pornography, and [other] harmful ... material. Law enforcement resources at the state and federal level have been focused nearly exclusively on child pornography and child stalking.’ However, the Policy has gone above and beyond the requirements of COPA and into the realm of subjects unrelated to student safety.”

H. Departmental Investigations.  In Township of West Milford, 30 NJPER ¶77 (N.J. PERC 2004), two union contract proposals regarding departmental investigations were not mandatorily negotiable. One proposal required that any officer under arrest be given his rights pursuant to the current decisions of the U.S. Supreme Court, while the other proposal prohibited charges against any employees after 45 days. The first proposal “is not mandatorily negotiable because it does not intimately and directly affect employee work and welfare. It addresses criminal, not departmental, investigations. It does not address terms and conditions of employment.” The second proposal is “not mandatorily negotiable to the extent it would prohibit the filing of complaints by private individuals after 45 days.”

I. Excluding Benefits for Same-Sex Partners.  In Rock County, Dec. No. 30805-A (Wis. ERC 2004), a bargaining proposal that limited certain benefits to spouses and excluded same sex domestic partners was not an illegal subject. The proposal did not irreconcilably conflict with a statutory provision or obligation or infringe on a constitutional right or power. The union’s argument that denying benefits to same sex partners is unconstitutional because there is no rational basis for excluding same sex domestic partners was rejected. “It is not homosexuality that excludes same sex partners from benefits, but the fact that such partners are unmarried and hence, not ‘spouses.’ It is not just same sex partners, but unmarried heterosexual partners and domestic partners who are not in any kind of sexual relationship with each other who are excluded from benefits. Hence, it is marriage and not homosexuality that triggers the exclusion .... To be sure, homosexuality will frequently coincide with the benefit exclusion, but from this it does not follow that the exclusion is based upon homosexuality or ‘drawn for the purpose of disadvantaging’ homosexuals .... [A] contract could limit its benefits to its ‘spouses’ for reasons completely unrelated to sexual preference or procreation. Such legitimate considerations include administrative difficulties in determining and monitoring the contours of ‘domestic partner’ relationships, possible additional costs in providing broader coverage, and the fact that ‘spouses’ have legal and financial obligations to each other, including responsibility for medical bills.”

J. Sheriff’s Authority.  In Dunn County, Dec. No. 31084 (Wis. ERC 2004), the Commission rejected the employer’s argument that certain proposals submitted by the Union were illegal subjects of bargaining because they conflicted with the constitutional authority of the Sheriff. These proposals: (a) restricted the performance of bargaining unit employees; (b) provided preference in departmental overtime opportunities to bargaining unit employees; (c) required preference in emergency call-in assignments to
bargaining unit employees; (d) required that the Court Security Officer be a sworn limited deputy; (e) restricting the scheduling and overtime opportunities of Replacement Limited Term Employees; and (f) specified the duties that the County may assign to Reserve Officers. The union’s work preservation proposals did not interfere with the sheriff’s constitutional prerogatives. “Just as the Court will assume that the legislature intended a constitutional interpretation of a statute if such an interpretation is available, we assume that facially valid unit work preservation language will be interpreted and applied in a manner that does not conflict with the sheriff’s constitutional prerogatives.” In addition, “much of the disputed contract language has existed for some time in apparent accommodation of the sheriff’s duties, and the sheriff has not himself asserted a constitutional concern in this matter. Under these circumstances, we cannot assume that such issues will arise in the future or that, if they do arise, the Union will rely upon contract language to limit the sheriff’s constitutional prerogatives.”

K. U.S. Coast Guard Recommendations.

In *Skagit County*, Dec. No. 8746-PECB, 2004 WL 2247884 (Wash. PERC ALJ 2004), the employer unsuccessfully argued that a mandate from the U.S. Coast Guard to eliminate the 12.5 hour shifts for the crew members on a ferry permitted it to unilaterally implement an alternative schedule. “The Coast Guard’s mandate to eliminate the 12.5-hour shifts was out of the employer’s control. Nevertheless, the employer retained its duty to bargain the effects of the mandate, which unquestionably impact the part-time employees’ wages, hours and working conditions. The employer was equally unsuccessful in arguing that it was permitted to subcontract out the work when the Union refused to follow the alternative schedule. “United States Coast Guard recommendations do not absolve the employer of its obligation to bargain the decision to contract out bargaining unit work. Where an employer has and exercises discretion in a matter, there may be room for the duty to bargain to operate.”

L. Reclassification. In *Essex County Prosecutor*, 29 NJPER ¶148 (N.J. PERC 2003), the union’s proposal to change county investigators to prosecutor’s detectives was prohibited by statute. State law provided that prosecutor’s detectives were in the classified civil service and placed a limit on the number of such detectives that could be hired by a county. By contrast, county investigators were placed in the unclassified civil service. “The statutory scheme creates County Detective and County Investigator titles. Their duties are defined by statute and their placement in and out of the classified civil service is set by statute. The maximum number of employees in these titles is set and, to ensure consistency throughout the State, ‘special officer’ titles are prohibited.… [T]here is no provision in the statutory scheme for statutory County Investigators to be titled Prosecutor’s Detectives. The statute establishes the titles and assigns the duties in civil service status.

M. Denial of Sick Leave Benefits. In *New York State Judiciary*, 29 NJPER ¶159 (N.J. PERC 2003), the union could not grieve the employer’s decision to deny an employee’s claim for sick leave injury benefits. “Administrative leave, sick leave and vacation leave are mandatorily negotiable subjects unless a statute or regulation preempts negotiations.” In addition, “[a] statute or regulation will not preempt negotiations unless
it specifically, expressly and comprehensively sets an employment condition, thereby eliminating the employer’s discretion to vary it.” The statute that provided the procedures for applying for sick leave injury benefits and challenges to the denial of such benefits provided applicants with the right to appeal any denial to a Merit System Board. “This regulatory scheme specifically, expressly and comprehensively sets an employment condition, and thereby eliminates the employer’s discretion to vary it. Thus, ultimately it is the Department of Personnel that decides whether to grant or deny SLI benefits and grievance arbitration is not the form for review of that determination. Any appeal of a denial must be filed with the Merit System Board.”

N. Performance-Based Denial of Salary Increment.

In Paramus Board of Education, 29 NJPER ¶161 (N.J. PERC 2003), the withholding of a teacher’s salary increment for performance reasons could not be grieved and arbitrated because the challenge to such decisions was preempted by statute. State law provided that all increment withholdings of teaching staff members can be submitted to binding arbitration except those based predominately on the evaluation of teacher performance, in which case any appeal from such a denial must be filed with the Commissioner of Education. The denial could not be arbitrated notwithstanding the union’s claim that the employer’s reasons were pretextual. “There is no evidence that the Board’s stated reasons and its supporting exhibits predominately relate to an evaluation of … teaching performance. Whether or not those reasons are pretextual is for the Commission of Education to decide.

In Matawan-Aberdeen Regional Board of Education, 30 NJPER ¶11 (N.J. PERC 2004), a grievance challenging the employer’s withholding of a teachers salary increment after students in one of his advance computer classes hacked into the District’s computer network and changed important data was preempted by State law because the salary increment withholding predominately involved an evaluation of teaching performance. The denial of such increments for performance reasons had to be appealed to the Commissioner of Education. The employer successfully argued that the incident demonstrated the teacher’s classroom management was inadequate, “a reason that we have consistently characterized as one based on teaching performance.” In addition, “[e]ven if we accept the Association’s characterization of the withholding as involving [the teacher’s] alleged failure to monitor compliance with the computer use policy during his classes, we still conclude that the basis for the withholding predominately involves an evaluation of teaching performance.”

In Old Bridge Board of Education, 30 NJPER ¶28 (N.J. PERC 2004), the union was precluded from pursuing a grievance involving the withholding of a teacher’s salary increment because of alleged sexual harassment of students. The denial was performance-based and any such denial had to be appealed to the Commissioner of Education. “[T]he evaluation of this teacher’ teaching performance includes educational judgments of about where to draw the line between appropriate and inappropriate comments and conduct toward his students in the classroom. Our conclusion is not altered by the fact that the teacher’s annual evaluation did not describe the conduct referred to it in the statement of reasons… The allegations came to the Board’s attention.
through student complaints, not the regular evaluation process, but nevertheless involved
the in-classroom interactions of the teacher with his students…. [T]he Board’s concerns
about student-teacher interactions arose after issuance of the teacher’s annual
performance evaluation and were handled through an appropriate mechanism for
investigating and judging allegations of inappropriate conduct and comments towards
students of the classroom. Nor are we persuaded that the reasons for the withholding are
predominately disciplinary because the statement of reasons refers to ‘gross misconduct’
rather than ‘inappropriate classroom behavior’ or ‘inappropriate destrucional
methodology’.…. We focus on the type of alleged misconduct or deficiency described to
reference in the statement of reasons; the terminology used by the Board is not
determinative. Finally, the withholding is not arbitrable simply because the [employer]
threatened disciplinary action, such as an increment withholding. All increment
withholdings are a form of discipline in the generic sense, although not necessarily
discipline that may be submitted to binding arbitration. Thus, in deciding whether an
increment withholding may be submitted to binding arbitration, the focus is not on
whether the action is ‘discipline’ but on whether the reasons for the discipline are
predominately related to the evaluation of teaching performance.”

By contrast, in Bergen County Vocational and Technical Schools District Board of
Education, 30 NJPER ¶58 (N.J. PERC 2004), a grievance challenging the withholding of
a teacher’s salary increment after he allegedly engaged in misconduct while chaperoning
students on a school-sponsored cruise did involve a mandatory bargaining subject
because the misconduct occurred during an extra curricular activity. “The reasons for
this withholding are not based on an evaluation of teaching performance. Not all
interactions between teachers and students require an evaluation of teaching performance.
This case does not involve any aspect of teaching or classroom conduct. The alleged
failure to model the behavior expected of teaching staff members may warrant concern,
but that alleged failure in this case is not a question of teaching performance that must be
assessed by the Commissioner of Education but an allegation of professional misconduct
that can be reviewed by an arbitrator. We add that the incident that triggered this
withholding occurred during a stipended extracurricular assignment. Chaperoning a
cruise to the Bahamas was extracurricular because it was not part of the teaching and
duty assignments scheduled during the regular work day, work week or work year.

O. Civil Service Promotions. In City of Elizabeth, 29 NJPER ¶165 (N.J. PERC
2003), the union could not arbitrate the employer’s decision to bypass two civil service
employees for promotion and appoint two less senior employees because such decisions
are preempted by the civil services laws. Civil Service laws authorize employers to make
appointments under the “rule of three.” Under State Supreme Court precedent, “an
appointing authority could not negotiate away its right under the Civil Service scheme to
choose from among the top three candidates on an eligibility list.”

P. Allowing Filing of Criminal Charges. In Township of Hillsborough, 30
NJPER ¶8 (N.J. PERC 2004), the employer’s refusal to allow a patrol officer to file
criminal charges against a civilian who has filed an internal affairs complaint against him
involved an illegal subject of bargaining. “We appreciate the exonerated officer’s
interest in seeking the extra vindication of the successful criminal complaint against his
accuser. But under the particular circumstances of this case, the Township’s policy making powers will be substantially eliminated if a negotiated agreement could override the decision not to permit a police officer to bring criminal charges against a civilian for providing false information to a police department. The decision to bring criminal charges against citizens who have complained to a police department is a sensitive one that could have major repercussions on community-police relations and on the willingness of citizens to file complaints. It is not a matter for the negotiations process. We note that this case does not involve an attempt to restrict any right an officer might have to file a civil complaint against a complainant or other types of criminal complaints.”

Q. Seniority-Based Job Bidding. In *Camden County Sheriff*, 30 NJPER ¶10 (N.J. PERC 2004), the union’s proposal for seniority in job bidding in the event of a merger was not preempted by the State’s civil service laws. The union’s proposal precluded persons who joined the bargaining unit as a result of such a merger from bringing with them any seniority from their prior service for job bidding purposes. The employer unsuccessfully contended that this proposal was preempted by the State’s civil service regulation which provided that, “Seniority calculations and leave entitlments for transferred permanent or probationary employees shall be calculated as if the entire period of service was in the receiving unit.” Rather, “[t]hat regulation provides that inter-governmentally transferred employees retained seniority or service credit for purposes of determining promotional, lay-off or demotional rights and sick and vacation leave entitlements. We have no basis to believe that [the Department of Personnel] intended to regulate the application of seniority to other terms and conditions of employment. Parties may choose to define seniority differently, e.g., departmental seniority, for non-regulated terms and conditions of employment such as overtime allocation, or, as in this case, for job bidding.”

