SETON HALL LEGISLATIVE JOURNAL

VOL. 2 FALL 1976 NO. 1

THE SCOPE OF COLLECTIVE NEGOTIATIONS IN THE PUBLIC EMPLOYMENT SECTOR UNDER L. 1974, c. 123

*by John T. Barbour**

The laws concerning public sector labor relations in New Jersey have been clouded by uncertainty since their inception in 1968.[1] Part of the difficulty posed by these provisions whenever construction or application is attempted by the courts is attributable to the fact that the Legislature adopted the public sector laws as amendments to a pre-existing labor statute, L. 1941, c. 100.[2] In so doing, the Legislature made most sections of the act applicable to either the public or private sectors of labor relations in the State.[3]

While the further amendment of the public sector laws was, no doubt, meant to elucidate those sections of the statute which needed more interpretation, the intent of such action appears to have been circumvented by the confusing effect which L. 1974, c. 123 has had

* B.S., Rutgers University, '70; J.D., Seton Hall University, '75; member of the New Jersey Bar. The author has served as the Assistant Director of Labor Relations, New Jersey School Boards Association. The view, opinions, and analysis expressed herein are solely those of the author and do not necessarily reflect the position or attitude of the Association.

1 N.J. LAWS ch. 303 (1968) was the first enactment of a comprehensive statute dealing with public sector labor relations. This act was passed and became effective in 1968. While N.J. CONST. art. I, § 19 provides that

> (p)ersons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing(,)

the Legislature did not take any steps to implement a statutory scheme concerning public sector labor relations until 1968.

2 N.J. LAWS ch. 100 (1941). That act had dealt strictly with private sector labor relations prior to the addition of Law of September 13, 1968, ch. 303 [1968, Vol. 1] N.J. LAWS 891. All of the existing laws concerning both public and private sector labor relations in New Jersey are now, however, compiled in N.J. STAT. ANN. § 34:13A-1 *et seq.* (Supp. 1976-77).

3 The only exception to this general statement appears in N.J. STAT. ANN. § 34:13A-5.2 wherein specific powers and duties granted to the labor mediation board [the board established to deal with private sector labor disputes] are granted to and incorporated by reference in the powers of the Public Employment Relations Commission [the board established to deal with public sector labor disputes and generally referred to as PERC].

on the prior laws.[4] A closer examination of the new provisions and the questions which they have prompted is the purpose of this article.

The Question of the Appropriate Forum

The question of appropriate forum involves the concept of where disputes arising under the New Jersey Employer-Employee Relations Act,[5] hereinafter the Act, will initially be heard. The disputes dealt with herein will be those dealing with negotiability of a specific matter and disputes over whether a specific activity of a public employer, hereinafter employer, or of public employees or their majority representative, hereinafter employees, is prohibited by the act. Disputes as to negotiability are referred to as "scope of negotiations" disputes. Those with regard to whether specific activity is prohibited by the act are referred to as "unfair practice" disputes. As originally enacted, the Act[6] was silent with respect to the appropriate forum. For that matter, the Act as originally enacted was silent as to what specific actions of either an employer or employees constituted prohibited conduct. The Act, at that time, did set forth rights that were protected, but it did not enumerate specific types of activity which would constitute violations of those rights as other labor relations statutes generally did.[7]

On September 19, 1969, the Public Employees Relation Commission (PERC) issued a decision and order[8] wherein it found that an employer had violated the Act and ordered the employer to take affirmative action to remedy the violation. The employer filed an appeal to the Appellate Division of Superior Court from the decision and order issued by PERC. The Supreme Court certified the matter before it was argued in the Appellate Division. The Supreme Court reversed PERC, saying:

> As we said in *Lullo v. International Ass'n of Fire Fighters, supra,* 55 N. J. 409, Chapter 303, L. 1968 is novel legislation in New Jersey. For the first time the Legislature entered broadly into the field of labor rela-

---

4 N.J. LAWS ch. 123 (1974) was effective January 19, 1975.

5 This is the short title of both N.J. LAWS ch. 303 (1968) as originally enacted, and as amended and supplemented by N.J. LAWS ch. 123 (1974).

