

CHAPTER 12

NEGOTIATIONS AND IMPASSE PROCEDURES;
MEDIATION, FACT-FINDING AND
GRIEVANCE ARBITRATION

Authority

N.J.S.A. 34:13A-6(b), 34:13A-5.4(c) and 34:13A-11.

Source and Effective Date

R.2001 d.214, effective June 4, 2001.
See: 33 N.J.R. 1169(a), 33 N.J.R. 2281(a).

Executive Order No. 66(1978) Expiration Date

Chapter 12, Negotiations and Impasse Procedures; Mediation, Fact-Finding and Grievance Arbitration, expires on June 4, 2006.

Chapter Historical Note

Chapter 12, originally Impasses, was filed and became effective prior to September 1, 1969.

Subchapter 3, Arbitration, was replaced by a new Subchapter 3, Arbitration, by R.1974 d.345, effective December 18, 1974. See: 6 N.J.R. 457(b), 7 N.J.R. 35(c).

Subchapter 1, Mediation, was repealed, and Subchapter 1, Purpose of Procedures, was adopted as emergency new rules, Subchapter 2, Fact-Finding, was repealed, and Subchapter 2, Commencement of Negotiations, was adopted as emergency new rules, Subchapter 3, Arbitration, was recodified as Subchapter 5, and Subchapter 3, Mediation, and Subchapter 4, Fact-Finding, were adopted as emergency new rules, by R.1975 d.10, effective January 20, 1975. See: 7 N.J.R. 78(a).

Pursuant to Executive Order No. 66(1978), Chapter 12, Negotiations and Impasse Procedures, was readopted as R.1986 d.354, effective August 7, 1986. See: 18 N.J.R. 1357(a), 18 N.J.R. 1838(c).

Pursuant to Executive Order No. 66(1978), Chapter 12, Negotiations and Impasse Procedure; Mediation, Fact-Finding and Arbitration, was readopted as R.1991 d.424, effective July 17, 1991. See: 23 N.J.R. 1296(b), 23 N.J.R. 2524(a).

Pursuant to Executive Order No. 66(1978), Chapter 12, Negotiations and Impasse Procedures; Mediation, Fact-Finding and Grievance Arbitration, was readopted as R.1996 d.364, effective July 12, 1996. See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

Pursuant to Executive Order No. 66(1978), Chapter 12, Negotiations and Impasse Procedures; Mediation, Fact-Finding and Grievance Arbitration, was readopted as R.2001 d.214, effective June 4, 2001. See: Source and Effective Date. See, also, section annotations.

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SUBCHAPTER 1. PURPOSE OF PROCEDURES

19:12-1.1 Purpose of procedures

N.J.S.A. 34:13A-5.4(e) provides that the Commission shall adopt such rules as may be required to regulate the time of commencement of negotiations and of institution of impasse procedures so that there will be full opportunity for negotiations and the resolution of impasse prior to required budget submission dates. Further, N.J.S.A. 34:13A-6(b) provides that whenever negotiations between the public employer and exclusive representative concerning the terms and conditions of employment shall reach an impasse, the Commission is empowered upon the request of either party to provide mediation to effect a voluntary resolution of the impasse, and in the event of a failure to resolve the impasse by mediation, to recommend or invoke fact-finding with recommendation for settlement. Accordingly, the provisions of this chapter establish a mandatory time period for the commencement of negotiations, utilizing the public employer's required budget submission date as a definitive reference point to afford the parties a full opportunity for negotiations and resolution of impasses which are reached prior to the required budget submission date and for utilization of impasse procedures for parties who reach impasse during alternative time periods. N.J.A.C. 19:12-2.1 through 19:12-4.3 do not apply to negotiations between a public fire or police department as defined by N.J.S.A. 34:13A-15 and an exclusive representative. See N.J.A.C. 19:16.

Amended by R.1996 d.364, effective August 5, 1996.
See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

Case Notes

Alternative time period cannot continue beyond required budget submission date. *New Jersey State Policemen's Benevolent Assn. v. East Orange*, 164 N.J.Super. 436, 396 A.2d 1158 (Ch.Div.1978).