R. Mandating Sick Leave for Extended Leaves of Absence. In *Waldwick Board of Education*, 30 NJPER ¶41 (N.J. PERC 2004), a contract provision mandating sick leave to employees who are absent for an extended period of time due to a catastrophic illness was preempted by State statute requiring the employer to exercise discretion on a case-by-case basis, rather than by a negotiated rule, when making its extended sick leave determinations. “[T]he statute] eliminates any discretion a school board would otherwise have to adopt a negotiated rule granting extended sick leaves and compels a board to exercise its discretion in each individual case.”

S. Employee Transfers. In *City of Newark*, NJPER ¶102 (N.J. PERC 2004) a union grievance that challenged the employer’s decisions to transfer firefighters involved in a legal bargaining subject. At issue was the Fire Director’s ordering that numerous firefighters be transferred without providing for bidding or consideration of seniority. “The substantive decision to transfer or reassign an employee is generally neither negotiable nor arbitrable.” The situation is different from “shift changes, where the balance of interests is different because of the greater impact on employee terms and conditions of employment, or circumstances where all qualifications are equal and seniority is used as a tie breaker. This employer has announced that a transfer of certain firefighters to promote cross-training, improve efficiency, increase diversity, and
decrease response time by making firefighters more familiar with various locations. Arbitration challenging transfers based on those reasons with substantial limit the City policy making powers.”

T. Step Placement on Salary Schedule. In *State of New Jersey (Dept. of Corrections)*, 30 NJPER ¶ 137 (N.J. PERC 2004), a union grievance that contested a captain’s step placement on the captain’s salary guide was preempted by state’s statute. “Salaries are generally negotiable and disputes over the amount of salary due are generally arbitrable. However, a statute or regulation may preempt negotiations or arbitration over a particular salary proposal or dispute if it specifically fixes a salary level and eliminates any discretion to vary it.” The State regulation in question “sets forth the formula that had to be followed both when [the captain] was promoted and when the new salary guidelines for lieutenants and captains were adopted and made effective retroactively.” This determination was made by the Department of Personnel. The union could not challenge the Department of Personnel’s application of that regulation through a grievance against the employer. Any appeal had to be made to the Merit System Board or in court.

U. Establishing Civil Service System. In *Town of Winchesters*, Dec. No. 4007 (Conn. SBLR 2004), the employer’s unilateral change to the process for promotions to sergeant in the police department was permitted after the employer had established a civil service system under State law. The contract provision in question no longer was enforceable and the subject was exempt from collective bargaining. State law exempted from collective bargaining all matters pertaining to the conduct in grading of merit examinations and the subsequent rating of candidates except for: (1) necessary qualifications for taking a promotional examination; (2) the relative weight to be attached to each method of examination; and (3) the use and determination of monitors for exams. “In this case, the dispute concerns the employer’s decision to use a ‘rule of three’ to make a promotional appointment to the position of sergeant instead of the strict seniority criteria described in the collective bargaining agreement. This subject became exempt from collective bargaining with the establishment of the civil service system and Commission in Winchester.”

V. Additional Salary Step. In *Camden County Sheriff*, 30 NJPER ¶10 (N.J. PERC 2004), a union proposal to add an additional salary step for senior officers was not preempted by the State’s pension laws. The employer argued unsuccessfully that state pension laws precluded certain pre-retirement increases in base salary for pension purposes. “We have often addressed the argument that a proposed form of compensation is not negotiable because it is preempted by pension statutes. Those cases recognize that there is a fundamental difference between a proposal concerning salary and other forms of compensation and the proposal specifying whether a form of compensation is creditable for pension purposes. The same distinction pertains here. The proposal for a senior officer step is mandatorily negotiable. Whether or not the additional salary, if awarded, is creditable for pension purposes … is an issue to be resolved by the Division of Pensions.”
W. Counsel Fees for Arbitrations. In *Camden County Sheriff*, 30 NJPER ¶10 (N.J. PERC 2004), a union proposal that required the employer to reimburse the union’s attorney fees if the union prevailed in arbitration was not precluded by several state laws. The employer argued unsuccessfully that: (1) one State statute specified the instances where attorney fees were permitted; (2) another statute prohibited the County from paying for services not rendered to it; (3) another statute limited the amount by which a county tax levy can increase each year; (4) the proposal was inconsistent with the “American rule” requiring that each party pay its own litigation costs; and (5) the proposal was preempted by the State’s arbitration statutes which required that the parties bear the cost of arbitration subject to a fee schedule approved by the Commission. First, while the State’s statute “allows a court to award counsel fees only in the types of actions enumerated or were authorized by statute, the rule has been construed to allow counsel fees where the parties have agreed thereto in advance by stipulation in a promissory note, power of attorney or other agreement or contract.” Second, while State law “limits the amount by which a county tax levy can increase each year, it does not expressly prohibit any particular type of expenditure.” Third, “[t]he County’s argument that [state law] bars governmental disbursements unless the services were ‘rendered to’ the entity itself was overbroad, because a public body may be statutorily obligated to pay for legal services rendered to another.” Finally, the arbitration statute did not preclude the awarding of attorney fees. “[N]either our rules nor the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes refers to, or expressly bars, payment of the other party’s counsel fees. While the interest arbitration statute requires the parties to ‘bear the cost of arbitration,’ we have interpreted that clause to mean the costs of the services performed by the arbitrator. Thus, we cannot say that the interest arbitration statute affirmatively bars payment of the other party’s counsel fees. We appreciate that in conventional arbitration it may be difficult to identify a prevailing party, but that is an argument that can be made to the arbitrator.”

X. Regionalizing Police Duties. In *Town of East Hartford*, Dec. No. 3853-A (Conn. SBLR 2004), the employer’s argument that state law permitted it to join other towns to regionalize police duties was rejected. This statute permitted towns to form regionalized police services. However, “the statute does not provide for the whole sale unilateral regionalization of police duties on an ongoing basis. There is nothing in the statute to indicate that the Town can enter into an ongoing mutual aid agreement without also fulfilling its collective bargaining rights. In this regard, the statute specifically talks about such ongoing agreements separately from the first portion which speaks of individual emergency situations during which the Chief Executive Officer or his designee requests assistance from another municipality when he or she has determined that it is necessary ‘in order to protect the safety or well-being of his municipality….’ Further, the statute specifically provides an approval process for longer term agreements. Thus, it is clear to us that the statute is not written to allow unfettered mutual aid agreements and cannot be read to supercede the policy in favor of collective bargaining …”

Y. Parking Fees. In *Western Washington University*, Dec. No. 8256-A-PSRA, 2004 WL 1043073 (Wash. PERC 2004), aff’g Dec. No. 8256-PSRA, 2003 WL 22992224 (Wash. PERC ALJ 2003), the employer unsuccessfully argued that it was excused from negotiating parking fees based upon: (1) State statutes authorizing the
powers of the Board of Trustees; (2) State regulations promulgated by the Board of Trustees; (3) the State Clear Air Act; (4) the employer’s Institutional Master Plan (IMP) for future development of facilities; (5) the employer’s Transportation Management Program (TMP), implemented to effectuate compliance with obligations under state and federal law; and (6) an interlocal agreements with a municipality that details the circumstances under which the employer used campus parking fees revenue to pay the municipality for enforcement and related expenses associated with residential parking zones. “The [State] statutes relied upon by the employer do not compel unilateral action by the employer, or otherwise expressly invalidate its collective bargaining obligations …. Moreover, the inclusion of the phrase ‘unless otherwise required by law’ in the cited statutes requires a harmonization between the authority conferred upon the employer and the duty to bargain imposed by the employer.” The Board of Trustee’s own regulations were equally in effective. “As a general proposition, an employer cannot override its statutory obligations by adopting a Washington Administrative Code rule. Moreover, nothing in the cited rule compels unilateral implementation of any specific parking regulation. The most that can be said is that the Board of Trustees is purported to delegate its statutory authority to a particular official, who was and remains an agent of the employer. The employer’s approach would not harmonize the employer’s authority concerning parking with the employer’s collective bargaining obligation concerning matters over which it exercises authority…. ” As for the State Clean Air Act, “[w]hile acknowledging that there are societal interests in compliance with the clean air legislation and its commute trip reduction component … [n]othing is cited or found … which explicitly preempts the collective bargaining obligation …. There is also no evidence that the employer’s implementation of its IMP deprived it of the authority to bargain. Reliance upon the interlocal agreement also was rejected because “the employer relies on a document of its own creation.… [That] is no more than a voluntary partnership compact negotiated between neighbors and designed to address mutual interest.” Finally, the TMP likewise is “merely a product of the employer’s own creation.”

III. PAST PRACTICES

A. Personnel Facilities for Lounge. In Matter of Application of Great Neck Water Pollution Control District, 36 PERB ¶7015(N.Y. Sup. Ct. 2003), the employer unlawfully discontinued a ten-year practice of allowing bargaining unit members to use a furnished staff building during work breaks as a lounge. The change involved a mandatory subject of bargaining since “the use of this building for these purposes … relates to the health, privacy and comfort of employees.” “Where [the employer] provided the personnel building to [bargaining] unit members for use during break times for a period of more than ten years’ duration and where the Collective Bargaining Agreement … requires that an employee working in an afternoon or weekend shift ‘shall not leave the grounds for the meal break,’ [the Board’s] determination that the use of the building represented an economic benefit to the employees, which was a mandatory subject of negotiation, is neither irrational, unreasonable, nor effected by error of law.”

that there was no consistent practice regarding the taping of internal investigation interviews. Neither the collective bargaining agreement nor the employer’s policies addressed the topic. However, “the union produced convincing evidence that the employer has consented to tape recording of investigatory interviews on an ad hoc basis for several years. Indeed, there is some evidence in this record that the employer never has denied a union request for tape recording. Thus, it is clear that an absolute ban on tape recording announced by the chief constituted a change in practice at least from there being no absolute ban.” In addition, the “employer views past practice too narrowly, incorrectly cites a grievance arbitration standard for what constitutes a past practice, and misinterprets the Commission’s decisions defining past practice in collective bargaining settings.”

C. Assigning Vehicles Round-the-Clock. In County of Nassau, 37 NYPER ¶3014 (N.Y. PERB 2004), rev’g, 36 NYPER ¶4602 (N.Y. PERB ALJ 2003), the union failed to demonstrate a past practice of assigning sergeants in the employer’s Applicant Investigation Unit vehicles on a round-the-clock basis. Although the Commission agreed that, “[I]n general, an employee’s use of his/her employer’s vehicle for transportation to and from work is an economic benefit for the employee and may not be unilaterally withdrawn by the employer,” it held that the union had not proven that a past practice existed. While the practice had existed since 1989, there was no evidence that anyone in a position of authority to bind the employer knew and acquiesced in the practice. The person who had “authorized” the use of the vehicles was a lieutenant. There was no evidence that this person was authorized to make the assignment.

D. Parking. In Franklin County Sheriff v. SERB, 2004 WL 1146528, 2004 SERB 4-9 (Franklin C.P. Jan. 31, 2004), the court upheld SERB’s determination that the employer had unlawfully refused to bargain over new parking conditions for employees that resulted in employees having to pay for parking that previously had been provided free of charge. The employer traditionally allowed employees to park free of charge in a lot adjacent to the building where they worked. The employer previously had attempted to move employees to a different parking lot, and the union responded by filing an unfair labor practice charge. The parties settled the charge, with the employer agreeing to allow employees to remain in the parking lot free of charge for as long as the employees worked at the same location. The parties also agreed that parking would be the subject of negotiations for the next collective bargaining agreement. During the subsequent contract negotiations, the union offered a proposal on parking, which the employer refused to accept. The employer also never made a counterproposal on the subject. The parties ultimately reached a tentative agreement on wages, which included the notation “union drops parking proposal.” The parking issue also was not raised during mediation. The final contract made no mention of parking. Shortly after ratification, the employees were relocated to another building. They were required to park in a parking garage, and they were assessed a monthly parking charge. Neither the union nor the employees were notified in advance about the move, and no opportunity was provided for input on the decision. The union requested certain accommodations regarding parking. The employer sought authority from the county commissioners (who owned the building and the parking garage) to offer an accommodation, but the commissioners declined to do so. The employer declined the union’s request to engage in mid-term bargaining.
Although the employer conceded that free parking was a past practice, it maintained that: (1) the practice was abrogated by the settlement agreement and the absence of any provision in the next collective bargaining agreement regarding parking; (2) any allegation that the employer had engaged in bad faith bargaining over the parking issue was both false and time-barred; and (3) the absence of any contractual provision regarding parking meant that any change did not constitute a unilateral change in a term or condition of employment.

