

CHAPTER 12

NEGOTIATIONS AND IMPASSE PROCEDURE;
MEDIATION, FACT-FINDING AND
ARBITRATION

Authority

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

Source and Effective Date

R.1991 d.424, effective July 17, 1991.
See: 23 N.J.R. 1296(b), 23 N.J.R. 2524(a).

Executive Order No. 66(1978) Expiration Date

Chapter 12, Negotiations and Impasse Procedure; Mediation, Fact-Finding and Arbitration, expires on July 17, 1996.

Historical Note

Chapter 12, Negotiations and Impasse Procedure; Mediation, Fact-Finding and Arbitration, was filed and became effective prior to September 1, 1969. Subchapter 3 became effective December 18, 1974 as R.1974 d.345. See: 6 N.J.R. 457(b), 7 N.J.R. 35(c). Chapter 12 (except Subchapter 3) was repealed and replaced with new rules by Emergency Rule R.1975 d.10, effective January 20, 1975. See: 7 N.J.R. 78(a). Chapter 12 was amended by R.1977 d.272, effective August 2, 1977. See: 9 N.J.R. 298(a), 9 N.J.R. 448(a). Organizational amendments were made to Chapter 12 by R.1981 d.357. See: 13 N.J.R. 625(a). Pursuant to Executive Order No. 66(1978), Chapter 12 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 was readopted as R.1991 d.424. See: Source and Effective Date.

See section annotations for additional rulemaking.

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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.

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 and shall simultaneously file with the Commission a copy of such notification.¹

(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.

¹The filing party may utilize its own notification form or obtain "Intention to Commence Negotiations" forms supplied upon request. Address requests to: Public Employment Relations Commission, 429 East State Street, Trenton, New Jersey 08625-0429.

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 appoint 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

1. The name, address and telephone number of the public employer who is a party to the collective negotiations, and the name and title of its representative to be contacted, if known;

2. The name, address and telephone number of the employee representative and the name and title of its representative to be contacted, if known;

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

4. The dates and duration of negotiation 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, and a statement that the parties have failed to achieve an agreement.

(b) Upon receipt of the aforementioned notification and request, the Director of Conciliation shall appoint a mediator if it is determined 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 does in fact exist in negotiations concerning the terms and conditions of the employment of the affected employees.

¹A blank form for filing such request will be supplied upon request. Address requests to: Public Employment Relations Commission, 429 East State Street, Trenton, New Jersey 08625-0429.

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 is unable to serve or if for any reason cannot proceed pursuant to the appointment, another mediator shall be appointed. The appointment of a mediator pursuant to this subchapter shall not be reviewable.

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 difference 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 the invocation of fact-finding would be useful in resolving the impasse, and that fact-finding procedures should be invoked.

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 to any cause pending 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.

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 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.

SUBCHAPTER 4. FACT-FINDING

19:12-4.1 Initiation of fact-finding

(a) After the appointment of a mediator and upon his or her report of a failure to resolve the impasse by mediation, the Director of the 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

1. The name, address and telephone number of the public employer who is a party to the collective negotiations, the name and title of its representative to be contacted, if known;
2. The name, address and telephone number of the employee representative, the name and title of its representative to be contacted, if known;
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. A statement that the parties have failed to achieve an agreement.

¹ A blank form for filing such a petition will be supplied upon request. Address requests to: Public Employment Relations Commission, 429 East State Street, Trenton, New Jersey 08625-0429.

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 so 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' preference. 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 the same is deemed to best 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 purpose 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 is unable to serve or if for any reason cannot proceed pursuant to the appointment, another 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).

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 such other steps as are deemed appropriate in order to discharge his or her function.

(b) For the purpose of such hearings, investigations and inquiries, the fact-finder shall have the authority and the power to subpoena witnesses, compel their attendance, administer oaths, take the testimony or deposition of any person under oath, and in connection therewith, to issue subpoenas duces tecum and to 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 to any cause pending 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 prior thereto, 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 in writing to the Director of Conciliation.

(f) All individually incurred costs shall be borne by the party incurring them. The cost for 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, in order that statements of position may be exchanged and an opportunity provided for the parties to reach an agreement. In the event of a continuing impasse thereafter, 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).

SUBCHAPTER 5. 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 regarding the method for naming or appointing an arbitrator. The Commission is not a necessary party to judicial proceedings relating to the arbitration under either N.J.S.A. 2A:24-3, N.J.S.A. 2A:24-5, or otherwise, 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.

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' representative to contact, 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.

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".

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 seven days from the mailing date in which to cross off any names to which it objects, number the remaining names indicating 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 persons named thereon shall be deemed acceptable. The Director of Arbitration shall appoint an arbitrator giving recognition to the parties' preference. If the parties' preference does not result in agreement upon any of the persons names, the Director of Arbitration shall submit a second such list and the procedures set forth above shall be repeated, except that each party shall number at least three names contained thereon indicating its 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 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".

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 Disputes" of the National Academy of Arbitrators, American Arbitration Association, and the Federal Mediation and Conciliation Service.

19:12-5.5 Time and place of hearing

The arbitrator after appointment shall communicate with the parties to arrange for a mutually satisfactory date, time and place for a hearing. In the absence of such 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 prior to the date of hearing.

19:12-5.6 Adjournments

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

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

The arbitrator after duly scheduling the hearing 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.

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 by the arbitrator or upon the expiration of the time period allowed for the submission of the post-hearing briefs.

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 the date of award that the arbitrator shall fix upon written notice to the parties. The award of the arbitrator shall be in writing and submitted directly to the Public Employment Relations Commission which will then serve the parties simultaneously. The arbitrator may, upon the mutual agreement of the parties, 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".

19:12-5.10 Subpoena power

The arbitrator shall have the power of subpoena in accordance with appropriate statutory authority as set forth in N.J.S.A. 2A:24-1 et seq.

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 biographical resume sent to the parties when a panel of arbitrators is submitted. The arbitrator shall not change any fee noted on the biographical resume without giving 30 days' advance written notice to the Commission.