SUBCHAPTER 2. COMMENCEMENT OF NEGOTIATIONS

19:12-2.1 Commencement of negotiations

(a) The parties to a collective negotiations agreement shall commence negotiations for a successor agreement, or in the case of an agreed reopener provision shall commence negotiations pursuant to such reopener provision, no later than 120 days prior to the public employer's required budget submission date. The term "required budget submission date" shall refer to the first budget implementing the successor agreement or the agreement pursuant to the reopener provision, as the case may be. In circumstances where the Commission has not determined the public employer's required budget submission date, the public employer shall notify the employee representative in writing of the required budget submission date no later than 150 days prior to such date. The foregoing provisions shall not preclude the parties from agreeing to the automatic renewal of the collective negotiations agreement unless either party shall have notified the other party of its intention to terminate or modify the agreement, nor shall it preclude the parties from establishing by mutual agreement an alternative date for the commencement of negotiations.

(b) The party initiating negotiations shall, no later than 15 days prior to the commencement date of negotiations required by this section or any alternate commencement date agreed to by the parties, notify the other party in writing of its intention to commence negotiations on such date.

(c) Nothing in this section shall be construed to abrogate or alter obligations of parties to newly established collective negotiations relationships, whether created by recognition or by certification.

Amended by R.1996 d.364, effective August 5, 1996.
See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).
Amended by R.2001 d.214, effective July 2, 2001.
See: 33 N.J.R. 1169(a), 33 N.J.R. 2281(a).
Rewrote (b).

Case Notes

Alternative time period cannot continue beyond required budget submission date. *New Jersey State Policemen's Benevolent Assn. v. East Orange*, 164 N.J.Super. 436, 396 A.2d 1158 (Ch.Div.1978).

SUBCHAPTER 3. MEDIATION

19:12-3.1 Initiation of mediation

(a) In the event that a public employer and a certified or recognized employee representative have failed to achieve an agreement through direct negotiation, either the public employer, the employee representative, or the parties jointly, may notify the Director of Conciliation, in writing, of the existence of an impasse and request the appointment of a mediator. An original and four copies of such notification and request shall be filed and shall be signed and dated and shall contain the following information.

1. The name and address of the public employer who is a party to the collective negotiations; the name, address, telephone number, and title of its representative to be contacted; and the name, address and telephone number of any attorney/consultant representing the public employer;

2. The name and address of the employee representative who is a party to the collective negotiations; the name, address, telephone number, and title of its representative to be contacted; and the name, address and telephone number of any attorney/consultant representing the employee representative;

3. A description of the collective negotiations unit, including the approximate number of employees in the unit;

4. The dates and duration of negotiations sessions;

5. The termination date of the current agreement, if any;

6. The public employer's required budget submission date;

7. Whether the request is a joint request; and

8. A detailed statement of the facts giving rise to the request, including all issues in dispute.

(b) A blank form for filing a request for the appointment of a mediator will be supplied upon request. Address requests to: Public Employment Relations Commission, PO Box 429, Trenton, New Jersey 08625-0429.

(c) Upon receipt of the notification and request, the Director of Conciliation shall appoint a mediator if he or she determines after investigation that mediation is not being resorted to prematurely, that the parties have been unable to reach agreement through direct negotiation, and that an impasse exists in negotiations concerning the terms and conditions of the employment of the affected employees.

Amended by R.1996 d.364, effective August 5, 1996.
See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

19:12-3.2 Appointment of mediator

The mediator appointed pursuant to this subchapter may be a member of the Commission, an officer or employee of the Commission, a member of the Commission's mediation panel, or any other mediator, all of whom shall be considered officers of the Commission for the purpose of assisting the parties to effect a voluntary settlement. The parties may jointly request the appointment of a particular mediator, but the Director of Conciliation shall have the express reserved authority to appoint a mediator without regard to the parties' joint request if such is deemed to best effectuate the purposes of the act. If an appointed mediator cannot proceed pursuant to the appointment, another mediator shall be appointed. The appointment of a mediator pursuant to this subchapter shall not be reviewable.