6 N.J. LAWS ch. 303 (1968).

7 *See, e.g.,* National Labor Relations Act 29 U.S.C. § 151 *et seq.*

8 In the Matter of Burlington County Evergreen Park Mental Hospital and Dorothy Cooper, PERC Decision No. 14 (September 19, 1969). PERC's order read as follows:

tions in the public sector. Whether PERC should be invested with authority to hear and decide unfair labor practice charges and to issue various types of affirmative remedial orders respecting them is an important policy question. In our judgment, a policy question of that significance lies in the legislative domain and should be resolved there. A court should not find such authority in an agency unless the statute under consideration confers it expressly or by unavoidable implication. In this case, obviously the statute does not expressly confer the power sought to be exercised by PERC. And, in our judgment, the statutory language does not justify a judicial determination that power of such magnitude resides there by implication.[9]

ORDER

Pursuant to Section 6 of the Act, the Commission hereby orders that the respondent, Evergreen Park Mental Hospital, its officers and agents shall

1. Cease and desist from:
   (a) Discriminating against any employee in regard to his or her hire, tenure, and conditions of employment to discourage membership in Council No. 1 of the American Federation of State, County and Municipal Employees, or any other employee organization, by discharging, denying permanent status, or otherwise terminating or interrupting his or her employment.
   (b) Unlawfully threatening employees concerning their employee organization membership, activities or desires.
   (c) In any other manner directly or indirectly interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which the Commission finds will effectuate the policies of the Act:
   (a) Offer to the complainant immediate and full reinstatement to her former or substantially equivalent position without prejudice; re-submit the CS-6 form requesting permanent status to the Civil Service Commission and make her whole for any loss of earnings suffered by reason of the discrimination against her.
   (b) Preserve and, upon request, make available to the Commission or the Executive Director, for examination and copying, all payroll records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.
   (c) Post at the Evergreen Park Mental Hospital, copies of the attached notice (to employees, explaining the substance of the order). Copies of said notice, to be furnished by the Executive Director, shall, after having been duly signed by the representative of the public employer, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter on bulletin boards where notices are available to all employees or by mailing it to each of its employees. Reasonable steps should be taken by the public employer to insure that said notices are not altered, defaced or covered by any other material.
   (d) Notify the Executive Director in writing within ten (10) days from the date of this Order, what steps have been taken to comply herewith.

[9] Burlington County Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579, 598-99, 267 A.2d 533, 544 (1970).

Although the court found that the correct procedure that the complainant should have followed was to have appealed to the Civil Service Commission, rather than to PERC, the court did not rely upon the existence of another administrative tribunal as the basis for finding PERC to be the improper forum for adjudicating alleged unfair practices. The court specifically pointed out that:

> Even if there were no other administrative remedy available, the absence of any express or clearly implied legislative authorization to the Commission to hear, decide and issue affirmative remedial orders in labor dispute cases arising out of improper discharge of an employee for joining or assisting a union would not leave the employee helpless. If necessary, the employee may seek a remedy in the courts where, upon a showing of a discharge in violation of his constitutional and statutory rights to join and assist a union, an appropriate remedy will be provided for him.[10]

Therefore, under L. 1968, c. 303, the appropriate forum for hearing unfair practice charges and for remedying such charges, if appropriate, was either the Chancery Division of Superior Court or an administrative agency specifically and expressly authorized by statute to deal with the matter giving rise to the alleged unfair practice. PERC was not such an agency under L. 1968, c. 303.

The amendments and supplements to the act enacted in L. 1974, c. 123 include a specific, express and exclusive delegation of authority to PERC "to prevent anyone from engaging in any unfair practice."[11] Furthermore, L. 1974, c. 123 expressly sets forth those activities which constitute unfair practices by employers[12] and by employee organizations.[13]

Clearly, these statutory sections establish PERC as an appropriate forum to hear and decide unfair practice allegations "and to take such reasonable affirmative action as will effectuate the policies[14] of this act."[15] The Supreme Court, in one of the few cases in which the courts have had a chance to interpret L. 1974,

---

10 *Id.* at 594, 267 A.2d at 541-42.