The court upheld SERB’s rejection of the employer’s defenses. Responding to the employer’s argument that its actions were authorized by the subsequent contract negotiations and the union’s decision to “drop” the parking proposal as part of a tentative agreement on wages, the court declared that:

A review of the successor CBA reveals that it plainly and unambiguously neglects to address the subject of parking conditions for Members. Moreover, even if the aforementioned TA on wages is incorporated into the successor CBA, the Court determines that the issue of Member parking is not addressed with sufficient specificity in that document to reach the conclusion that it was intertwined into the bargaining process regarding wages, or that an inference can be made that parking conditions are effectively removed as an issue for future bargaining. A more reasonable interpretation of the final sentence of the TA merely leads one to believe that any previous FOP proposals on parking and fair share are not to be included in the TA on Wages. As a result, the Court finds factual support that the relevant CBA does not include any meaningful language as to the issue of parking, calling for a separate inquiry to determine if the Employer failed to engage in mid-term bargaining once the Communications Bureau was relocated, an event which lead to an alternation of the past practice.

The court then concluded that the employer unlawfully had failed to bargain in good faith, both during the negotiations on a successor contract and when the union requested mid-term negotiations after the employees were moved.

E. Discretionary Leaves of Absence. In Southfield Education Association v. Southfield Public Schools, 2004 WL 225059 (Mich App. 2/5/04), aff’g, 15 MPER ¶33028 (Mich. ERC 2002), the employer was permitted to discontinue a permissive policy of granting leaves of absence that had been in effect for 16 years, even though the employer had granted all leave requests and requests for extensions and also refrained from enforcing time limits on extensions and provisions in the collective bargaining agreement that would have allowed the employer to terminate employees for failing to properly obtain extensions. The collective bargaining agreement expressly stated that such leaves were permissive. “[D]espite Respondent’s liberal policy with respect to the granting of leaves and its failure to enforce restrictions on leaves, Respondent retained the right to exercise its discretion to deny leaves and to enforce leave restrictions. The mere fact that Respondent refrained from denying leaves and enforcing restrictions on leaves in the past does not establish that there was a ‘past practice’ prohibiting Respondent from doing so
in the future.” “[T]he past practice charging parties allege – approval of all leave requests – does not conflict with unambiguous contract provisions granting respondent complete discretion regarding most requests. And to the extent Respondent’s actions could be viewed as conflicting with these contract provisions, by the fact that it ignored certain leave restrictions or created a practice of mandatory approval, we agree with the MERC that Charging Parties have failed to show a voluntary, knowing, and intentional agreement to modify the contract. The fact that Respondent refrained from denying leaves of enforcing the restrictions placed on leaves does not show that it intended to bind itself to an agreement to approve all future requests.”

F. E-Mail Use. University of Wisconsin Hospitals and Clinics Authority, Dec. No. 3020-C (Wis. ERC 2004), aff’g in part and rev’g in part, Dec. No. 30202-C (Wis. ERC ALJ 2002) involved whether the employer had a past practice of allowing the union to use the employer’s e-mail system to communicate directly with the employer’s administration and with bargaining unit employees. The employer had a past practice of allowing the union to communicate with its administrators through the e-mail system. “It is apparent on this record that the Hospital itself regularly communicated with the Union via the Hospital’s e-mail system. Allowing the Union this mechanism for quick and efficient communication is also a condition of employment; once mutually established, as here, such access cannot be withdrawn unilaterally without violating the duty to bargain ....” However, no binding past practice existed regarding the union’s use of employer’s e-mail system to communicate directly with employees. Explaining that “[W]hile we suspect that the Hospital had some notion that some communications were occurring, there was virtually no evidence in the record to this effect, much less evidence that the Hospital acquiesced in any practices related to such communications.”

G. Pension Calculation. In Flint Professional Firefighters Union Local 352 v. The City of Flint, 2004 WL 1366000 (Mich. App. 2004), aff’g in part and rev’g in part, 15 MPER ¶33070 (Mich. ERC 2003), the employer was permitted, in part, to amend its retirement ordinance to limit the number of pay periods, used to calculate the final average compensation that is the basis for pension benefits, to 26 pay periods. Retiring employees were permitted to select the beginning and ending dates of the years used in calculating the final average compensation. Some employees did so in a way that included 27 pay periods. The amendment was enacted to stop this method of calculation. The court agreed with the Commission that the employer could prevent employees from choosing their three best years using 27 pay dates in each of the three years. However, the court also held that the Commission had erroneously permitted the employer to prevent employees from using 27 pay dates in at least one year. The court noted the employer’s “long standing regular practice of including in its [final average compensation] calculations, monies paid but not earned in a particular year,” such as accrued sick and vacation time, and retroactive payments due to contract settlements. The court commented that “this methodology is clearly at odds with the amendment’s directive that annual compensation shall not ‘include income received during the 26 pay periods which was not also earned during the 26 pay periods.’”

H. Changing Job Bid Requirements. In Reading School District, 35 PPER ¶111 (Pa. LRB 2004), aff’g, 35 PPER ¶61 (Pa. LRB ALJ 2004), the employer unlawfully
changed the job bidding process from having job applicants submit sealed bids to the union, to submitting them directly to the human resource director. “A past practice may create or establish a separate enforceable condition of employment that cannot be derived from the express language of the collective bargaining agreement. Furthermore, an employer commits an unfair practice within the meaning of [the statute] when the employer unilaterally changes a mandatory subject of bargaining, including one established by past practice.” “The law is well settled that bidding and posting procedures are a mandatory subject to bargaining.”

IV.  MANDATORY BARGAINING SUBJECT ESTABLISHED

A.  Wages.

1.  Salary Guide Credit.  A union proposal concerning initial placement on the salary schedule based upon prior service in other jurisdictions involved a mandatory subject of bargaining. “Salary guide credit for prior service in other jurisdictions intimately and directly affects employee work and welfare and does not significantly interfere with any governmental policy determinations.” Township of Winslow, 29 NJPER ¶178 (N.J. PERC 2003).

2.  Unused Sick Leave Payment.  A union proposal that adjusted the formula for determining the size of a cash payment for unused sick leave involved a mandatory subject of bargaining. “The size of a cash payment for unused sick leave upon retirement intimately and directly affects employee work and welfare. Concern for the financial impact on the employer does not outweigh the employees’ interest in negotiating over this or other traditional terms and conditions of employment.” Township of Winslow, 29 NJPER ¶178 (N.J. PERC 2003).

3.  Indexing Clothing Allowance.  A Union proposal that a clothing allowance be adjusted in accordance with the Consumer Price Index involved a mandatory subject of bargaining. The employer’s arguments that the decision to provide a clothing allowance, or to reimburse employees for the cost of damage to worn-out uniforms, is a governmental policy determination or that increasing the clothing allowance would substantially limit the employer’s policy-making powers by causing a diminished budget for services were rejected. “We have long held that contract proposals for clothing allowances are mandatorily negotiable.” Township of Winslow, 29 NJPER ¶178 (N.J. PERC 2003).

4.  Direct Deposit.  The employer unlawfully instituted direct deposit for its employees. “Employees no longer have the option of being paid by check but rather needed an account with a financial institution in order to be paid, while the impact of automatic deposit on the basic policy of the District’s school system as a whole, affected its educational mission in but a limited financial way.” Owen J. Roberts School District, 35 PPER ¶¶4, 5 (PA. LRB ALJ 2004).

5.  Staff-Sized Based Compensation.  The union’s demand to bargain regarding increased compensation for firefighters when there were reductions in
staffing levels involved in mandatory subject of bargaining. The union’s proposal demanded extra compensation for firefighters when fewer than four firefighters were assigned to a piece of equipment. The union justified its demand as a form of premium pay for hazardous duty, increased safety risks and/or increased workload. “[T]he demand is now simply one for increased compensation, and, as a monetary demand, it is a mandatory subject of bargaining…. While the City has the prerogative to decrease staffing levels, [the union] has a corresponding right to insist on negotiations to address the impact of those staffing decisions, including increased safety risks and workload, on its members…. A public employer may make a decision unilaterally as to the number of firefighters that it will assign to a rig, just as it may unilaterally determine the number of students that it will assign to a teacher. Once that decision is made, however, an employee organization may insist upon negotiations over demands for terms and conditions of employment that appropriately relate to the impact of the public employer’s unilateral action.” The employer’s contention that the union’s proposal was vague and overly broad was rejected. “A demand will be found to be non-mandatory due to vagueness only where the language of the demand raises an issue of whether it could be read to encompass a non-mandatory subject of bargaining; here, whether it could be read to extend beyond the demand for compensation. For if the language is found to be non-specific, but written within the boundaries of a mandatory subject or bargaining as in this case, the lack of specificity may effect the merits of the proposal, but not the duty to negotiate it.” *Niagara Falls Uniformed Firefighters Association (City of Niagara Falls)*, 37 NYPER ¶4520 (N.Y. PERB ALJ 2004).

6. **Premium Pay.** A Union grievance that sought premium pay for certain duties that were purportedly not part of a maintenance employee’s regular duties raised a mandatory bargaining subject. The employer decided to eliminate a part-time licensed water and waste water operator position, whose responsibilities included checking the lift stations at each of the schools, and assign those duties to the maintenance person assigned to the school. “The employer’s interest in protecting its right to determine what duties will be performed during what hours is not being compromised. Premium pay for lift station work is conceptually similar to the mandatorily negotiable subjects of hazardous duty pay or shift differentials, where employees receive additional compensation for performing duties under particular circumstances. The issue for the arbitrator here is simply whether the contract or past practice entitles employees to be paid premium pay for performing certain tasks during normal work hours. *Jackson Township Board of Education*, 30 NJPER ¶27 (N.J. PERC 2004).

7. **Signing Bonus.** The employer unlawfully implemented a recruitment/retention bonus plan for newly-hired teachers. The employer unsuccessfully argued that the bonus plan was not subject to negotiations because the bonus money was promised to people who are not employees and did not belong in the bargaining unit at the time. “Recruitment signing bonuses are an aspect of employee compensation, especially since the teachers were paid the bonuses after they began employment with the School District and became bargaining unit members, and that the bonuses had taxes and social security deducted.
Additionally, the record evidence shows that the recruitment signing bonuses vitally effect the salary schedule stated in the collective bargaining agreement and, therefore, are considered a mandatory subject to bargaining.” *Hamilton County School District*, 30 FPER ¶180 (Fla. PERC 2004).

8. **Overtime for Special Temporary Assignments.** A grievance that sought overtime compensation for police officers temporarily assigned to a special shift involving surveillance at a cemetery that was frequently vandalized involved a mandatory bargaining subject. “[O]vertime compensation has been repeatedly found to be mandatorily negotiable. Having to pay extra compensation pursuant to a negotiated agreement does not prevent the employer from being able to assign employees to the extra duties it needs to staff.” *Township of Saddlebrook*, 30 NJPER ¶113 (N.J. PERC 2004).

B. **Benefits.**

1. **Life Insurance Benefits.** A union proposal to increase the amount of life insurance involved a mandatory subject of bargaining. “Life insurance intimately and directly affects employee work and welfare. The employer’s fiscal concerns do not outweigh the employee’s interests in being able to negotiate over increases in insurance benefits.” *Township of Winslow*, 29 NJPER ¶178 (N.J. PERC 2003).

2. **Procedures for Receiving Benefits.** The employer unlawfully implemented procedures that police officers would be required to comply with to receive injured-on-duty benefits. “On its face, the General Order impacts both wages and terms and conditions of the officer’s employment. The provisions of the General Order impact wages by imposing strict requirements with which officers must comply in order to qualify for injured-on-duty status and wages. The General Order effects the officer’s terms and conditions of employment by changing an officer’s status from “injured on duty” to “sick” when the officer does not return to work subsequent to an initial medically excused absence and by declining to reimburse sick time utilized by an officer prior to his or her physician’s submission of supplemental medical documentation substantially in the continuance of the injured-on-duty claim. The General Order changes the calculation of vacation time for an officer injured in the line of duty by requiring the injured officer to take furlough time when he or she leaves the State for more than 24 hours while injured. Further, the General Order imposes mandatory discipline upon an officer who fails to attend two scheduled appointments to be evaluated by the Town’s physician. The Court recognizes the reasonable intent of the General Order: to improve reporting and documentation of injured-on-duty claims, to require proper medical documentation, and to encourage officers to cooperate with the Town in its efforts to evaluate the claims of injury. The content of the General Order, however, clearly does impact wages, sick time, and vacation time as well as imposed mandatory discipline under some circumstances.” *Burrillville v. Rhode Island State Labor Relations Board*, 2004 WL 254578 (R.I. Super. 1/30/04).
3. **EAP.** The employer unlawfully cancelled its contract with a private company to provide EAP services due to budgetary constraints. “The record shows that the EAP was a significant benefit to bargaining unit employees.... [T]he EAP filled an important gap by providing up to three free consultations to those in need of assistance. This type of assistance was not of the type usually available to employees and dependents under their medical plans. Furthermore, the EAP was described as effective at resolving issues between co-workers or between employees and supervisors, as a preventative, alternative measure to discipline. Another feature of the EAP was the confidential nature of the service, which is particularly important in a small community.” Based upon prior case law that, “Changes in the administration of a benefit were held to be a mandatory subject of bargaining …., elimination of the EAP did have a significant impact upon the working conditions of county employees [and] the employer’s need to manage its finances as to the minor budget outlay for the EAP must be balanced against the significant value of the EAP services to employees and their family members, resulting in a conclusion that the value of the EAP predominates ....” *Grays Harbor County*, Dec. No. 8044-A-PECB, 2004 WL 1718872 (Wash. PERC 2004), *affg*. Dec. No. 8044-PECB, 2003 WL 21044653 (Wash. PERC ALJ 2003).

