

P.E.R.C. NO. 2023-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FRANKLIN TOWNSHIP EDUCATION
ASSOCIATION, JANICE REGAN, AND
SHELIA HOLLAND,

Petitioners,

v.

OAL DKT. NOS. EDU 01442-2021
AND EDU 01448-2021
AGENCY DKT. NOS. 1-1/21 AND
3-1/21

BOARD OF EDUCATION OF FRANKLIN
TOWNSHIP, SOMERSET COUNTY

Respondent,

-and-

FRANKLIN TOWNSHIP EDUCATION
ASSOCIATION

Charging Party,

v.

OAL DOCKET NO.: PRC 08413-21
PERC DKT. NO. CO-2021-139

CONSOLIDATED

BOARD OF EDUCATION OF FRANKLIN
TOWNSHIP, SOMERSET COUNTY

Respondent.

SYNOPSIS

In consolidated matters wherein PERC has been deemed the agency with the predominant interest, including an unfair practice case before PERC and a petition of appeal before the Commissioner of Education, the Commission denies the parties' exceptions and adopts, as amended, the Initial Decision of an Administrative Law Judge (ALJ), which determined that N.J.S.A. 18A:16-13.2 obligates the Franklin Township Board of Education to first offer a certain health plan to Franklin Township Education Association members, and then proceed to negotiations over any resulting increase in costs. The Commission finds no support in the statutory language for the Board's position that it does not have to offer the plan until after financial-impact negotiations are completed.

SYNOPSIS, cont.

The Commission amends the Initial Decision to specify that the Board also violated sections 5.4a(1) and (5) of our Act through its undisputed refusal to offer the plan prior to the completion of financial-impact negotiations, as this placed the Association on an unequal footing in such negotiations, and deprived members of information necessary to make informed decisions regarding health insurance coverage. The Commission rejects, as premature or speculative, the Association's exceptions regarding the issue of remedy, which cannot be ascertained until the Board has actually offered and implemented the plan. The Commission forwards the matter to the Commissioner of Education for further processing.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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CONSOLIDATED

BOARD OF EDUCATION OF FRANKLIN
TOWNSHIP, SOMERSET COUNTY

Respondent.

Appearances:

For the Charging Party, Fagella, Nowak, Kleinbaum & Friedman
P.C., attorneys (Richard A. Friedman, of counsel and on the
briefs; Sheila Murugan, on the briefs)

For the Respondent, Parker McCay P.A., attorneys (William C.
Morlok, of counsel)

DECISION

This case comes to us by way of exceptions, respectively
filed by the Franklin Township Board of Education (Board) and the
Franklin Township Education Association (Association), to the
Initial Decision of an Administrative Law Judge (ALJ) on

consolidated matters consisting of an unfair practice case before the Public Employment Relations Commission (PERC), and a petition of appeal before the Commissioner of Education of the State of New Jersey (Commissioner), wherein the Association alleges that the Board improperly refused to offer a health plan under P.L. 2020, c.44 (Chapter 44), as codified at N.J.S.A. 18A:16-13.2.^{1/} We adopt the ALJ's Initial Decision, as amended herein.

The Association filed an unfair practice charge and amended charge with PERC on January 8, 2020, and June 24, 2021, respectively. As amended the charge alleges, in sum, that effective January 1, 2021, N.J.S.A. 18A:16-13.2 requires the Board to offer Association unit members a certain health plan^{2/} regardless of any financial impact to the Board, and that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1) and (5)^{3/} when it: refused to offer such

^{1/} This statute, as respectively amended by Chapter 44 effective July 1, 2020, and by P.L. 2021, c. 163 (Chapter 163) effective July 7, 2021, applies to local boards of education who do not participate in the School Employees' Health Benefits Program. As further discussed infra, it requires such employers to offer their employees certain specified health plans, regardless of any collective negotiations agreements in effect on July 1, 2020 that provide for enrollment in other plans offered by the employer.

