Gary LoCassio
Assistant Director
Division on Civil Rights
PO Box 089
Trenton, NJ 08625

August 15, 2005

**Re: Proposed Amendments NJAC 13:13**
**Subchapter 2, Employment**
**Proposal No. 2005-251**

Dear Mr. LoCassio:

The Employers Association of New Jersey (EANJ) respectfully submits its objection to the Director's proposed amendment to NJAC 13:13-2.8 because it exceeds the Legislature's grant of authority.

By way of background, it is well settled that New Jersey courts give considerable leeway to administrative agencies in the interpretation and enforcement of legislation under their jurisdiction, and will readily imply to such agencies all powers that are necessary to carry out the policies and purposes contained in the statute. However, if administrative regulations exceed the authority delegated to the agency, they are *ultra vires*. See generally *New Jersey Guild of Hearing Aid Dispensers*, 75 *N.J.* 544, 561-562 (1978); *Medical Soc'y v. Dep't of Law & Pub. Safety*, 120 N.J. 18, 25-26 (1990). Indeed, administrative agencies do not have inherent power and, consequently, may not seek to accomplish ends or employ means that are not provided in the statute, *Perreira v. Rediger*, 169 *N.J.* 399, 416 (2001), and if reasonable doubt exists as to whether a particular power is vested in an administrative body, such power is denied. *In re Jamesburg High School Closing*, 83 *N.J.* 540, 549 (1980).

In this case, the Director seeks to amend a regulation to expressly overrule *Conoshenti v. Public Service Electric & Gas Co.*, 364 *F.3d* 135 (3rd Cir. 2004). In *Conoshenti* the Third Circuit Court of Appeals applied the plain meaning of NJAC 13:13-2.8(a) and observed that the Law Against Discrimination (LAD) requires that an employee with a disability "be able to perform the essential functions of his job during the application of the reasonable accommodation-that is, at the same time that the reasonable accommodation is being implemented." 364 *F.3d* at 551. Accordingly, the Court held that a leave of absence could not be considered a possible reasonable accommodation under the LAD, since the affected employee could not currently be on leave and perform his or her job.



EANJ
30 West Mount Pleasant Avenue - Suite 201 • Livingston, New Jersey 07039
(973) 758-6800 • (609) 393-7100 • Fax: (973) 758-6900 • Website: www.eanj.org

The Director first promulgated Chapter 13, Regulations Pertaining to Discrimination on the Basis of Handicap in 1985. Chapter 13 was readopted in 1990, 1995 and 2000. At the time of its initial adoption, and at all times thereafter, NJAC 13:13-2.8(a) provided that "It shall be lawful to take any action otherwise prohibited under this section where it can be reasonably be determined that an applicant or employee, as a result of the individual's disability, cannot **presently** perform the job even with reasonable accommodation." (Emphasis added). At the time of its initial adoption, and at all times thereafter, NJAC 13:13-2.5(b)1ii omitted any reference to a leave of absence as a possible reasonable accommodation, although this subsection did make specific reference to job restructuring, part-time or modified work schedules. The reason for this omission is clear. Requiring a leave of absence under the LAD would exceed the Director's authority under express provisions of the law.

The LAD was amended in 1972 to prohibit discrimination based on a person's handicap. In signing the bill in August 1972, Governor Cahill stated that law "will restore the physically handicapped citizens of this state to their rightful dignity as valuable and contributing members of the labor force and will allow them to benefit from the same employment opportunities as their more fortunate neighbors." See Legislative History (1972). The LAD was amended in 1978 to include mentally and developmentally disabled persons within its protection, but also clarified that the law applied to people with present as well as past handicaps. The 1978 amendment provides, in relevant part, that job discrimination is prohibited "against any person because such person is...handicapped...,unless the nature and extend of the handicap reasonably precludes the performance of a particular employment." NJSA 10:5-4.1.

NJSA 10:5-4.1 enacted in 1978 is entirely consistent with NJSA 10:5-29.1, enacted in 1972, which permits an employer to deny a job opportunity to a person with a handicap when it "can be clearly shown that a person's handicap...would prevent such a person from performing a particular job." In other words, by focusing on a person's present condition and whether he or she can perform a particular job, the Legislature clearly excluded the possibility of requiring an employer to grant an employee a leave of absence.

It is clear that the Director did not commit an oversight when it omitted any reference to a leave of absence as a possible reasonable accommodation. Instead, the Director reasonably interpreted the LAD and rightly concluded that such a regulation would contravene the policy established by the Legislature. This interpretation is wholly consistent

with designating job restructuring and modified work schedules as possible reasonable accommodations because these accommodations could permit an employee with a disability to perform his or her "particular job." On the other hand, a leave of absence does not permit a person to perform the job. Rather, it enables the employee **not** to perform the job, a result that would undermine the purpose and intent of LAD. Accordingly, EANJ respectfully submits that the purpose of the pending amendments is not to "alleviate the confusion" of the *Conoshenti* decision or to "clarify" existing regulations. Instead, as well meaning as it may be, the Director is seeking an end-run around the Legislature and is engaging in an *ultra vires* act.

This conclusion is supported also by the enactment of the Family Leave Law in 1989, which grants eligible employees the opportunity to care for an ill or disabled family member or a newborn. Significantly, the Legislature expressly declined to extend the disability leave requirement to employees who were themselves disabled. NJSA 34:11B-14. See also *Gerety v. Atlantic City Hilton Casino* (NJ Supreme Court decided July 25, 2005 *Approved for Publication*)(Employee with a disability entitled to equal but not preferential treatment under an employer's disability leave policy.); NJSA 10:5-2.1 (Nothing in the LAD prevents an employer from "discrimination among individuals on the basis of competence, performance, conduct or other reasonable standards.").

The case law cited by the Director in support of the pending proposal does not authorize an *ultra vires* act. While the appellate division has discussed in *dicta* the possibility of a leave of absence as a reasonable accommodation, no New Jersey court has decided the precise application of the law to this specific circumstance. Only the Third Circuit Court of Appeals has decided the precise issue directly. To the extent that the Division on Civil Rights has addressed the issue under its adjudicative function, as noted above, the Director must construe all reasonable interpretations in favor of the clear legislative policy of excluding the possibility of a leave of absence as a reasonable accommodation.

Finally, EANJ does not oppose disability leaves. In fact, the vast majority of EANJ members, like most employers within the state, provide disability leaves for a reasonable duration, in addition to other forms of time off from work. EANJ has advised the New Jersey Supreme Court as *amicus curaie* that employers are reluctant to terminate employees on disability leave and that a social compact exists within the state which generally permits employees time off from work to recover from disabling injury or illness. EANJ often advises its members to accommodate employees with disabilities when feasible. Rather, EANJ respectfully objects to the

Director usurping the Legislature by substantially amending the LAD to circumvent a clear legislative policy to the contrary.

For the aforementioned reasons, EANJ respectfully opposed the proposed amendments to NJAC 13:13-2.5(b)1ii and 13-2.8 in their entirety.

Respectfully submitted,

John J. Sarno
President