Amended by R.1996 d.364, effective August 5, 1996.
See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

19:12-3.3 Mediator's function

The function of a mediator shall be to assist all parties to come to a voluntary agreement. A mediator may hold separate or joint conferences as he or she deems expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between the parties. In the absence of an agreement between the parties, the mediator, at any time after appointment, may recommend to the Director of Conciliation that fact-finding procedures should be invoked.

Amended by R.1996 d.364, effective August 5, 1996.
See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

Case Notes

Mediator function used as example. *Smith v. Shapiro*, 197 N.J.Super. 320, 484 A.2d 1282 (App.Div.1984), certification denied 101 N.J. 235, 501 A.2d 912 (1985).

19:12-3.4 Mediator's confidentiality

Information disclosed by a party to a mediator in the performance of mediation functions shall not be divulged voluntarily or by compulsion. All files, records, reports, documents or other papers received or prepared by a mediator while serving in such capacity shall be classified as confidential. The mediator shall not produce any confidential records of, or testify in regard to, any mediation conducted by him or her, on behalf of any party in any type of proceeding, under the New Jersey Employer-Employee Relations Act, as amended, including, but not limited to, unfair practice proceedings under N.J.A.C. 19:14.

Amended by R.1991 d.424, effective August 19, 1991.
See: 23 N.J.R. 1296(a), 23 N.J.R. 2524(a).

Reference to the New Jersey Employer-Employee Relations Act added.

Amended by R.1996 d.364, effective August 5, 1996.
See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

Case Notes

Union counter proposals and attorney's negotiating notes subject to disclosure; subpoena power. *Newark Bd. of Ed. v. Newark Teachers Union*, 152 N.J.Super. 51, 377 A.2d 765 (App.Div.1977).

19:12-3.5 Mediator's report

(a) The mediator shall submit one or more confidential reports to the Director of Conciliation which shall, in general, be limited to the following:

1. A statement of the dates and duration of the meetings which have been held and their participants;
2. A brief description of the unresolved issues which existed at the beginning of the mediation effort;
3. A statement of the issues which have been resolved through mediation;

4. A statement of the issues which are still unresolved, if any;

5. A recommendation as to whether or not the Director of Conciliation should invoke fact-finding with recommendations for settlement.

(b) The confidential report(s) submitted by the mediator may be utilized by the Director of Conciliation in considering whether or not fact-finding with recommendations for settlement should be invoked. Such reports shall not be considered in any other proceedings before the Commission or be made available or disclosed to any party or any other tribunal.

Amended by R.1996 d.364, effective August 5, 1996.
See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

SUBCHAPTER 4. FACT-FINDING

19:12-4.1 Initiation of fact-finding

(a) Upon a mediator's report of a failure to resolve the impasse by mediation, the Director of Conciliation may invoke fact-finding with recommendations for settlement and appoint a fact-finder. The public employer, the employee representative, or the parties jointly, may request the Director of Conciliation, in writing, to invoke fact-finding. An original and four copies of such request shall be filed, and shall be signed and dated and shall contain the following information.

1. The name and address of the public employer who is a party to the collective negotiations; the name, address, telephone number, and title of its representative to be contacted; and the name, address and telephone number of any attorney/consultant representing the public employer;
2. The name and address of the exclusive representative who is a party to the collective negotiations; the name, address, telephone number, and title of its representative to be contacted; and the name, address and telephone number of any attorney/consultant representing the employee representative;
3. The name of the mediator;
4. The number and duration of mediation sessions;
5. The date of the last mediation effort;
6. The unresolved issues to be submitted to a fact-finder; and
7. Whether the request is a joint request.

(b) Forms for filing a petition to request a fact-finding will be supplied upon request. Address requests to: Public

Employment Relations Commission, PO Box 429, Trenton, New Jersey 08625-0429.