^{2/} The plan in dispute must be "the equivalent of the New Jersey Educators Plan in the School Employees' Health Benefits Program [(NJEHP)]." N.J.S.A. 18A:16-13.2.

^{3/} These provisions prohibit public employers, their
(continued...)

a plan (including during the relevant open enrollment period) until negotiations over the plan's financial impact were completed; and refused to provide the Association with requested information about the alleged financial impact.^{4/} The charge further alleges that while the Association was ready and willing to negotiate in good faith with the Board over the financial-impact issue, the Board's refusal to provide the requested

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- 3/ (...continued)
representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. ... [and] (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."
- 4/ The undisputed record includes, among other things: a letter from the Board's superintendent to the Association's president dated October 15, 2020, stating, "[T]he district would realize a negative financial impact if Chapter 44 were implemented. Therefore, the NJEHP will not be offered effective January 1, 2021 without engagement in collective negotiations over the financial impact of the difference"; a letter from the Association to the superintendent, dated October 28, 2020, stating, "the Board is obligated to provide ... information to the Association which is necessary for ... [it] to negotiate meaningfully on behalf of its members. The Board has provided no information regarding cost savings, and cannot do so until it takes the statutorily required steps in relation to the plan or its equivalent. Without that information, any demand to negotiate, indeed the Board's refusal to provide the information, constitutes bargaining in bad faith"; and an email exchange dated November 10, 2020, prior to the commencement of open enrollment, between the Association president and the Board's human resources manager, who confirmed the NJEHP plan would not be offered "until we complete our negotiation."

information constitutes a refusal to negotiate in good faith, rendering the Association unable to reach a mutual agreement through negotiations, and its members unable to make well-informed decisions regarding health insurance coverage. The Board through these actions, the charge alleges, interfered with, restrained and coerced employees in the exercise of rights guaranteed by the Act.

On January 8, 2021, the Association filed a petition of appeal with the Commissioner of Education, also alleging the Board violated N.J.S.A. 18A:16-13.2 by refusing to offer the required health plan.

On June 28, 2021, PERC's Director of Unfair Practices issued a Complaint on the charges, as amended, determining that the allegations therein, if true, may constitute unfair practices.

On August 23, 2021, the Board filed a motion for Consolidation and Predominant Interest with the Office of Administrative Law (OAL), arguing that PERC has the predominant interest in resolving this dispute. On August 25 the Association joined in the motion, but urged that "the predominant interest lies with the OAL."^{5/} On September 23, ALJ Sarah G. Crowley issued an Order of Consolidation and Predominant Interest, finding PERC's interest predominated. On October 4, the PERC

^{5/} We presume the Association meant the Commissioner of Education, not the "OAL."

case was transferred to the OAL.

In her Initial Decision, issued on November 18, 2022, the ALJ granted the Association's motion for summary decision, concluding:

[T]he petitioner [Association] is entitled to judgment as a matter of law on the issue involving the obligation of the District to provide a plan equivalent to the NJEHP to its members. I further CONCLUDE that after offering such a plan to its members, if there is a net cost increase, the parties SHALL negotiate this issue to mitigate the financial impact to the employer.

[Initial Decision at 5.]

On November 29 and 30, 2022, respectively, the Board and the Association filed written exceptions to the Initial Decision with PERC. The Association filed a reply to the Board's exceptions on December 6. The Board did not file a reply to the Association's exceptions. On December 8, the Association, without leave, filed a supplemental submission in further support of its reply brief, enclosing a copy of the Initial Decision of a different ALJ, issued on December 7, 2022, in the matter of Community Charter School of Paterson Education Association v. Community Charter School of Paterson Board of Trustees, OAL Dkt. EDU 03968-21. This decision addresses an identical dispute, cites ALJ Crowley's Initial Decision in this matter, and reaches the same result.^{6/}

^{6/} Generally, once all exceptions, cross-exceptions and replies have been submitted, "[n]o further briefs shall be filed"
(continued...)