11 N.J. STAT. ANN. § 34:13A-5.4 (c) (Supp. 1976-77).

12 N.J. STAT. ANN. § 34:13A-5.4 (a) (Supp. 1976-77).

13 N.J. STAT. ANN. § 34:13A-5.4 (b) (Supp. 1976-77).

14 N.J. STAT. ANN. § 34:13A-2 (Supp. 1976-77) sets forth the declaration of policy.

15 N.J. STAT. ANN. § 34:13A-5.4 (c) (Supp. 1976-77).

c. 123 and the effects thereof, has upheld this grant of authority.[16] In elaboration, the court said:

> While this appeal was pending, the New Jersey Employer-Employee Relations Act, as amended by L. 1974, c. 123 (approved October 21, 1974 to take effect 90 days after enactment), gave PERC jurisdiction to hear and decide unfair labor practice charges and to issue appropriate remedial orders respecting them. We determine that the foregoing amendment procedurally has retroactive effect and applies to the pending and unresolved charges of unfair practices. . . .[17]

The matter was remanded "to the trial court with directions to enter an order transferring the dispute to PERC for appropriate proceedings under the act."[18]

From the above Supreme Court decision it is apparent that PERC is now, as a result of L. 1974, c. 123, the appropriate forum to hear unfair practice charges, and to provide appropriate remedies.

The amendments and supplements contained in L. 1974, c. 123 also contain new material concerning the appropriate forum for making scope of negotiations determinations. Specifically, the Act now provides that:

> The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court.[19]

Thus, L. 1974, c. 123 granted authority to PERC to hear and decide unfair practice charges and to make scope of negotiations determinations. One of the major ambiguities in this Act arises from the difference in the wording of these two legislative grants of power to PERC. The Supreme Court has said that PERC is

---

[16] Patrolman's Benevolent Association of Montclair, Local No. 53 v. Town of Montclair, 70 N.J. 130, 358 A.2d 180 (1976).

[17] *Id.* at 136, 358 A.2d at 182-83.

[18] *Id.*, 358 A.2d at 183.

[19] N.J. STAT. ANN. § 34:13A-5.4 (d) (Supp. 1976-77).

the appropriate forum to hear and remedy unfair practice charges.[20] From a reading of that section of the statute set forth above, granting PERC authority to make scope of negotiations determinations, it is apparent that PERC is an appropriate forum for scope of negotiations proceedings. What is not apparent is whether PERC is the only appropriate forum in which to initially bring scope of negotiations proceedings.

A comparison of the statutory section conferring unfair practice jurisdiction upon PERC[21] and the section conferring scope of negotiations determination[22] jurisdiction upon PERC appears to provide only that PERC is an appropriate forum for initial scope of negotiations determinations rather than the sole appropriate forum. The former provides that "The commission [PERC] shall have *exclusive power . . .*" while the latter provides that "The commission [PERC] shall at all times have the power and the duty . . ." (emphasis added).

Although the Supreme Court has not yet spoken with respect to PERC as an appropriate forum or as the sole appropriate forum within which initial scope of negotiations proceedings should be brought, the trial courts have continued to make scope of negotiations determinations, and the Appellate Division has continued to pass upon the validity of such determinations on the basis of the merits involved.[23]

It therefore appears that PERC is currently the sole appropriate forum with respect to initial unfair practice determinations, but it is merely an appropriate forum for making initial scope of negotiations determinations and shares this distinction with at least the trial divisions of Superior Court.