(c) In the absence of a joint request seeking the invocation of fact-finding, the non-filing party may submit a statement or response within seven days of receipt of the request for fact-finding, setting forth the following:

1. Any additional unresolved issues to be submitted to the fact-finder;
2. A statement as to whether it refuses to submit any of the issues listed on the request to invoke fact-finding on the ground that they are not within the required scope of negotiations; and
3. Any other relevant information with respect to the nature of the impasse.

(d) Proof of service on the petitioner of the respondent's statement shall be supplied to the Director of Conciliation. If a party has not submitted a response within the time specified, it shall be deemed to have agreed to the invocation of fact-finding as submitted by the requesting party.

Amended by R.1996 d.364, effective August 5, 1996.
See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

19:12-4.2 Appointment of fact-finder

(a) Upon the invocation of fact-finding pursuant to this subsection, the Director of Conciliation shall communicate simultaneously to each party an identical list of names of three fact-finders. Each party shall eliminate no more than one name to which it objects, indicate its preference regarding the remaining names, and communicate the foregoing to the Director of Conciliation no later than the close of business on the third working day after the date the list was submitted to the parties. If a party has not responded within the time specified, all names submitted shall be deemed acceptable. The Director of Conciliation shall appoint a fact-finder giving recognition to the parties' preferences. The parties may jointly request the appointment of a particular fact-finder, including the person who was appointed as mediator, if any. Notwithstanding the foregoing provisions, the Director of Conciliation shall have the express reserved authority to appoint a fact-finder without the submission of names to the parties, whenever he or she deems it necessary to effectuate the purposes of the act.

(b) The fact-finder appointed pursuant to this subchapter may be a member of the Commission, an officer or employee of the Commission, a member of the Commission's fact-finding panel, or any other fact-finder, all of whom shall be considered officers of the Commission for the purposes of assisting the parties to effect a voluntary settlement and/or making findings of fact and recommending the terms of settlement. If an appointed fact-finder cannot proceed pursuant to the appointment, another fact-finder shall be appointed. The appointment of a fact-finder pursuant to this subchapter shall not be reviewable.

Amended by R.1986 d.354, effective September 8, 1986.
See 18 N.J.R. 1357(a), 18 N.J.R. 1838(c).
Amended by R.1996 d.364, effective August 5, 1996.
See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

19:12-4.3 Fact-finder's function

(a) The appointed fact-finder shall, as soon as possible after appointment, meet with the parties or other representatives, make inquiries and investigations, hold hearings, which shall not be public unless all parties agree to have them public, or take other steps deemed appropriate in order to discharge his or her function.

(b) For the purposes of such hearings, investigations and inquiries, the fact-finder shall have the authority and power to subpoena witnesses, compel their attendance, administer oaths, take the testimony or deposition of any person under oath, issue subpoenas duces tecum and require the production and examination of any governmental or other books or papers relating to any matter under investigation by or in issue before the fact-finder.

(c) Information disclosed by a party to a fact-finder while functioning in a mediatory capacity shall not be divulged by the fact-finder voluntarily or by compulsion. All files, records, reports, documents or other papers received or prepared by a fact-finder while serving in a mediatory capacity shall be classified as confidential. The fact-finder shall not produce any confidential records of, or testify in regard to, any mediation conducted by him or her, on behalf of any party in any type of proceeding under the New Jersey Employer-Employee Relations Act, as amended, including, but not limited to, unfair practice proceedings under N.J.A.C. 19:14.

(d) If the impasse is not resolved, the fact-finder shall make findings of fact and recommend the terms of settlement as soon after the conclusion of the hearing as possible.

(e) Any findings of fact and recommended terms of settlement shall be submitted simultaneously in writing to the parties and the Director of Conciliation.

(f) All individually incurred costs shall be borne by the party incurring them. The cost of the services of the fact-finder, including per diem expenses, if any, and actual and necessary travel and subsistence expenses, and any other necessary expenses of the fact-finding proceeding, shall be borne by the Commission unless mandated otherwise by subsequent legislation.