C. **Hours.**

1. **Economically-Motivated Work Schedule Changes.** The employer unlawfully modified the work schedule for police officers from the contractually-mandated 10-hour tour of duty to an 8-hour tour. The employer unsuccessfully argued that the change would vastly improve police efficiency, result in a continuous adequate level of coverage even when they were absences, which significantly reduced overtime, and would result in greater levels of supervision. “Although, from the Borough’s respective, there may be advantages to implementing the 8-hour work schedule, it appears that the economic benefit obtained from reducing overtime is a key motivating factor in the Borough’s determination to revise the work schedule. While Borough argues that the 8-hour schedule would be an operational improvement, it does not claim that the 10-hour shift is unworkable. Since it appears that the Borough’s decision to change the work schedule flowed from economic concerns rather than an inherent policy decision, it appears that the change in the work schedule constitutes unilateral alteration in a chairman condition of employment.” *Borough of Hamburg*, 30 NJPER ¶17 (N.J. PERC 2004).

2. **Increased Workweek.** The union’s proposal to increase investigators’ paid working hours from 37.5 hours to 40 hours per week involved a mandatory bargaining subject “[A]n employer generally has a prerogative to determine the hours during which it will offer its services. However, the proposed addition of paid work hours does not appear to compromise this prerogative. The [Union’s] proposal for a paid 40-hour work week can apparently be met within the confines of the employee’s normal work week and the employer’s normal office hours by simply providing for a paid lunch period…. [T]he employees’ interest in
negotiating over how many work hours will be considered compensable outweighs the employer’s interest in determining that issue unilaterally. The investigators are removed from the labor market when they are either at work or at lunch; the employer may agree to pay employees for all of those hours, and the parties may also negotiate the rate of pay for any of those hours or any additional assigned hours. There is no significant interference with the employer’s ability to determine when its offices will be opened.” *Morris County Prosecutor’s Office*, 30 NJPER ¶76 (N.J. PERC 2004).

3. **Schedule Changes.** The employer unlawfully changed the schedule for ferry boat crew members from 12.5 hours to two shifts of ten and 3.5 hours after the U.S. Coast Guard had ordered that the 12.5-hour schedule be discontinued. The employer unsuccessfully argued that the schedule change was a permissive bargaining subject because it involved a core management function regarding services to be provided to the public. “The 10/3.5 schedule impacted the part-time employees’ wages, hours and working conditions in several ways. Most plainly, the hours changed for all bargaining unit members. Prior to the adoption of the new schedule, part-time employees filled in for the 12.5-hour shifts as needed, and full-time employees worked 12.5-hour shifts on a rotating basis. Part-time employees never worked scheduled 3.5-hour shifts, though they sometimes filled in for shorter shifts. In addition, wages were affected. The 3.5-hour scheduled shifts eliminated the possibility of filling in for one of the scheduled ten-hour shifts on the following day. The practical effect of these changes was to either reduce part-time employees’ wages, or require them to work a greater number of days to earn the same amount of money. Working conditions also changed. Prior to the adoption of the new scheduled 3.5-hour shifts, part-time employees could refuse any shift and could decline shifts for long stretches of time. Under the new schedule, employees who accepted a 3.5-hour schedule were expected to work the shifts regularly. Employees would lose flexibility by accepting 3.5-hour shifts, and would lose the ability to refuse shifts. The 10/3.5 schedule is more closely related to hours than entrepreneurial control and so it is a mandatory subject. While part-time ferry employees’ schedules must conform to a sailing schedule and full-time employees’ hours, no special public policy reason supports limiting the bargaining rights of ferry employees.” *Skagit County*, Dec. No. 8746-PECB, 2004 WL 2247884 (Wash. PERC ALJ 2004).

4. **Reduced Hours of Part-Time Employees.** The employer unlawfully reduced hours worked by part-time employees. The employer unsuccessfully argued that its decision was not subject to bargaining because part-time employees traditionally worked varying schedules and fluctuating hours and there never were any guarantees that their schedules would remain static. “[T]he fact that the employees worked fewer hours necessarily impacted the wages they earned. The … employees had regularly worked the same number of hours, the only change coming during the summer months when their hours were increased because of the summer programs. There was evidence that the reduction in hours did not result in a reduction in the amount of work the employees were expected to perform. It also appears that the reduction in hours resulted in a loss of benefits
to the employees.” However, “the reduction was driven by financial constraints, implicating the ‘District’s concern about its overall budget and the standards of services’ it would provide in light of those financial concerns.” The balancing of interests favored bargaining because the employer failed to establish the need for its immediate implementation of the reduction of hours before bargaining. In fact, the parties already were in negotiations when the change was implemented. *Chicago Park District v. Illinois Labor Relations Board*, ___ N.E.2d ___, 2004 WL 2546819 (Ill. App. 2004).

D. **Leaves of Absence.**

1. **Sick Leave Verification.** A grievance that challenged the employer’s requirement for all physician’s certificates verifying sick leave to indicate the condition for which the employee was treated involved a mandatory bargaining subject. “[T]he Association may not prevent the Board from attempting to verify the *bona fides* of a claim of sickness, but the Board may not prevent the Association from contesting its determination in a particular case that an employee was not actually sick….[A] sick leave policy might be implemented in an unreasonable manner that unduly interferes with the employee’s welfare and … a grievance contesting an allegedly unreasonable implementation may be arbitrated… Employees have a strong privacy interest in being protected against inquiries that could lead to the disclosure of illnesses or disabilities unrelated to sick leave abuse. And the employer has a strong interest in seeking to verify illness when necessary to ensure compliance with sick leave rules and to protect against sick leave abuse. Nothing in this record or the employer’s briefs suggests that this grievant was a sick leave abuser or otherwise not entitled to sick leave.” *City of Trenton*, 30 NJ PER ¶ 135 (N.J. PERC 2004).

2. **Second Opinion Medical Verification.** The employer unlawfully imposed a requirement that bargaining unit employees obtain a second opinion from a physician chosen by the employer in order to return to work from a non-work-related injury. “This case is distinguished from cases in which employers were found to have the managerial prerogative to unilaterally implement standards for their employees’ physical ability to perform work. The Municipality did not modify any standards which the employees were required to meet to work as laborers. Rather, the Municipality changed the procedure which employees are required to follow to return to work following an extended absence for a non-work-related injury. Thus, the Municipality made a unilateral change in the contractual sick leave policy – it did not change the standards for employment as a laborer in the public works department.” Moreover, “[c]hanges in leave policies, including changes in sick leave policies, are mandatory subjects of bargaining. The same result has been reached where a leave policy is changed to add the requirement that employees provide medical verification of their health status in order to return to work.” In addition, “[t]he record fails to indicate that requiring employees to obtain a second opinion requiring their health status significantly impacts on the Municipality’s basic policy. The Municipality does not claim that medical releases that employees obtain from their personal
physicians are unreliable, and the record does not support such a claim. On the other hand, requiring employees to obtain a second opinion from a Municipality physician has a substantial impact on their interest in wages, hours and working conditions, because the employees cannot return to work and must continue to use any remaining leave until the Municipality physician approves their return to work.” *Municipality of Murrysville*, 34 PPER ¶167 (Pa. LRB ALJ 2003).

3. **Paid Sick Leave.** A contract proposal that restricts paid union leave to services provided within that employee’s own bargaining unit does not intrude upon the employee’s statutory right to be represented by “representatives of their own choosing” such that the proposal is a mandatory subject of bargaining. The union’s argument “wrongly equates the impact of denying an employee the opportunity to serve as a union representative with the impact of denying pay while so serving.” The union’s argument that the proposal does not effect the relationship between employer and employee, but only the union’s internal organization also was rejected. “[I]t is axiomatic that issues of paid leave primarily relate to wages, hours, and conditions of employment and are mandatory subjects of bargaining. Put simply, that is why paid union leave is a mandatory subject of bargaining despite its potential effect on employee’s choice of representatives. To the extent employees are deterred from serving as representatives, if they must take on paid leave, then providing no paid union leave necessarily would limit the pool of willing representatives (and thus, burden employee choice) to a greater degree than providing some paid leave. Since a proposal to pay no union leave is mandatory, despite its broader interference, then a proposal to pay for some but not all union leave must also be mandatory, if interference with employee choice is the crux of the issue. Thus, to the extent the Association’s argument is premised upon interference, it cannot be reconciled with case law establishing that pay for union leave is a mandatory subject of bargaining.” *Rock County*, Dec. No. 30787-A (Wis. ERC 2004).

4. **Restricting Leave for Professional Development.** The employer unlawfully adopted a policy restricting the availability of leave for teachers to attend educational conferences for professional development during the student instructional day. “The implementation of the policy involved a mandatory subject of bargaining and not a matter of inherent managerial policy. Based upon longstanding precedent, an employer is obligated to bargain over a policy that restricts the availability of leaves of absence for professional development.” *West Greene School District*, 34 PPER ¶139 (Pa. LRB ALJ 2003).

E. **Other Conditions.**

1. **Initial Benefits Eligibility.** The union did not improperly seek interest arbitration of bargaining proposals involving initial eligibility determinations for benefit claims for continuing salary and benefits following a job-related injury or illness. Although a proposal that would require *de novo* of review of an employer’s initial determination of a claimant’s rights would involve a permissive subject of bargaining, a proposal that provided for arbitral review of the initial
determination would raise a mandatory subject of bargaining. “[A]llowing such review would not render meaningless the [employer’s] right to make an initial determination,” because “the [employer’s] right to make an initial determination is significant, as it gives the [employer] the discretion to set the criteria to be applied and the authority to issue a final and binding order which will govern, if not timely challenged.” Matter of Application of Poughkeepsie Professional Firefighters Association, Local 596, 29 NYPER ¶7016 (N.Y. Sup. Ct. 2003)(rev’g N.Y. PERB).

2. Requiring Use of City-Owned Vehicles. An employer’s decision to require inspectors to use employer-owned vans in the performance of their work duties raised a mandatory subject of bargaining. The employer’s decision concerned the inspector’s wages or terms and conditions of employment because: (a) “inspectors must use the van to keep their employment with the bureau and the failure of an inspector to use a City van, or the misuse or damage to the van by an inspector, subjects them to disciplinary action and possible discharge;” (b) “inspectors are reimbursed for mileage and using their own vehicles for their inspections and in requiring inspectors to use the City van the Department has effectively reduced the amount of mileage reimbursement the inspectors receive each month;” and (c) “the issue of parking for the inspector’s personal vehicles while they are using the City van at work also concerns a term and condition of employment.” Because the employer still required inspectors to maintain the City as an insured party on their personal vehicles, but still reduced the opportunity for the inspectors to earn a mileage reimbursement, “the City has effectively decreased the amount it reimburses the inspectors, for the cost of that additional insurance.” Although the “City’s concern for operational efficiency is related to the standards of service it provides, the establishment of such standards being one of the inherent managerial functions,” the balancing of the interests between the employees and the employer favored bargaining over the subject. “[T]here is no record evidence that requiring bargaining over the decision to require bureau inspectors to use City vans would impose any unreasonable burden on the City’s exercise of its inherent managerial authority to determine standards of service and operational efficiency. Moreover, the City offers no argument as to what the burden would be and there is no evidence of an immediate crises or problem with the bureau’s inspection process or any other compelling reason which might allow the City to unilaterally decide that inspectors will use city vans.” City of Chicago, 20 PERI ¶13 (Ill. LRB 2003) (aff’g ALJ w/o exceptions).