---

20 Patrolman's Benevolent Association of Montclair, Local No. 53 v. Town of Montclair, 70 N.J. 130, 358 A.2d 180 (1976).

21 N.J. STAT. ANN. § 34:13A-5.4 (c) (Supp. 1976-77).

22 N.J. STAT. ANN. § 34:13A-5.4 (d) (Supp. 1976-77).

23 *See, e.g.*, Bd. of Education of the Twp. of North Bergen v. North Bergen Fed. of Teachers, 141 N.J. Super. 97, 357 A.2d 302, (App. Div. 1976); Ocean Twp. Bd. of Education v. Ocean Twp. Teachers Assn., No. C-2679-74 (oral decision, Ch. Div. April 18, 1975), *rev'd on other grounds*, No. A-3334-74 (App. Div. May 5, 1976); Chappell v. Commissioner of Education of New Jersey, 135 N.J. Super. 565, 343 A.2d 811 (App. Div. 1975); Clifton Teachers' Assn., Inc. v. Bd. of Education of Clifton, 136, N.J. Super 336, 346 A.2d 107 (App. Div. 1975); Piscataway Twp. Education Assn. v. Piscataway Twp. Bd. of Education, No. A-499-74 (App. Div. December 22, 1975). *Compare with* Bd. of Education of the city of Plainfield v. Plainfield Education Assn., No. A-4283-74 (App. Div. Nov. 4, 1976).

Scope of Judicial Review of PERC Actions

Recent questions have arisen with respect to the reviewability by the courts of specific PERC decisions and with respect to the standards to be used by the courts if such review is appropriate.[24]

Administrative agency decisions may be composed of two components—factual determinations and conclusions of law. The Legislature expressly recognized that PERC decisions made in both unfair practice proceedings and scope of negotiations proceedings involve findings of fact and conclusions of law.[25]

Ordinarily, the extent to which an administrative agency's decision is reviewable by the courts and the scope of standards governing review depend upon whether review is sought with respect to a finding of fact or a conclusion of law. Factual findings will generally be upheld if supported by competent evidence.[26] The standard to govern appellate intervention with respect to such factual findings is the same as that on appeal in any non-jury case.[27]

One possible exception to the above general rule could arise where no testimony is taken in the proceeding which leads to the decision. For example, if all factual evidence is submitted as a transcript of a prior proceeding before another body or if all factual evidence is submitted by stipulation or affidavit, then the ordinary deference to the trier of facts' findings is not appropriate.[28]

---

[24] In re the matter of Union County Regional High School Board of Education and Union County Regional High School Teachers Association, Inc.; and, Cranford Board of Education and Cranford Education Association, was the subject of proceedings before the Appellate Division on July 22, 1976 wherein an order was issued temporarily enforcing the order issued by PERC below. PERC Decision No. 76-43 (June 14, 1976). On the same day, the Appellate Division order was stayed by a single Justice of the Supreme Court.

On July 30, 1976 the Appellate Division order directing temporary enforcement of PERC's interlocutory order in this matter was dissolved by the full Supreme Court. The Court further ordered the Appellate Division to grant the board of education's motion for leave to appeal and to consider the matter on the merits. The PERC order was reversed by the Appellate Division on December 10, 1976. No. A-4394-75.

Also see City of Jersey City v. Jersey City Police Superior Officers Association and The New Jersey Public Employment Relations Commission, unreported App. Div. proceeding Docket No. AM-496-75, Motion No. M-1892-75, dated April 27, 1976. Motion for leave to appeal from interlocutory order of PERC, denying interim relief in scope of collective negotiations determination proceeding, PERC Docket No. SN-76-41.

[25] N.J. STAT. ANN. § 34:13A-5.4 (c) and (d) (Supp. 1976-77).

[26] *See* Mayflower Securities v. Bureau of Securities 64 N.J. 85, 312 A.2d 497 (1973); In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 316 A.2d 39 (App. Div. 1974), *cert. denied*, 65 N.J. 292 (1974); Hounquer v. Div. of Alcoholic Beverage Control, 40 N.J. 501, 123 A.2d 574 (App. Div. 1956).

[27] Close v. Kordulak Bros., 44 N.J. 589, 210 A.2d 753 (1965).

[28] Alfone v. Sarno, 139 N.J. Super. 518, 354 A.2d 654 (App. Div. 1976).

The foregoing standards appear to be adopted by the Act. Appellate review is mentioned at two places in the 1974 amendments. The Act provides that:

> The commission shall have the power to apply to the Appellate Division of the Superior Court for an appropriate order enforcing any order of the commission issued under subsection c. or d. hereof, and its findings of fact, if based upon substantial evidence on the record as a whole, shall not, in such action, be set aside or modified; any order for remedial or affirmative action, if reasonably designed to effectuate the purposes of this Act, shall be affirmed and enforced in such proceeding.[29]

Additionally, the Act provides in the section which grants PERC the authority to make scope of negotiations determinations that:

> Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court.[30]

It is of interest to note that the original bill, introduced in the State Senate,[31] provided that any scope of negotiations determinations made pursuant to this section would be final. This provision was deleted in committee[32] and the above quoted language took its place.