(g) The parties shall meet within five days after receipt of the fact-finder's findings of fact and recommended terms of settlement, to exchange statements of position and try to reach an agreement. In the event of a continuing impasse, the Commission or the Director of Conciliation may take whatever steps are deemed expedient to effect a voluntary settlement of the impasse.

Amended by R.1991 d.424, effective August 19, 1991.

See: 23 N.J.R. 1296(a), 23 N.J.R. 2524(a).
 Confidentiality requirements added at (c).
 Amended by R.1996 d.364, effective August 5, 1996.
 See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

"Director of Arbitration" substituted for "director of conciliation".
 Amended by R.1996 d.364 effective August 5, 1996.
 See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

SUBCHAPTER 5. GRIEVANCE ARBITRATION

19:12-5.1 Function of the Commission

The Commission deems it in the interests of the public to maintain an arbitration panel whose members are available to assist in the arbitration of unresolved grievances. The availability of this service is intended to comply with the requirement of N.J.S.A. 2A:24-5 that the method for naming or appointing an arbitrator provided in the parties' agreement shall be followed. Accordingly, the release of a panel of arbitrators is predicated solely upon a prima facie showing of the parties' intention to utilize the Commission's arbitration service. Parties are referred to the judicial proceedings available under N.J.S.A. 2A:24-3 and N.J.S.A. 2A:24-5 in the event of a dispute regarding arbitrability or the method for naming or appointing an arbitrator. The Commission is not a necessary party to judicial proceedings relating to the arbitration under N.J.S.A. 2A:24-3 or N.J.S.A. 2A:24-5, but shall, upon the written request of a party, furnish to such party at the party's expense, photostatic copies of any papers in the Commission's possession that may be required in any such judicial proceedings.

Amended by R.1996 d.364, effective August 5, 1996.
 See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

Case Notes

Public-sector grievance arbitration conducted under supervision of Public Employment Relations Commission (PERC) is governed by Arbitration Act. *Policeman's Benev. Ass'n, Local 292 v. Borough of North Haledon*, 305 N.J.Super. 454, 703 A.2d 1 (A.D. 1997).

19:12-5.2 Request for submission of panel

Arbitration under these rules is initiated by written request to the Director of Arbitration. One original and four copies of such request, signed and dated by the requesting party or parties, shall be filed requesting the submission of a panel of arbitrators. The request shall set forth the names and addresses of the parties; the names, titles and telephone numbers of the parties' representatives to contact; the names, addresses and telephone numbers of any attorneys/consultants representing the parties; whether the request is a joint request and a statement identifying the grievance to be arbitrated. The request shall be accompanied by a copy of the arbitration provisions of the parties' agreement. Forms for filing a request for submission of a panel of arbitrators will be supplied upon request. Address requests to: Public Employment Relations Commission, PO Box 429, Trenton, New Jersey 08625-0429.

Amended by R.1986 d.354, effective September 8, 1986.
 See: 18 N.J.R. 1357(a), 18 N.J.R. 1838(c).

19:12-5.3 Appointment of an arbitrator

Upon receipt of a written request pursuant to N.J.A.C. 19:12-5.2 (Request for submission of panel), the Director of Arbitration shall submit simultaneously to each party a copy of such request and an identical list of names of at least five persons chosen from the Arbitration Panel. Each party shall have ten days from the mailing date in which to cross off any names to which it objects, number the remaining names in order of preference, and return the list to the Director of Arbitration. If a party does not return the list within the time specified, all arbitrators named shall be deemed acceptable. The Director of Arbitration shall appoint an arbitrator giving recognition to the parties' preferences. If the parties' preferences do not result in agreement upon any of the persons named, the Director of Arbitration shall submit a second list and the procedures set forth above shall be repeated, except that each party shall number at least three names in order of preference. If the arbitrator appointed pursuant to this section declines or is unable to serve, the Director of Arbitration shall have the power to appoint an arbitrator not previously rejected by any party, without submission of any additional list. If the parties have agreed upon a method of appointment different from that set forth above, such method shall be followed. Action of the Director of Arbitration hereunder shall not be reviewable.