3. Scheduling and Assignments.

a. Work Schedules. The union’s work schedule proposal involved a mandatory subject of bargaining. The issue was, “whether the facts demonstrate that a particular work schedule issue so involves and impedes governmental policy that it must not be addressed through the negotiations process at all despite the normal legislative desideratum that work hours be negotiated in order to improve morale and efficiency.” There are “exceptions to the rule of work schedule negotiability when the records
showed a particularized need to preserve or change a work schedule in order, for example, to ensure appropriate supervision, prevent gaps in coverage, or otherwise protect a governmental policy determination.” In addition, “if a work schedule proposal sets staffing levels directly, we would find it not mandatorily negotiable.… We would also restrain arbitration if a proposal expressly adopted a policy of equal or proportional staffing. We believe that the choice between equal or proportional staffing is an essential managerial concern within the City’s broad discretion to determine how to deploy its police force.… Even if a proposed work schedule did not directly set staffing levels or policy, we would restrain arbitration if the work schedule would significantly interfere with the employer’s ability to decide how to deploy its police officers.” The union’s proposal did not raise these concerns. Accordingly, the proposal could be considered by an arbitrator unless the proposal required that shift times and the persons allocated to each shift be determined by a “calls for service needs assessment analysis” or if it would reduce staffing levels for the community policing division below any articulated minimal levels. City of Clifton, 29 NJPER ¶149 (N.J. PERC 2003).

b. Adjusting Schedules to Avoid Overtime. The employer’s adjustment of schedules so officers can receive firearms training without receiving overtime pay raised a mandatory subject of bargaining. A contract proposal that protects against work schedules being changed for the purpose of avoiding payment of overtime “is a negotiable claim because it protects the employees’ interests in negotiating over the work hours and does not interfere with any governmental policy interest. Reducing overtime costs is a legitimate concern, but not one that outweighs the employees’ interests in enforcing an alleged agreement to preserve work schedules.” Here, “[n]othing in this record indicates that payment of overtime compensation to effected employees would interfere with the City’s prerogative to train officers” during certain times of the day. City of Atlantic City, 29 NJPER ¶154 (N.J. PERC 2003).

c. Changing Firefighter Schedules. The union’s proposal to change the firefighter schedules involved a mandatory subject of bargaining. The union proposed to change the existing “10/14” schedule that had been in effect for almost thirty years to a schedule that required firefighters to work a 24-hour shift, followed by 72 hours off-duty. The employer contended that supervision would be severely diminished because firefighters would be working a schedule different from the schedule worked by their supervisors. “An employer’s interest in effective supervision does not generally preclude an interest arbitrator from evaluating a proposed change to a 24/72 shift for firefighters. An arbitrator may consider the arguments pro and con with respect to a proposed work schedule for firefighters which is common throughout the State and whether the benefits to the firefighters outweigh the municipal

d. Assignments Based Upon Seniority. A grievance challenging the employer’s decision to assign patrol officers to a swing shift based on their productivity rather than seniority involved a mandatory bargaining subject. “Public employers and Unions may … agree that seniority can be a factor in shift assignments where all qualifications are equal and managerial prerogatives are not otherwise compromised. However, public employers have a non-negotiable prerogative to assign employees to particular jobs, to meet the governmental policy goal of matching the best qualified employees to particular jobs. Under the parties’ contract, shift assignments must be based on seniority only ‘upon all other things being equal.’ That language is mandatorily negotiable … and protects management against having any prerogatives compromised. Further, this record does not specify any differences in duties performed on the swing shifts or indicate that the shift assignments were based on the governmental policy of achieving the best qualified employees to particular swing shift duties.” *Township of Middletown*, 30 NJPER ¶55 (N.J. PERC 2004).

e. Disciplinary Reassignment. A grievance challenging the reassignment of the custodial employee from a first shift grounds position to a third shift custodial position for disciplinary reasons involved a mandatory bargaining subject. “The decision to reassign a school district employee is normally the exercise of a managerial prerogative and not subject to review through binding arbitration. However, where a district reassigns an employee for disciplinary reasons without changing the employee’s work site, [state law] permits an agreement to submit such disputes to binding arbitration.” *Bergen County Vocational Schools Board of Education*, 30 NJPER ¶104 (N.J. PERC 2004).

4. Tape Recording Internal Investigations. The employer could not unilaterally prohibit tape recording of internal police investigation interviews. The situation is different from tape recording bargaining sessions, which has been held to be a permissive bargaining subject. “A fundamental reason for holding that verbatim recording of collective bargaining negotiations and grievance meetings is not a mandatory subject of bargaining is because there is no significant relation between the presence or absence of a stenographer or tape recorder at those sessions, and the terms and conditions of employment of the employees.... Rather than being a forum for ‘free collective bargaining’ or ‘advancing negotiations towards eventual settlement’ where [the effort is] to protect ‘ease of expression’ between union and management ..., an investigatory interview puts bargaining unit employee conduct under direct scrutiny and has the potential to directly affect that employee’s wages, hours, and working conditions.” Moreover, “changes in disciplinary procedures constitute mandatory subjects of bargaining.... Thus, there could be a duty to bargain about tape
recording of investigatory interviews, it if affects the disciplinary procedure.” The employer unsuccessfully argued that a mandatory subject was not involved because: (a) investigatory interviews are conducted before disciplinary proceedings are commenced; and (b) investigatory interviews are a subset of a broader category of internal investigations ranging from commendation to discipline. “The employer’s attempt to soften the import of investigatory interviews is not persuasive. The issue here is not about fact finding that results in commendations, but fact finding that can result in suspension or termination of employment.” City of Pullman, Dec. No. 8086-A-PECB, 2003 WL 23354426 (Wash. PERC 12/17/03), aff’g, Dec. No. 8086-PECB, 2003 WL 21419640 (Wash. PERC ALJ 5/30/03).

5. Employer Policies.

a. Dress Code. Although the employer’s dress code policy might be within the employer’s managerial prerogative or be considered basic educational policy, its enforcement may still be a working condition which must be bargained. “[T]his particular dress code is not so restrictive or egregious as to require teachers to purchase new wardrobes, but it is unclear from the record what would happen to the teacher who did not or could not or would not comply with it, and this could very well fundamentally impact on the teacher’s employment relationship. The dress code is silent as to how the policy is going to be implemented and enforced, and what the proposed penalty would be for non-compliance…. [T]he policy seeking to be implemented may be within managerial prerogative or be considered basic education policy, but its enforcement may still be a working condition which must be bargained.” Polk County Board of Education v. Polk County Education Association, 139 S.W.2d 304 (2004).

b. Cell-Phone. The employer unlawfully implemented a policy regarding cell-phone use by teachers during assigned and non-assigned time. The policy prohibited teachers from receiving cell-phone calls without prior written approval. “Cell phone use during non-assignment time does not affect the educational process because teachers are not responsible for teaching students during lunch periods of preparation periods. The Association elicited an admission from the Superintendent that the regulation of non-assignment time cell phone use had very little to do with education. Because the cell phone policy applies to non-assignment time, the impact of this part of the policy is greater on employees’ interests than it is on the probable effects of the District’s educational policy. [T]he part of the cell phone policy that regulates non-assignment time cell phone use is a mandatory subject of bargaining.” Monessen City School District, 35 PPER ¶33 (Pa. LRB 2004).

c. Internet Use. The employer unlawfully implemented an Internet use policy that threatened discipline or criminal prosecution against
employees who violated it. “[M]odifications of disciplinary rules and codes of conduct fall within the guise of mandatory subjects of bargaining…. This Policy has an enormous impact on the employee disciplinary policy. The Policy clearly indicates that violations of any of the terms, which includes casual personal use of the internet, would be subject to ‘disciplinary action or criminal offense.’ [T]his Policy impinges directly upon employment security. Therefore, the Policy clearly implicates mandatory subjects of bargaining.” Johnston School Committee v. Rhode Island State Labor Relations Board, 2004 WL 877619 (R.I. Super. 2004).

d. **Smoking.** The employer unlawfully implemented a no smoking policy for its prison guards. “[S]moking and tobacco policies in the workplace have a demonstrable impact on employees’ interests that outweigh the core managerial interests of public employers such that tobacco and smoking policies have consistently been determined to be a mandatory subject of bargaining.” The employer unsuccessfully argued that it had a managerial interest in providing a healthier environment for inmates or preventing disruptive or volatile behavior. “The Commonwealth did not offer evidence that inmates negatively react from witnessing officers who used tobacco products or that officers’ tobacco use has caused volatile behavior different from ordinary routine inmate outbursts or threats to security. Also, the Commonwealth did not offer any evidence regarding the inmates’ use of tobacco products while outdoors or in the prison yard. Inmates permitted to use tobacco outdoors may not be as taunted or inclined to react negatively by witnessing others using tobacco, as alleged, as compared to inmates who are completely prohibited from using tobacco. Additionally, permitting inmates to smoke outdoors would undermine the Commonwealth’s alleged concerns regarding inmate healthcare costs. Also, given the breadth of the no smoking policy at Fayette, the Commonwealth has failed to establish that chewing tobacco by officers in the presence of inmates would have any effect on the health or taunting of inmates. The Commonwealth presented no evidence regarding the environmental conditions at Fayette, such as ventilation systems or inmate proximity to guards’ stations to support the finding that smoking tobacco was harmful to inmates.” Commonwealth of Pennsylvania Department of Corrections, Fayette SCI, 35 PPER ¶84 (Pa. LRB 2004), aff’d, 35 PPER ¶58 (Pa. LRB ALJ 2004).

e. **Computer Use.** The employer unlawfully implemented a computer use policy at three of its campuses. “[A]ll of the campus policies prohibits spam, mass mailings, or any other use which could impede the network, restrict uses to University business except for incidental, personal use, and permit CSU monitoring access, not only under subpoena or court order, but as CSU deems necessary to keep the system viable. Some of these terms are not well defined. And a violation of any of the terms could result in loss of the user’s authorization. Thus,
each of the campus policies creates a statement of incompatible activities and effects change in the status quo.” *Trustees of California State University*, 28 PERC ¶228 (Cal. PERB ALJ 2004).

6. **Parking Fees.** The union’s proposals concerning parking fees involved a mandatory subject of bargaining because they clearly concerned wages, hours or terms and conditions of employment and did not involve matters of inherent managerial authority. “[T]he FOP parking proposal involves the Officers’ and ranked Officers’ terms and conditions of employment. All of the Officers and ranked Officers drive their personal vehicles for the purpose of commuting to work, and indeed many of the Officers and ranked Officers must drive to work since they reside away from the immediate Champaign-Urbana area. Consequently, it is vital that the Officers and ranked Officers have a place to park their vehicles while they are working. The various parking arrangements available to these employees as an alternative to parking at a Campus parking facility are either inadequate, inconvenient or unreliable. Likewise, expecting the Officers and ranked Officers to park at the ‘shuttle lot’ and then ride a bus to the Headquarters is also an unacceptable parking alternative. Even if the shuttle bus were available around the clock to accommodate the Officers and ranked Officers working the Department’s second and third shifts, the shuttle bus will increase the employee’s commute time by approximately 20 minutes. This 20 minute increase in an Officer and a ranked Officer’s commuting time establishes that parking at the Headquarters’ Lot is a term and condition of their employment. Employee parking fees also did not concern a matter of inherent managerial authority, notwithstanding the employer’s contention that bargaining over employee parking fees might make the projected stream of revenue uncertain and possibly prevent the underwriting of construction for additional parking structures. “[T]he simple fact that the issuance of bonds to fund parking structure construction costs may in some way be predicated on parking fee revenues derived from bargaining unit employees does not render such fees a matter of inherent managerial authority.” *Board of Trustees, University of Illinois*, 20 PERI ¶84 (Ill. LBSP 2004).

7. **Promoting Less Senior Employee.** A grievance challenging the employer’s decision to deny a day shift custodial position to a night shift custodian in favor of a less senior employee involved a mandatory subject of bargaining. At issue was a contract provision that gave preference for a transfer from the night shift to the day shift, but the contract also reserved to the employer the right to determine the experience and qualification of each member of the bargaining unit to fill a vacant post. “Provisions allowing employees to bid for work hours or specific work shifts by seniority are mandatorily negotiable, provided management may deviate from a seniority system when necessary to accomplish a governmental policy goal. For example, seniority bidding cannot compromise management’s right to assign employees with special qualifications to special tasks, determine that employees with certain abilities perform better on certain shifts, train employees, strength and supervision, determine staffing levels, or respond to emergencies…. The assessment in each case must focus on specific wording of a contract proposal or the specific nature of an arbitration dispute
given the specific facts in the record and the specific arguments presented to us.” Thus, “[t]he contract cannot be construed to give a senior employee an absolute preference for the day shift position, but it can be construed … to give a senior employee a preference absent a demonstrated need to select a different employee. Scotch Plains-Fanwood Board of Education, 30 NJPER ¶26 (N.J. PERC 2004).