Whether or not the Legislature could make scope of negotiations determinations final, with no appeal to the courts, is doubtful.[33] In any event, this did not occur. It is suggested that the above quoted statutory language adopts the general rules for review of administrative agency determinations by the judiciary with respect to unfair practice decisions and scope of negotiations determinations made by PERC.

---

[29] N.J. STAT. ANN. § 34:13A-5.4(f) (Supp. 1976-77).

[30] N.J. STAT. ANN. § 34:13A-5.4(d) (Supp. 1976-77).

[31] S. 1087, introduced April 16, 1974.

[32] *Hearings on S. 1087 Before the Senate Conference and Coordinating Committee,* May 7, 1974.

[33] *See* In re Senior Appeals Examiner, 60 N.J. 356, 290 A.2d 129 (1972) wherein the court stated that N.J. CONST. art. VI, § 5, para. 4 largely immunizes judicial review of administrative agency determinations from legislative curbs.

Scope of Negotiations

The issue of what is and what is not a mandatory matter for negotiations was one of the most litigated areas under L. 1968, c. 303 and promises to continue to be so under the Act as amended and supplemented by L. 1974, c. 123. The scope of negotiations is one of the prime areas of confusion. Public employers have a tendency to attempt to narrowly define the scope of negotiations while public employees and their organizations generally seek a very broad definition of negotiability.[34]

These are generalizations, of course, and are subject to future change. For example, if PERC and the courts interpret the statute to provide for a very broad definition of scope of negotiations, so that management's policy-making functions and prerogatives were held to be negotiable, employers might switch from their present position and try to have the scope of negotiations expanded to include all of the employee benefits presently mandated by other statutes, i.e. tenure rights,[35] minimum sick leave provisions,[36] minimum salary provisions,[37] etc.

The landmark set of cases interpreting the scope of negotiations as established by L. 1968, c. 303 is commonly referred to as the Dunellen Trilogy.[38] While these cases were not the first cases in which the court interpreted portions of this act,[39] and arguably not even the first cases in which the court addressed the issue of scope of negotiation,[40] these decisions have been generally accepted as establishing the parameters of the scope of negotiations.

The Supreme Court stated, in one of the Dunellen Trilogy cases:

> Surely the Legislature, in adopting the very general terms of L. 1968, c. 303, did not contemplate that the local boards of education would or could abdicate their manage-

---

34 Dunellen Bd. of Education v. Dunellen Education Assn., 64 N.J. 17, 25, 311 A.2d 737, 741 (1973).

35 N.J. STAT. ANN. § 18A:28–1 *et seq.*

36 N.J. STAT. ANN. § 18A:30–1 *et seq.*

37 N.J. STAT. ANN. § 18A:29–5.

38 Bd. of Education of Englewood v. Englewood Teachers, 64 N.J. 1, 311 A.2d 729 (1973); Burlington Cty. College Faculty Assn. v. Bd. of Trustees, 64 N.J. 10, 311 A.2d 733 (1973); Dunellen Bd. of Education v. Dunellen Education Assn., 64 N.J. 17, 311 A.2d 737 (1973).

39 *See, e.g.*, Burlington Cty. Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579, 267 A.2d 533 (1970); Lullo v. International Assn. of Fire Fighters, 55 N.J. 409, 262 A.2d 681 (1970); Bd. of Education, Borough of Union Beach v. NJEA, 53 N.J. 29, 247 A.2d 867 (1968).