In granting the Association's motion for summary decision, the ALJ reasoned as follows:

The undisputed facts are that petitioners [Association] have not been offered a plan equivalent to NJEHP. And although the "net costs" of such a plan have not, nor could they be determined without such an offering, the parties have commenced negotiations regarding this issue. Notwithstanding the speculative nature of [the] cost increase of such a plan, the Board has maintained that it does not have to offer the plan until after the negotiations are completed. However, the law provides that if there is an increase in costs that [the] parties shall negotiate. Moreover, negotiations have been commenced. . . . The language is clear and unambiguous --- an equivalent plan shall be offered; and if an increase in cost occurs, the parties shall negotiate it.

. . .

Respondent [Board] argues that the financial impact of offering this plan is substantial and the parties need to negotiate the issue prior to offering it. They submit documentation outlining the potential increase in cost. However, even assuming that I accept these projections as fact, it does not relieve the District of the obligation to provide such a plan. They must provide the plan and then proceed to negotiations over such increase in costs.

6/ (...continued)
without leave of the Commission. N.J.A.C. 19:14-7.3(g). However, we will accept the Association's supplemental submission here, as the Community Charter School decision was released a day after the Association filed its reply brief, and the Commission and its designees may otherwise take notice of "administratively noticeable facts". N.J.A.C. 19:14-6.6(a). We also note the Board filed no objection to the Association's supplemental submission.

[Initial Decision at 4 and 5 (emphases in original).]

In its exceptions brief, the Board argues that because the record before the ALJ indicated the Board had accepted an Association proposal to hold an open enrollment to determine how many employees would select the NJEHP plan and then hold those selections in abeyance while the parties negotiated costs and other financial aspects associated with it, there was no basis for the ALJ to grant the Association's motion for summary decision. The Board contends that its acceptance of this proposal rendered the Association's motion "entirely moot." The Board further argues that requiring it to implement the NJEHP plan prior to negotiations over its financial impact is "against public policy," as this could ultimately result in an impasse in subsequent salary negotiations, which could negatively impact the education of its students. Next, the Board argues that the applicable law requires that financial-impact negotiations shall commence "immediately" and must go "hand in hand" with implementation of the NJEHP plan, and that the Association failed to "immediately" engage in negotiations to mitigate an increase in net cost that, the Board projects, would result from NJEHP plan implementation.

The Board estimates it will experience cost increases associated with the NJEHP plan in a variety of potential scenarios, respectively contingent upon whether: "every" Board

employee was placed on the plan (\$1,131,967.68 more); "all" Board employees switched to it (\$3,292,715.52 more, annually)^{7/}; the 39 employees hired by the Board on or after July 1, 2020 were placed on it (an "increased overall cost" (IOC) of \$64,776.12); and finally, if 80%, 50% or 25% of eligible employees chose it (respective IOCs of \$918,529.37, \$598,371.90 and \$331,574.01).^{8/}

The Association agrees with the merits of the ALJ's Initial Decision, but takes exception to the fact that it did not order the Board to make employees whole for "financial loss suffered as a result of the Board's failure to offer the NJEHP" plan. The Association contends it sought summary judgment solely on the issue of the Board's "liability with respect to its failure to offer the NJEHP," and stated in its moving papers that the make-whole remedy "would be subsequently proven." The Association further argues that the power to award that remedy lies within the jurisdiction of the Commissioner of Education.

In reply to the Board's exceptions, the Association argues that, except with respect to the issue of remedy as raised in its exceptions brief, the ALJ's Initial Decision should be adopted as

^{7/} It is not clear from the Board's brief what the difference is between "every" board employee and "all" board employees.