Amended by R.1986 d.354, effective September 8, 1986.
 See: 18 N.J.R. 1357(a), 18 N.J.R. 1838(c).

"Director of Arbitration" substituted for "director of conciliation".
 Amended by R.1996 d.364, effective August 5, 1996.
 See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

19:12-5.4 Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

The arbitrator shall be guided by the objectives and principles set forth in the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" of the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service.

Amended by R.1996 d.364 effective August 5, 1996.
 See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

19:12-5.5 Time and place of hearing

The arbitrator shall communicate with the parties to arrange for a mutually satisfactory date, time and place for a hearing. In the absence of an agreement, the arbitrator shall have the authority to set the date, time and place for a hearing. The arbitrator shall submit a notice containing arrangements for a hearing within a reasonable time period before hearing.

Amended by R.1996 d.364, effective August 5, 1996.
 See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

19:12-5.6 Adjournments

The arbitrator shall have the authority to grant adjournments for good cause shown, upon either party's application or the arbitrator's own motion.

Amended by R.1996 d.364, effective August 5, 1996.
See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

19:12-5.7 Arbitration in the absence of a party

After duly scheduling the hearing, the arbitrator shall have the authority to proceed in the absence of any party who, having failed to obtain an adjournment, does not appear at the hearing.

Amended by R.1996 d.364, effective August 5, 1996.
See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

19:12-5.8 Filing of briefs

The parties at their option or at the request of the arbitrator, may file pre-hearing or post-hearing briefs. The arbitrator, after consultation with the parties, shall have the authority to set a time period for the submission of briefs. They shall be submitted to the arbitrator along with submission of proof of service on all parties. In the event that post-hearing briefs are to be submitted, the hearing shall be deemed closed upon receipt of post-hearing briefs by the arbitrator or upon the expiration of the time period allowed for the submission of the post-hearing briefs.

Amended by R.2001 d.214, effective July 2, 2001.
See: 33 N.J.R. 1169(a), 33 N.J.R. 2281(a).

In the last sentence, inserted "are to be submitted, the hearing shall be deemed closed upon receipt of post-hearing briefs" preceding "by the arbitrator".

19:12-5.9 Award

The arbitrator shall issue an award as soon as possible after the close of hearing, but not more than 45 days thereafter or such other time for date of award that the arbitrator shall fix upon written notice to the parties. The award shall be in writing and shall be submitted to the parties simultaneously. If the parties agree, the arbitrator may submit the award without a written opinion.

Amended by R.1986 d.354, effective September 8, 1986.
See: 18 N.J.R. 1357(a), 18 N.J.R. 1838(c).

Deleted text "served simultaneously on Employment relations commission" and substituted "submitted directly to . . . the parties simultaneously".

Amended by R.1996 d.364, effective August 5, 1996.

See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).

Amended by R.2001 d.214, effective July 2, 2001.

See: 33 N.J.R. 1169(a), 33 N.J.R. 2281(a).

Deleted "the Public Employment Relations Commission and" preceding "the parties simultaneously".

19:12-5.10 Subpoena power

The arbitrator shall have subpoena power in accordance with N.J.S.A. 2A:24-1 et seq.

Amended by R.1996 d.364, effective August 5, 1996.
See: 28 N.J.R. 2797(a), 28 N.J.R. 3818(a).

19:12-5.11 Cost of arbitration

The cost of such arbitration shall be borne by the parties in accordance with their agreement, and not by the Commission. The arbitrator shall charge pursuant to a per diem fee schedule set forth on a resume sent to the parties when a panel of arbitrators is submitted. The arbitrator shall not charge any fee noted on the resume without giving 30 days' written notice to the Commission.

Amended by R.1996 d.364, effective August 5, 1996.
See: 28 N.J.R. 2797(a), 28 N.J.R. 3813(a).