8. **Hidden Surveillance Cameras.** The employer unlawfully refused to bargain before it installed hidden surveillance cameras to record custodians’ activities in a maintenance garage. Based upon long-standing NLRB precedent, the installation and use of hidden surveillance cameras comes within the scope of “terms and conditions of employment” because of the potential to affect the job security of employees who are monitored and because it impinges upon employees’ right to privacy. On the latter point, the maintenance garage functioned as both a lunch room and changing area for groundsmen, and the groundsmen were captured on videotape removing or adjusting their clothing. In addition, the installation and use of hidden surveillance cameras does not come within any managerial right. “Bargaining over the installation and use of hidden surveillance cameras would not require the District to negotiate about its function – educating students – or the standards of service it provides. Such bargaining will also not require the District to negotiate about its overall budget, organizational structure, the selection of new employees, or the direction of employees. The District’s right to investigate whether employees are violating rules and policies through the installation and use of hidden cameras would not be challenged by a requirement that it bargained over the use of such cameras.” Bloom Township High School District 206, 20 PERI ¶35 (Ill. ELRB ALJ 2004).

9. **Grievance Issues.**

a. **Controlling Attendance at Grievance Hearings.** The employer unlawfully attempted to restrict the number of attendees at Board-level grievance hearings. “Grievance procedures are a mandatory subject to bargaining under [the state’s collective bargaining law]. Given the explicit reference to ‘grievance procedures’ in [the state statute], there is no need to engage in the balancing exercise used when assessing whether particular ‘working conditions’ are a mandatory subject of bargaining. The hearings before the school board at issue here are clearly part of the grievance process utilized by the Union and the employer so … the employer’s contention that it had a managerial prerogative to unilaterally to change the procedure for grievance hearings [is rejected].” The employer asserted an “inherent right to limit attendance at executive sessions of its Board,” from which it “may be possible to infer such an employer right from the provisions of the state Open Public Meetings Act.” However, the “imbalance of numbers of participants [in which five board members could be joined by three employer officials, while the union will be limited to two persons plus the grievant] would distort the process by which the employer and the Union are to bargain on a level playing field. The … Union’s explicit right and obligation to represent

b. **Definition of Grievance.** A union proposal concerning the definition of “grievance” was mandatorily negotiable. The employer contended that the proposed definition failed to include a passage from the existing contractual definition that limited disciplinary grievances to “minor” discipline, thus suggesting that the grievance and arbitration procedure applied to “major” discipline, which cannot be submitted to binding arbitration. Since the union’s proposal did not specifically require binding arbitration of major discipline, and the union acknowledged that it did not intend to drop the sentence referencing minor discipline, the union’s proposal was mandatorily negotiable. *Township of West Milford*, 30 NJPER ¶77 (N.J. PERC 2004).

The union’s proposal regarding the definition of a “grievance” was mandatorily negotiable. The union’s proposal attempted to broaden the definition to include disputes arising over the interpretation, application or violation of any applicable rules or regulations or policies, agreements or administrative decisions affecting any covered employees. State statute “requires employers to negotiate written policies setting for grievance and disciplinary review procedures covering the interpretation, application or violation of policies, agreements or administrative decisions, including disciplinary determinations. Grievance procedures can be broad but Unions may not submit grievances challenging non-negotiable managerial prerogatives to binding arbitration. The [union’s] proposal does not specifically require binding arbitration of such disputes and is therefore mandatorily negotiable. *Borough of North Vale*, 30 NJPER ¶80 (N.J. PERC 2004).

c. **Separate File for Grievances.** A union proposal requiring that documents, records, and communications dealing with grievances be filed separately and not be included in any employee’s personnel file involved a mandatory bargaining subject. The employer unsuccessfully argued that the proposal infringes on its managerial prerogative to determine the content of personnel files. “The Association has a legitimate interest in ensuring that an employee is not adversely affected by having references to participation in the grievance process included in his or her personnel file.” While the District asserts that it seeks to retain grievance material in personnel files for informational purposes only, it does not explain its interest in having the material included in such files, as opposed to the separate grievance file contemplated by the article.” *State-Operated School District of City of Patterson*, 30 NJPER ¶111 (N.J. PERC 2004).

d. **Tape Recording Grievance Meetings.** However, the employer’s insistence upon tape recording a third-step grievance meeting
was unlawful because it involved a permissive subject of bargaining. Consistent with precedent from the NLRB which holds that tape recording of contract negotiation sessions and grievance meetings involve a permissive subject of bargaining, “absent a meaningful distinction between contract negotiation sessions and grievance meetings, tape recordings of grievance meeting is also a permissive subject of bargaining.” 

Charter Township of Flynt, 17 MPER ¶54 (Mich. ERC 2004)(aff’g ALJ w/o exceptions).

10. Residency Requirement. The employer’s residency requirement in a local ordinance involved a mandatory subject of bargaining. “[B]ecause the residency requirement subjects unit employees to potential discipline, their terms and conditions of employment are affected.” In addition, the employer “[did] not link the objective of the ordinance with any of the enumerated managerial rights [therefore] the residency ordinance does not involve the matter of inherent managerial authority ….” The employer’s argument that the burdens of bargaining outweigh the benefits because it would be forced to negotiate residency with too many bargaining units and face a lack of consistency across all bargaining units was rejected. 


11. Zipper Clause. The employer’s proposed “zipper clause” was not a prohibited subject of bargaining, but instead, was a mandatory subject. The Union unsuccessfully argued that the zipper clause involved a prohibited subject of bargaining because: (1) it required the union to waive its statutory right to participate in mid-term bargaining; and (2) taking such a proposal to binding interest arbitration, and having an arbitrator involuntarily impose such a provision upon the union would compel the union to waive a right that it could not waive unless it was voluntary. “The statute does not define the circumstances in which a mid-term bargaining obligation arises. It merely states that if such an obligation exists, then the parties must follow the procedures specified in the statute.” The union’s involuntary waiver argument also was rejected. “We have described agreements arrived at through interest arbitration as being formed ‘by operation of law.’ That does not mean, however, that an agreement formed through interest arbitration is somehow different from other agreements. To further this policy, we will treat contracts formed through interest arbitration the same as those formed through any other bargaining procedure…. To conclude otherwise would lead to anomalous results. The Association argues that the subject of zipper clauses is mandatory until the [last best offer] stage when it becomes prohibited. Under such a scenario, a Union led a posed a zipper clause would gain a strategic advantage by refusing to reach agreement until after a table bargaining and mediation concluded, at which point the Union could avoid the zipper. This would run directly counter to the statutory goal of encouraging parties to settle their disputes at the earliest stage possible…. The Association’s argument would also have implications for other contract provisions. The major premises of the Association’s argument is that in interest arbitration, the losing party does not ‘agree’ to the terms of the contract. If we were to apply this premise to other
subjects, a number of other basic contract provisions currently deemed mandatory for bargaining would become prohibited in interest arbitration. For example, this Board can compel a party to proceed to grievance arbitration and we can enforce a grievance arbitration award, only if ‘the parties have agreed to accept such awards as final and binding.’ Similarly, ‘fair share’ provision requires an ‘agreement’ between the employer and the exclusive representative.” Benton County Sheriff’s Department, Case No. UP-36-02 (Ore. LRB 2004).


a. Standards Based Upon Arbitration Award from Another Unit. An employer is not excused from bargaining over a change in promotion standards by relying upon an arbitration award involving a different bargaining unit. The employer argued unsuccessfully that an arbitration award from a different bargaining unit required it to promote employees from the other bargaining unit over employees in the union’s bargaining unit. The union had not received notice from any interested party in the arbitration before the award had been issued. “It is well established that standards and criteria for promotion are a mandatory subject of bargaining.... [The employer] is not relieved of its duty to bargain with Charging Party over promotional standards and criteria by claiming that the investigators’ promotions will not be made from the eligibility register, but from an [arbitration] award involving the City of Detroit and a different bargaining unit.... The City is in the unusual position of being obligated to bargain with both the non-supervisory and supervisory police units regarding promotions to lieutenants. One, for promotion out of the non-supervisory bargaining unit to lieutenants. Another for promotion within the supervisory bargaining unit. The employer cannot be absolved of its duty to bargain concerning promotional standards, as it seeks to do here, by telling the Charging Party to go bargain with the supervisory police unit. The supervisory police bargaining unit has no duty to bargain with the Charging Party – the employer has.” City of Detroit (Police Department), 17 MPER ¶18 (Mich. ERC 2004).

b. Testing Procedures. The union’s proposals regarding the order of the components of the promotional process and the timing of the release of the written examination results involved mandatory subjects of bargaining. Both proposals involved the underlying issue of when the written and oral examinations would be conducted. The employer’s argument that the first proposal (which required that the written examination occur before the promotional examination) interfered with its prerogative to determine promotional criteria was rejected. “[T]his proposal does not interfere with that prerogative since the employer retains ultimate control of who will be promoted at the end of the process.” The union’s second proposal, (which required that the results of the written examination be withheld until all other aspects of the promotion process have been completed) also did not interfere with any managerial
prerogative. “The employer has not stated a managerial interest, beyond its financial interest, in cutting off the promotion process after the written examination. Our holding protects the employer’s undisputed prerogative to set promotional criteria and apply those criteria to its final promotion decisions.” *Township of Piscataway*, 30 NJPER ¶57 (N.J. PERC 2004).

c. Job Bidding Procedures. The union’s proposal to modify the job bidding procedures was mandatorily negotiable. The union’s proposal: (i) required that the contract include the actual number of biddable positions; (ii) revised the procedures for employees choosing their shift assignments; (iii) precluded an employee from being removed from a bidded position because disciplinary charges had been brought or could have been brought until the employee had been found guilty of the disciplinary charges or had consented to be disciplined; and (iv) required that the job bidding include assignments which include the shift, days off and working units. With respect to the first, second and fourth proposed changes, the employer had not described how these proposed changes would significantly interfere with any managerial prerogative. With respect to the proposed change that would delay disciplinary transfers from bided positions, “[p]olice Unions in Civil Service jurisdictions may negotiate over pre-disciplinary procedures. In addition, Civil Service regulations provide the reassignments shall not be utilized as part of a disciplinary action, except when disciplinary procedures have been utilized. An officer has a strong interest to remain in a shift assignment that he or she has chosen, perhaps to accommodate personal or family obligations. The employer’s interest in removing someone if that individual caused a problem in an area can be accommodated after compliance with any negotiated disciplinary procedures.” *Camden County Sheriff*, 30 NJPER ¶10 (N.J. PERC 2004).

13. Discriminatory Terminations. The union could pursue a grievance that was subject to a related discrimination proceeding before the Division on Civil Rights. “That a related matter is pending before the D.C.R. does not make this grievance non-arbitrable…. [B]inding arbitration is barred only where a grievance claims that a managerial decision was tainted by discrimination…. [T]his case involves a negotiable term and condition of employment: the ability to have terminations reviewed through binding arbitration absent an alternative statutory appeal procedure.” *Washington Township Board of Education*, 30 NJPER ¶53 (N.J. PERC 2004).

14. Changing Voluntary Attendance at Activities. The employer unlawfully modified an existed work rule by requiring employees to attend an annual overnight 8th grade trip to Washington, D.C., where attendance previously had been voluntary. The employer unsuccessfully argued that it had the managerial prerogative to require attendance because the trip to Washington, D.C. is “tied directly into the curriculum for 8th grade activities.” “An overnight or multi-day trip to Washington, D.C. by some middle school teachers falls outside
of the period of time in which all members of the unit are required to be ‘present and at work.’… [T]he trip to Washington, D.C. is ‘extra curricular’ within the meaning of the statute, notwithstanding its locus in the 8th grade curriculum.” State law provided that “All aspects of assignment to, retention in, dismissal from, and any terms and conditions of employment concerning extracurricular activities shall be deemed mandatory subjects for collective negotiations between an employer and the majority representative of the employees and the collective bargaining unit, except that the establishment of qualifications for such positions shall not constitute a mandatory subject for negotiations.” The statute also defined extracurricular activities to include “those activities or assignments not specified as part of the teaching and duty assignments scheduled in the regular work day, work week or work year.” Finally, the statute also defined “regular work day, work week, or work year” as “that period of time when all members of the bargaining unit are required to be present and at work.” Hackettstown Board of Education, 30 NJPER ¶82 (N.J. PERC ALJ 2004), modified on other grounds, 30 NJPER ¶107 (N.J. PERC 2004).

15. Ammunition for Weapons Practice. A union proposal concerning ammunition for weapons practice was mandatorily negotiable. “Employees have an interest in having the employer supply and pay for ammunition necessary to maintain required weapons training and certification. Employees have a further interest in having the employer supply and pay for training materials connected to their safety. The employer has not specified any governmental policy interest that would be affected by supplying and paying for ammunition for employees to practice for training and qualification…. The Unions here do not seek to negotiate over what type or amount of ammunition will be used for regular duty or qualification. Those decisions are reserved to management…. Nor do the Unions seek to negotiate over how often ammunition for service weapons will be replaced. They simply want the employer to supply and pay for sufficient quantities of ammunition for weapons practice.” Township of West Milford, 30 NJPER ¶77 (N.J. PERC 2004).