^{8/} The Board's final point is that the ALJ's initial decision incorrectly identified the Civil Service Commission as "the other agency" with an interest in this matter. This was addressed in a Corrected Initial Decision, issued on November 29, 2022, which identified the Department of Education as the other agency.

the Final Decision. The Association further argues that the Board's acceptance of its open-enrollment proposal does not render the ALJ's summary decision moot, first because that proposal, the Association certifies, contained other terms which the Board rejected through its failure to respond, including the exchange of cost calculations and the logistics of dental contributions; and second because the proposal to hold an open enrollment was done as an accommodation to the Board in an attempt to resolve the pending litigation. As such, the Association argues, no negotiated agreement had been reached.

The Association further replies that public policy does not require negotiations prior to implementation, as the Board ignores that any costs experienced will not occur overnight (as premiums are paid throughout the plan year, and actual financial impact cannot be determined until the Board, which is self-insured, pays actual claims from members), allowing ample time for negotiations through which the Board may recoup any costs incurred, as appropriate. The Association also argues that the ALJ correctly recognized that Board's cost projections are speculative. The Board cannot experience any increase in net costs until the NJEHP plan is offered and implemented, the Association contends, rendering it impossible to negotiate changes in plan level offerings or contributions before these figures are established.

Analysis

We have reviewed the record, and we find no basis in the Board's exceptions to modify or reject the ALJ's determination that N.J.S.A. 18A:16-13.2, as further discussed infra, obligates the Board to first offer a plan equivalent to NJEHP to Association members, and then proceed to negotiations over any resulting increase in costs. (Initial Decision at 5.) We amend the Initial Decision only to specify that the Board also violated sections 5.4a(1) and (5) of our Act through its undisputed refusal, as found by the ALJ, to offer the NJEHP plan prior to the completion of financial-impact negotiations.

N.J.S.A. 18A:16-13.2(a) provides, in pertinent part (emphases added):

(1) Notwithstanding the provisions of any other law, rule, or regulation to the contrary, beginning January 1, 2021 and for each plan year thereafter, a board of education as an employer providing health care benefits coverage for its employees, and their dependents if any, in accordance with P.L.1979, c.391 (C.18A:16-12 et seq.) shall offer to its employees, and their dependents if any, the equivalent of the New Jersey Educators Health Plan [(NEHP)] in the School Employees' Health Benefits Program as that plan design is described in subsection f. of section 1 of P.L. 2020, c. 44 (C.52:14-17.46.13).

. . .

(2) The plans under this section shall be offered by the employer regardless of any collective negotiations agreement between the

employer and its employees in effect on the effective date [July 1, 2020] of this act, P.L.2020, c.44, that provides for enrollment in other plans offered by the employer.

With respect to employees hired prior to July 1, 2020, N.J.S.A.

18A:16-13.2(b) provides, in pertinent part (emphases added):

Prior to January 1, 2021, each employer shall provide an enrollment period during which all employees who commenced employment prior to the effective date [July 1, 2020] of this act shall be required to select affirmatively a plan provided by the employer. If an employee fails to select affirmatively a plan during this enrollment period, the employer shall enroll the employee, and the employee's dependents if any, in the equivalent New Jersey Educators Health Plan offered pursuant to subsection a. of this section for the year January 1, 2021 until December 31, 2021.

As for employees hired on or after July 1, 2020, N.J.S.A. 18A:16-

13.2(c)(1) provides (emphases added):

Beginning on January 1, 2021, an employee commencing employment on or after the effective date [July 1, 2020] of this act but before January 1, 2028 who does not waive coverage, shall be enrolled by the employer in the equivalent New Jersey Educators Health Plan, or the equivalent Garden State Health Plan if selected by the employee, as those plans are offered pursuant to subsection a. of this section. The employee shall remain enrolled in either the equivalent New Jersey Educators Health Plan or the equivalent Garden State Health Plan selected by the employee at the annual open enrollment for each plan year until December 31, 2027, . . .

Section 8 of Chapter 44, as amended by section 3 of Chapter 163, provides, in pertinent part (emphases added):

With regard to employers that have collective negotiation agreements in effect on the effective date of this act, P.L.2020, c.44, that include health care benefits coverage available to employees when the net cost, which is the cost after deducting employee contributions, to the employer is lower than the cost to the employer would be compared to the New Jersey Educators Health Plan, the employer and the majority representative shall engage in collective negotiations, that include all terms and conditions of employment, to substantially mitigate the financial impact of the difference as agreed to by the parties, which may include modifications to plan level offerings or contributions for the New Jersey Educators Health Plan or the equivalent plan, or to both plan level offerings and contributions. Notwithstanding any provision of law or regulation to the contrary, plan level offerings or contributions for the New Jersey Educators Health Plan or the equivalent plan, or both plan level offerings and contributions, may be modified pursuant to collective negotiations required by this section.

Any school district with an increase in net cost as defined above as a result of changes by P.L.2020, c.44 (C.52:14-17.46.13 et al.) shall commence negotiations immediately, unless mutually agreed upon by the employer and the majority representative to opt to substantially mitigate the financial impact to the employer as part of the next collective negotiations agreement which may include, but not be limited to, salary increases, step guides, or other terms and conditions of employment.

In her Initial Decision, the ALJ found the above statutory provisions to be "clear and unambiguous --- an [NJEHP] equivalent plan shall be offered; and if an increase in cost occurs, the parties shall negotiate it." (Initial Decision at 4.) We find

the ALJ's interpretation to be consistent with the plain language of these provisions. That is, the Legislature granted employers no discretion in requiring that an NJEHP-equivalent plan must be offered to employees beginning January 1, 2021. Here, the Board's undisputed (and ongoing) refusal to offer such a plan by (and since) that date is non-compliant with the statute.

We further adopt the ALJ's rejection of the Board's argument that "it does not have to offer the plan until after the [financial-impact] negotiations are completed." (Initial Decision at 4.) Like the ALJ, we find no support in the statutory language for the Board's position. We find the ALJ reasonably concluded the law requires that "after offering such a plan . . ., if there is a net cost increase, the parties SHALL negotiate this issue to mitigate the financial impact to the employer." (Id., at 5); see also, Community Charter School of Paterson, supra (same.)

This conclusion is consistent with the Chapter 44 language quoted supra, as amended by Chapter 163, defining how the change in "net cost" is to be determined, requiring negotiations "to substantially mitigate the financial impact of the difference as agreed to by the parties," and stating that when an increase in net cost occurs "as a result of" changes required by Chapter 44, the parties "shall commence negotiations immediately." Here, any net-cost increase occurring "as a result of" offering the

required NJEHP-equivalent plan must necessarily be speculative in nature until after the Board has actually offered and implemented that plan. The ALJ's determination is further supported by the above-quoted language of Chapter 44 granting parties the discretion to mutually agree to "substantially mitigate the financial impact to the employer as part of the next collective negotiations agreement." Id. (emphasis added.)

We further find the ALJ's decision is not rendered "moot" by the Board's purported acceptance of an Association proposal to hold an open enrollment to determine how many employees would select the NJEHP plan and then hold those selections in abeyance while the parties negotiated costs. The Association contends the Board rejected that proposal by failing to respond to its other terms including information exchange, and also asserts that it was made in an attempt to resolve the pending litigation. Regardless, the Board's purported acceptance of such a proposal does not cure either its refusal to offer the required plan, an ongoing statutory violation, or the unfair practice arising from such refusal, in violation of our Act.