16. Denying Vacation Day Request. A grievance that challenged the denial of a vacation day request involved a mandatory subject of bargaining. “[T]he possibility of improving the employee’s quality of life by allowing them to take a vacation day off at a time that suits them is sufficient reason to consider the denial of a vacation day to be a mandatorily negotiable issue.” In considering this negotiability dispute …: (1) scheduling a vacation leave or other time off is mandatorily negotiable, provided the employer can meet its staffing requirements; (2) the employer may deny a requested leave date to ensure that it has enough employees to cover a shift, but it may also legally agree to allow an employee to take leave even though doing so would require it to pay overtime compensation to a replacement employee; and (3) an employer does not have an inherent prerogative to unilaterally limit the number of employees on leave or the amount of leave time absent a showing that minimum staffing requirements will be jeopardized.” The employer has not “specified or showed a basis for concluding that upholding the grievance would otherwise jeopardize its minimal staffing requirements.” State of New Jersey (Department of Corrections, 30 NJPER ¶78 (N.J. PERC 2004).
17. Performance of Non-Police Duties. Contract provisions that preclude requiring police officers to perform fireman functions or duties, or to assist in an attempt to control a fire near fire or any other disorder of use of hose, streams or otherwise, involved a mandatory subject of bargaining. “Employees may seek to negotiate for contractual protections against being required to assume duties outside their job titles and beyond their normal duties.” Another contract provision that precluded requiring police officers to perform any mechanical or maintenance work also was mandatorily negotiable. “[T]he contract proposal specifically seeks to prevent employees from being required to wash and clean vehicles, change tires and perform maintenance work in the police station. Under the circumstances of this case where public works employees are available to perform these tasks at all times the proposal is mandatorily negotiable.” City of Union City, 30 NJPER ¶79 (N.J. PERC 2004).

18. Teacher Evaluations. A teacher performance evaluation plan involved a mandatory subjective bargaining and did not fall within the definition of a “managerial prerogative.” “[W]e do not find that the authority to change the procedures and methods of teacher performance evaluations is exclusively reserved to the District by law.…. [T]he District’s proposed changes primarily effect the terms and conditions of employment rather than broad management policies…. While the District may voluntarily develop broad education management policy to address what is essentially an employee performance evaluation, or may do so at the request for mandate of other governmental bodies, it cannot implement such policy initiatives or changes that impact the terms and conditions of employment set forth in a previously negotiated collective bargaining agreement.” Pittsfield School District, Dec. No. 2004-087 (N.H. PELRB 2004).

19. Legal Indemnification. The contractual exclusion of the employer’s indemnification decisions from the grievance procedure involved a mandatory bargaining subject. The union unsuccessfully argued that this exclusion was contrary to law and unenforceable. “[I]ndemnification is a mandatory subject of bargaining because public employees would have strong economic interests in legal representation from their public employer as a result of getting sued for a work-related function.” State v. Public Safety Employees Association, 93 P.3d 409 (Alaska 2004).

20. Changing Minimum Qualifications. An employer still is required to negotiate the effects of any changes in promotion criteria. Thus, the employer was required to bargain the impact of implementing an associate’s degree requirement for promotion to police sergeant. “[S]ergeants receive significantly more pay, and correspondingly, increased paid leave and retirement benefits than police officers…. When the city implemented the associate’s degree requirement at issue here, certain senior officers in the Association’s bargaining unit lost the opportunity to be promoted to sergeant and the accompanying potential for increased wages and benefits.” Beaverton Police Association v. City of
21. Reclassification Procedures. “[T]he process for reclassification of positions is a mandatory subject of bargaining. Certainly, reclassification decisions directly effect wages and terms and conditions of employment. Reclassification clauses are found in many, if not a majority, of collective bargaining agreements that come in front of this Board. This is not a question of an employer’s right to select an individual to carry out the functions of an otherwise agreed upon or statutorily imposed process. This is a question of whether the procedure to be followed in reclassifying a bargaining unit position must be negotiated.” However, the employer did not unlawfully change the method of approving reclassifications because the labor contract allowed it to do so. City of Danbury, Dec. No. 4000 (Conn. SBLR 2004).

22. Banning Off-Duty Employment. A grievance that challenged an order by the police chief to ban all off-duty employment involved a mandatorily bargaining subject. “Off-duty employment provides opportunities for extra income. Several aspects of off-duty police employment are mandatory negotiable…. [A] police department has a managerial prerogative to mandate overtime to meet emergent needs or to guarantee minimum staffing levels. There is no indication, however, that overtime was mandated. In addition, a police department has the right to extend the work week and work day of police officers to meet an ‘emergency.’ There is no indication that this [right] was invoked. Instead, off-duty work was banned until police officers agreed to fill a list of needed positions. There is no indication that those positions could not have been filled without suspending the opportunity to engage in off-duty work.” Borough of Clayton, 30 NJ PER ¶ 134 (N.J. PERC 2004).

V. PERMISSIVE BARGAINING SUBJECTS

A. Limiting Right to Grieve. The employer unlawfully insisted to impasse on contract language that restricted the union’s right to initiate and to process through arbitration grievances that involved the interpretation and application of the parties bargaining agreement. The collective bargaining law “does not restrict a Union’s participation as a party to the grievance procedure, and does not lend itself to an interpretation that the requirement to negotiate grievance procedures includes a requirement that the Union also negotiated whether or not it may file or process grievances in its own name.” The employer’s conduct constituted a per se refusal to bargain because “public employers are prohibited from imposing a waiver of statutory Union rights.” School Board of St. Lucie County, 29 FPER ¶250(Fla. PERC 2003).

B. Staffing Decisions Not Raising Safety Issues. The union was limited in its ability to challenge the employer’s decision not to call a second police officer on a shift. “[C]ases generally bar negotiations over or enforcement of contract clauses binding employers to specific staffing levels. However, grievances seeking to enforce alleged agreements to provide a safe work environment have been held to be legally arbitral. But these cases also held that an arbitral award could not order an increase in staffing since
the determination of staffing level is a managerial prerogative.” Thus, the union was permitted to arbitrate its safety concerns, but it could not challenge the employer’s staffing decisions. *Town of Harrison*, 29 NJPER ¶162 (N.J. PERC 2003).

C. **Job Assignments.** The union could not challenge the employer’s decision regarding whom to assign senior citizen bus driving duties during regular work hours. “Public employers have a non-negotiable managerial prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs. Thus, if viewed as an assignment, the employer had a prerogative to choose which public works employee to assign to the bus driving duties during regular work hours. Even if we viewed the bus driving duties as a new position, the employer had a prerogative to fill that position with the employee deemed most qualified. As with assignments, public employers have a non-negotiable right to fill vacancies and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs.” In addition, “any claim of discrimination in the exercise of a managerial prerogative cannot be submitted to binding arbitration [because] such challenges must be made in forms provided by state and federal anti-discrimination laws.” *Borough of Hawthorne*, 29 NJPER ¶164 (N.J. PERC 2003).

D. **Monitoring Employee Attendance.** The employer properly implemented the use of an existing security monitoring system as a timekeeping device to monitor employee attendance. “[A] check-in/check-out system implemented for security purposes is not a negotiable subject unless there is an impact on the length of the workday or duty-free time.” The unfair labor practice charge did “not demonstrate an impact on the workday, only the application of discipline for failure to adhere to attendance requirements.” *State of California (Department of Motor Vehicles)*, 29 PERC ¶16 (Cal. PERB 2003).

E. **Gasoline Credit Card System.** The employer lawfully implemented a new mechanized gasoline credit card system that utilized a portion of employees’ individual state driver’s license number as the employee’s personal identification number. The previous system required the employee to sign a credit card charge slip and submit a copy of the signed receipt to the employer’s business office. No PIN numbers or codes were required to use the credit card. “[T]here is no duty to bargain changes to work rules already in existence where the change merely alters the manner of recording, such as the substitution of a mechanical process for a written one. Thus, the change in procedure from requiring a signature on a credit card charge slip, to inputting a PIN number, is not a change that raises a bargaining obligation. The union’s privacy concerns, which were based upon the fact that a portion of the employee’s drivers license number was used, were rejected. “[W]hile employee privacy has been recognized as a legitimate factor in balancing the parties’ interest, [the union] has failed to identify how its members’ privacy rights are threatened or violated by the new requirement…. [T]he claim that the decision raises a privacy interest simply because the number is ‘personal’ and was provided to the employer for another purpose [is] unpersuasive, particularly since the State has chosen to use only a portion of its for the PIN number…. [T]he individual’s license number is not identifiable from the six digits used for the PIN number.” This situation differed from cases involving the implementation of security procedures where employees’ personal
belongings were searched to avoid theft and/or illegal dumping. Nor did State law that precluded the disclosure of an employee’s drivers license number to the general public preclude the employer’s use of a portion of that number. State of New York (Office of Mental Retardation and Developmental Disabilities-Hudson Valley Developmental Disability Services Office), 39 PERB ¶4595 (N.Y. PERB ALJ 2003).

F. Retiree Benefits.

The union’s retiree health proposals involved permissive subjects of bargaining. One proposal reduced the number of years needed to qualify for retiree health benefits, while the other provided survivor health benefits. With respect to the first proposal, reducing the number of years of service would impact the employer’s desire to provide uniform retiree health benefits since employees and other bargaining units would be subject to an eligibility service requirement that is longer. “Wherein an employer or a majority representative proposes to change or institute provisions concerning employer payment of retiree health benefits …, such a proposal must be made contingent upon the [statutory] uniformity of requirements … being that.” Consequently, “[t]he concern that an interest arbitrator not issue an award that would bind another unit is addressed if any change on employer payments takes effect only when uniformity requirements are met.” Because the union’s proposal did not contain that uniformity of requirement, it did not involve a mandatory subject of bargaining. With respect to survivor benefits, “it is well settled that benefits for former employees who have already retired are not mandatorily negotiable and that receipt of benefits by survivors of a retired former employee is not a term and condition of employment.” Essex County Prosecutor, 29 NJPER ¶148 (N.J. PERC 2003).

A retiree’s challenge to the denial of his claim for retirement health benefits did not involve a mandatory subject of bargaining because it does not “vitaly effect the terms and conditions of employment of the current collective bargaining unit employees ….” Consequently, the plaintiff was not required to grieve and arbitrate the denial of his claim since he was no longer subject to collective bargaining. Bachman v. City of Jackson, 2003 WL 22962068 (Mich. App. 2003).

An employer’s threat to take away medical coverage to a retiree and its refusal to bargain over medical coverage for retirees involved a permissive bargaining subject. “[I]ssues relating to individuals who are not employees, including retirees, are subject to bargaining and … an employer has no obligation to bargain concerning such matters unless they ‘vitaly effect’ the terms and conditions of employment of bargaining unit members…. To satisfy the ‘vitaly effects’ tests, the effect on active employees must be established with certainty. The mere speculation about the impact of retiree benefits on active employees isn’t sufficient. In the instant case, members of the bargaining unit are in exactly the same position that they would have been had the incident … never occurred.” Village of Holly, 17 MPER ¶48 (Mich. ERC 2004)(aff’g ALJ w/o exceptions).

G. “Re-arming” Police Officers. The union could not grieve the employer’s decision not to “re-arm” a police officer who was named as a defendant in a civil rights lawsuit by a civilian who was shot. The officer had been found fit for duty by the
employer’s psychologist (who added, however, that the officer’s “inclination towards a macho approach to police work could potentially portent difficulty if it is not moderated through some counseling”); the police officer also had completed the required counseling; and a grand jury had refused to indict him. “The decision whether or not to arm a police officer is a policy decision not subject to mandatory negotiations.... An arbitration award requiring the City to re-arm this officer would substantially limit the City’s policy-making power to determine the conditions under which it is proper for its police officers to be armed.” City of Newark, 29 NJPER ¶174 (N.J. PERC 2003)

H. Waiver of Mid-Term Contract Changes. An employer was not permitted to bargain and insist to impasse on contract provisions that waive bargaining and impasse resolution obligations regarding work rules adopted during the term of a collective bargaining agreement. Whenever the employer notified the union of a change in a work rule, the union would have 30 days to object. Instead of submitting any differences to mediation and interest arbitration, the employer could implement any change by adoption of the rule. “As intended by the employer and clearly explained to the union, the employer’s proposed contract language means that the employer could unilaterally change every working condition not specified elsewhere in its proposed collective bargaining agreement.... Because of the virtually limitless unilateral changes in working conditions it would permit during the term of the parties ’ collective bargaining agreement, ... the employer’s proposal regarding rules of operation was overly broad and in conflict with the interest arbitration process .... If the union had made or agreed to the same proposal, that agreement also would have contravened [the interest arbitration process]. The proposal was, therefore, an illegal subject of bargaining.” Whatcom County, Dec. No. 7244-A-PECB, 2003 WL 1712537 (Wash. PERC ALJ 2003), aff’d, Dec. No. 7244-B-PECB, 2004 WL 725698 (Wash. PERC 2004).