We amend the ALJ's Initial Decision to specify that the Board's failure to meet its obligations under N.J.S.A. 18A:16-13.2 simultaneously violated sections 5.4a(1) and (5) of our Act. That is, through its undisputed refusal, as found by the ALJ, to offer the NJEHP-equivalent plan prior to the completion of

financial-impact negotiations, the Board interfered with, restrained or coerced employees in the exercise of the rights guaranteed to them by the Act, and/or refused to negotiate in good faith with the Association concerning terms and conditions of employment of its members. Health benefits are mandatorily negotiable unless preempted by statute or regulation. State of New Jersey, P.E.R.C. No. 2000-12, 25 NJPER 402, 403 (¶30174 1999); Bor. of Woodcliff Lake, P.E.R.C. No. 2004-24, 29 NJPER 489 (¶153 2003); West Orange Bd. of Ed. and West Orange Ed. Ass'n, P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992), aff'd, NJPER Supp.2d 291 (¶232 App. Div. 1993). Here, the Board's insistence on cost negotiations before those costs were actually known placed the Association on an unequal footing in such negotiations, and deprived members of information necessary to make informed decisions regarding health insurance coverage.

Finally, we reject as premature or speculative the Association's exceptions regarding the issue of remedy. Association members' financial losses, if any, suffered as a result of the Board's failure to offer the required NJEHP-equivalent plan, cannot be ascertained until the Board has actually offered and implemented that plan. The Association is not precluded from re-filing its charge with PERC or re-petitioning the Commissioner of Education for make-whole relief if and when such damages become evident.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering this final decision, the Commission shall forward the record, including the ALJ's recommended decision and this final decision, to the Commissioner of the Department of Education, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its grant of authority.^{9/}

ORDER

The Franklin Township Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, particularly by refusing to offer and implement the NJEHP-equivalent plan required by N.J.S.A. 18A:16-13.2 prior to the completion of financial-impact negotiations.

2. Refusing to negotiate in good faith with the Franklin Township Education Association concerning terms and conditions of employment of its members, particularly by refusing to offer and implement the NJEHP-equivalent plan required by

^{9/} On December 2, 2022, the OAL granted PERC's request for an initial extension of time, until February 16, 2023, to issue its final decision in this matter. On January 11, 2023, the OAL granted PERC's subsequent request for a further extension, until April 3, 2023, to allow for transfer of the case to the Commissioner of the Department of Education for review and issuance of its final decision on this case, pursuant to N.J.A.C. 1:1-17.899(c).

N.J.S.A. 18A:16-13.2 prior to the completion of financial-impact negotiations.

B. Take the following action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Immediately offer and implement the NJEHP-equivalent plan as required by N.J.S.A. 18A:16-13.2.

3. Negotiate in good faith with the Franklin Township Education Association over mandatorily negotiable subjects, including the financial impact, if any, resulting from the offering and implementation of the NJEHP-equivalent plan required by N.J.S.A. 18A:16-13.2.

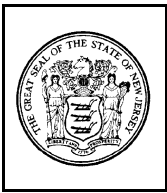
4. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this ORDER.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: January 26, 2023

Trenton, New Jersey



NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

We hereby notify our employees that:

WE SHALL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, particularly by refusing to offer and implement the NJEHP-equivalent plan required by N.J.S.A. 18A:16-13.2 prior to the completion of financial-impact negotiations.

WE SHALL cease and desist from refusing to negotiate in good faith with the Franklin Township Education Association concerning terms and conditions of employment of its members, particularly by refusing to offer and implement the NJEHP-equivalent plan required by N.J.S.A. 18A:16-13.2 prior to the completion of financial-impact negotiations.

WE SHALL immediately offer and implement the NJEHP-equivalent plan as required by N.J.S.A. 18A:16-13.

WE SHALL negotiate in good faith with the Franklin Township Education Association over mandatorily negotiable subjects, including the financial impact, if any, resulting from the offering and implementation of the NJEHP-equivalent plan required by N.J.S.A. 18A:16-13.2.

OAL DKT NOS. EDU 01442-
2021 AGENCY DKT. NOS.
1-1/21 and 3-1/21 and
OAL DKT NO.: PRC 08413-
21, PERC DKT. NO. CO-
2021-139 Consolidated

Board of Education of Franklin
Township, Somerset County

(Public Employer)

Docket Nos.

Date:

By:

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830