I. Criminal Offense Reporting Requirements. The employer could change the criminal offense reporting requirements for airport employees who had special access to airport facilities. The previous reporting requirements denied employees access to secured areas if they had been convicted of a disqualifying offense or found not guilty be reason of insanity. The new reporting requirements denied access if the employee pled nolo contendere to any disqualifying offense, or if an adjudication on a disqualifying offense had been withheld. Such employees effectively were terminated because all employees were required to have an access badge to maintain their employment. “[A]n employer can make unilateral changes to mandatory subjects of bargaining where there are exigent circumstances such as public safety.” Because [the employer’s] employees are entrusted with public safety and all … employees must have access to all secured areas, exigent circumstances warranted a unilateral decision...” Laborer’s International Union of North America v. Greater Orlando Aviation Authority, 869 So. 2d 608 (Fla. App. 2004)

J. Assignments.

1. Avoiding Holiday Pay. The employer lawfully changed detectives’ work schedules so that they were not scheduled to work on a holiday, thus avoiding the obligation to pay holiday pay. “Faced with what we believe to be
clear language within the parties’ CBA that the Division retained the prerogative to require detectives to report to duty on holidays, we find the reciprocal of that authority to be similarly valid, that is, to not require them to report to duty on holidays…. The Division was exercising authority within its managerial policy in attempting to officially manage its expenditures to which the highest level of public safety by decreasing the number of detectives working on holidays to assign more “Road Troopers” to holiday duty. … While we recognize that detectives will receive less premium pay as a result of them not always being required to work on holidays, we do not find that the Division’s decision should not have the detectives work on designated holidays primarily affects the terms and conditions of employment, rather than the matters of broad managerial policy. To find otherwise would be to conclude that the parties had without negotiations reached a mutual agreement that the Detectives had obtained a right to work on holidays. We do not think that the evidence demonstrates that they obtained this right.” New Hampshire Department of Safety, Division of State Police, Dec. No. 2004-014 (N.H. PELRB 2004).

2. Additional Assignment Related to Old Duties. The employer lawfully assigned new duties to senior clerk/typists because they were reasonably related to their former duties. The union unsuccessfully argued that an agreement existed with the employer that certain duties would not be assigned to the employees until the computer system functioned properly. “It is undisputed that the purported agreement … was not embodied in the parties’ CBA and no term was set forth in the agreement. Further, no modification was made to documents setting forth the duties of senior clerk/typists. At some point, management again assigned those duties to its senior clerk/typists. Since the duties at issue were reasonably related to existing duties, the agreement solely involved a permissive subject of bargaining. Because that agreement involved a permissive subject of bargaining, and was not embodied in the parties’ CBA, the City did not commit an unlawful unilateral change when it again assigned those duties to its employees.” City & County of San Francisco, 28 PERC ¶139 (Cal. PERC 2004).

K. Safety Policy. The union’s proposal to grant a joint health and safety committee actual decision-making power to establish the employer’s policies for firefighter personal safety equipment and apparel and safe working conditions involved a permissive bargaining subject. The proposal “constitutes an improper infringement upon the city’s prerogative to establish the fire department’s safety policy…. [I]t is within the scope of the city’s managerial prerogative to set safety policy. Managerial decisions regarding the size and scope of municipal services are within the scope of the managerial prerogative.” In addition, the proposal “broadly grants the committee policy-decision power that binds the city. No authority exists to show that the [interest arbitration] panel had this jurisdiction to remove policy decisions from the public employer and place it in the hands of three union and three public employees.” City of Detroit v. Detroit Firefighters Association Local 334, 2004 WL 513663 (Mich. App. 2004).

L. Accuracy of Evaluations. A grievance challenging a mid-year evaluation of a student assistance counselor did not involve a mandatory bargaining subject. There were
a total of 25 ratings, and the employee received 16 “Needs Improvement” and 9 “Satisfactory” ratings. The union unsuccessfully argued that the evaluation was, in essence, a disciplinary reprimand. “A school board has a managerial prerogative to observe and evaluate employees. Disciplinary reprimands, however, may be contested through binding arbitration.… We realize that there may not always be a precise demarcation between that which predominantly involves a reprimand and is therefore disciplinary … and that which pertains to the Board's managerial prerogative to observe and evaluate teachers and is therefore nonnegotiable. We cannot be blind to the reality that a ‘reprimand’ may involve combinations of an evaluation of teaching performance and a disciplinary sanction; and we recognize that under the circumstances of a particular case what appears on its face to be a reprimand may predominantly be an evaluation and vice-versa. Our task is to give meaning to both legitimate interests. Where there is a dispute we will review the facts of each case to determine, on balance, whether a disciplinary reprimand is at issue or whether the case merely involves an evaluation, observation or other benign form of constructive criticism intended to improve teaching performance. While we will not be bound by the label placed on the action taken, the context is relevant. Therefore, we will presume the substantive comments of an evaluation relating to teaching performance are not disciplinary, but that statements or actions which are not designed to enhance teaching performance are disciplinary. Applying these standards, we hold that the mid-year formative evaluation constitutes an evaluation rather than a reprimand. The evaluation contains assessments of the employee’s performance as a student assistance counselor and does not contain any indicia of discipline. Unsatisfactory evaluation ratings do not transform an evaluation into a reprimand.” Washington Township Board of Education, 30 NJPER ¶42 (N.J. PERC 2004).

M. Financially-Based Layoffs. The employer’s decision to layoff an entire bargaining unit of machinists to alleviate ongoing financial problems involved a permissive subject. “A public employer has an inherent right to determine the size of its work force. Thus, a public employer’s decision to layoff employees is not a mandatory subject of bargaining.” In addition, the union waived the opportunity to engage in effects bargaining, opting instead to persuade the employer not to implement the layoffs. Detroit Public Schools, 17 MPER ¶14 (Mich. ERC 2004).

N. Seniority-Based Permanent Promotions. A grievance that contested a secretary’s promotion involved a permissive subject of bargaining to the extent that it alleges that a more senior employee should have been granted a permanent promotion. An employer “has a managerial prerogative to determine which employee is best qualified for a permanent promotion.… [However,] … a trial period claim may be legally arbitrable so long as a senior employee is qualified for a position and the employer retains the right to choose another employee at the end of the period.” New Jersey Turnpike Authority, 30 NJPER ¶54 (N.J. PERC 2004).

O. Changing Insurance Carriers. A contract provision that required the union’s consent for the employer to change insurance carriers did not involve a mandatory bargaining subject. “Where changing the identity of the insurance carrier effects terms and conditions of employment, i.e., the level of insurance benefits and the administration
of the plan, it is a mandatorily negotiable subject. This provision, however, requires union consent to a change in carriers, even if the new carrier provides identical benefits. Requiring consent significantly interferes with the employer’s prerogative to change carriers without affecting terms and conditions of employment.” *City of Union City*, 30 NJPER ¶79 (N.J. PERC 2004).

**P. Filling Vacancies.** A grievance challenging the failure to fill three vacancies in violation of the negotiated minimum staffing provision was not mandatorily negotiable. “[M]inimum staffing provisions are not mandatorily negotiable. The Association has an interest in preserving work and guaranteeing employment for employees it represents. That interest, however, is outweighed by the employer’s governmental policy interest in setting the size of its workforce and determining how many employees it needs to perform required tasks.” *Woodbridge Township Board of Education*, 30 NJ PER ¶110 (N.J. PERC 2004).

**Q. Completing Competency Development Plan.** A grievance that sought to eliminate an assignment for supervisors to complete a Competency Development Plan (CPD) for every employee who did not achieve all of the competencies required for a promotion did not involve a mandatory bargaining subject. The employer has a “managerial prerogative to require supervisors to complete CPDs given that such an assignment is within the scope of a supervisor’s job duties…. It is not for us to assess whether an assignment is cumbersome or time-consuming or duplicative; it is instead for the vicinage to determine whether completing CPDs is an appropriate use of its supervisor’s skills and time.” *New Jersey State Judiciary (Middlesex Vicinage)*, 30 NJPER ¶ 131 (N.J. PERC 2004).

**R. Denial of Shift Preference.** A grievance that challenged the denial of a shift preference to an employee with greater seniority did not involve a mandatory bargaining subject. “Public employers and majority representatives may agree that seniority can be a fact in shift assignments where all qualifications are equal and managerial prerogatives are not otherwise compromised. However, public employers have a managerial prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs and an arbitrator cannot second-guess those determinations.” *County of Camden*, 30 NJPER ¶136 (N.J. PERC 2004).

**S. Shared Living Rule.** A union proposal to eliminate the “shared living rule” (which required a set-off in hours compensated for individual nursing providers in cases where the provider shares a living space with the client, or the client lives with the provider) involved a permissive bargaining subject. “[T]here is no obligation of the employer to negotiate the scope or nature of its core services to citizens and consumers, whether it involves school services, budgets or the manning and staffing of fire departments…. To abolish the ‘shared living rule’ would inevitably impact [the State’s] authority to determine staffing levels for the home care clients as well as how much money was being spent to provide that service…. The State doesn’t merely have an ‘interest’ – the State … administers the program, and spends federal Medicaid monies to do it. Nothing so close to ‘core responsibility’ or ‘entrepreneurial control’ could be more

T. Training Fund. A union proposal to establish a home care authority industry training fund involved a permissive subject of bargaining. This fund would have taken control of all matters related to employee training not otherwise specified by State law. “[T]he decision to require particular training courses was within the managerial control of the employer…. Although the Union proposal seems to call for supplemental training for that ‘not otherwise specified by statute,’ it in fact would supplant the training now designed for the [employees]. It is within the authority of the agencies to set the training plan for providers and the service plan for clients. The negotiation of an additional training plan is a permissive topic for bargaining.” Governor of State of Washington-Office of Financial Management, Dec. No. 8761-PECB, 2004 WL 2507443 (Wash. PERC ALJ 2004).

U. Evaluation Criteria. A grievance that challenged the performance notices received by bargaining unit employees did not involve a mandatory bargaining subject. The notices informed the employees that they were supposed to increase their “motor vehicle contacts” or face charges of neglect of duties and possible reprimand or dismissal. “An employer has a non-negotiable right to select evaluation criteria. Additionally, a law enforcement agency has a managerial prerogative to determine how it would deliver services to the public. Arbitration would substantial limit the employer’s prerogative to use motor vehicle contacts as an evaluation criterion.” Township of Washington, 30 NJPER ¶ 130 (N.J. PERC 2004).

V. Hotel Accommodations. The employer’s failure to provide civilian employees of the State’s liquor control enforcement bureau (“LEO’s”) with their own private hotel rooms while they were assisting the State police at a local arts festival did not involve a mandatory bargaining subject. The employer previously had settled a grievance whereby it agreed to provide private hotel accommodations to LEO’s upon advance notice of a request. However, the arts festival was held in a rural setting and was attended by thousands of persons. Due to limited number of hotel rooms in the area, it was not possible to provide private hotel rooms for each LEO. “[T]he union presented no … evidence to demonstrate that the requirement that LEO’s share accommodations with other employees affected their wages, hours or terms and conditions of employment.” Testimony from an LEO who did not participate in the event that “sharing a room ‘is a morale issue. You stay with somebody you don’t know lots of times. You get somebody who snores, you don’t get any sleep.’ [was] vague and insubstantial compared to the Commonwealth’s reasons for housing the LEO’s in a single facility.” By contrast, “the Commonwealth proved that it had several non-economic reasons for housing the LEO’s and its other officers at a single location, including the motel’s proximity to the arts festival and its efficiency if it became necessary to convene the employees in the case of an emergency. The Union’s argument that the Commonwealth had other accommodation alternatives, specifically that other hotels in the region could separately provide up to a dozen single occupancy rooms, is unavailing. The fact that other alternatives existed to using a single location does not diminish the weight of the Commonwealth’s decision, since the option it chose was considered the best available option for the purpose of
achieving its objective.” Commonwealth of Pennsylvania/ Pennsylvania Police Force, Case No. PERA-C-01-393-E (Pa. LRB 1/18/05), aff’g, 35 PPER ¶125 (Pa. LRB ALJ 2004).