40 *See* Lullo v. International Assn. of Fire Fighters, 55 N.J. 409, 262 A.2d 681 (1970).

ment responsibilities for the local educational policies or that the State educational authorities would or could abdicate their management responsibilities for the State educational policies. [citations omitted] On the other hand it did contemplate that to the extent that it could fairly be accomplished without any significant interference with management's educational responsibilities, the local boards of education would have the statutory responsibility of negotiating in good faith with representatives of their employees with respect to those matters which intimately and directly affect the work and welfare of their employees.[41]

In further application of this standard, the court stated, while holding college calendar not to be a mandatory subject for negotiations, that

> (a)lthough the [college calendar] undoubtedly has some practical effect on the faculty's employment arrangements [citation omitted] we are satisfied that under the approach set forth in *Dunellen Board of Education v. Dunellen Education* . . . it was not a subject of mandatory negotiation.[42]

Furthermore, the court cited with approval a Nebraska Supreme Court decision[43] which held that the scope of negotiations did not include matters which were predominantly matters of (1) educational policy, (2) management prerogatives, or (3) statutory duties of the public employer. In illustration, the court set forth the following matters as examples of those matters which

> fall exclusively within management's prerogatives and would not be the subject of compulsory negotiation: the right to hire; to maintain order and efficiency; to schedule work; to control transfers and assignments; to determine what extracurricular activities may be supported or sponsored; and to determine the curriculum, class size and types of specialist to be employed.[44]

---

41 Dunellen Bd. of Education v. Dunellen Education Assn., 64 N.J. 10, 25, 311 A.2d 737, 741 (1973).

42 Burlington Cty. College Faculty Assn. v. Bd. of Trustees, 64 N.J. 10, 13, 311 A.2d 733, 735 (1973).

43 School District of Seward Education Assn. v. School District of Seward, 188 Neb. 772, 199 N.W. 2d 752 (1972).

44 Dunellen Bd. of Education v. Dunellen Education Assn., 64 N.J. 10, 25-26, 311 A.2d 737, 741 (1973).

Although there was further litigation concerning scope of negotiations under L. 1968, c. 303,[45] the Dunellen Trilogy established the parameters within which those cases would be decided.

The Dunellen Trilogy contained the seeds of current confusion regarding scope of negotiations. Two statements in the *Dunellen* decision give rise to the claim that the enactment of L. 1974, c. 123 effectuated a change in the standards of negotiability as established by the Dunellen Trilogy.

Therein, the court said:

> Nowhere in the Act did the Legislature define the phrase "terms and conditions" as used in section 7 nor did it specify what subjects were negotiable and what subjects were outside the sphere of negotiation. In section 10 it did expressly provide that no provision in the act shall "annul or modify any statute or statutes of this State." N.J.S.A. 34:13A–8.1. In the light of this provision it is our clear judicial responsibility to give continuing effect to the provisions in our Education Law (Title 18A) without, however, frustrating the goals or terms of the Employer-Employee Relations Act (N.J.S.A. 34:13A–1 *et seq.*).[46]

Furthermore:

> The lines between the negotiable and the nonnegotiable will often be shadowy and the legislative reference to "terms and conditions of employment" without further definition hardly furnishes any dispositive guideline.[47]

The reason that these two statements have resulted in confusion in the area of scope of negotiations is that section 10 of the Act which was discussed therein was amended by the Legislature in L. 1974, c. 123. Prior to that enactment, that section read:

---

[45] *See, e.g.*, New Jersey Bd. of Higher Education v. Assn. of New Jersey State College Faculties, 66 N.J. 72, 328 A.2d 235 (1974) (restrictions on outside employment are negotiable, although a code of ethics is not); Assn. of New Jersey State College Faculties v. Dungan, 64 N.J. 338, 316 A.2d 425 (1974) (rules on faculty tenure policies are not mandatorily negotiable); Pros., Det., Essex Cty. v. Hudson Cty. Bd. of Freeholders, 130 N.J. Super. 30, 324 A.2d 897 (App. Div. 1974), *cert. denied*, 66 N.J. 330, 331 A.2d 30 (1974) (compensation is mandatorily negotiable); Rutgers Council v. New Jersey Bd. of Higher Education, 126 N.J. Super. 53, 312 A.2d 677 (App. Div. 1973) (student-faculty ratio policy and calendar need not be negotiated); New Jersey Turnpike Employees Union v. New Jersey Turnpike Authority, 123 N.J. Super. 461, 303 A.2d 599 (App. Div. 1973) (agency shop clause may not be negotiated).

[46] Dunellen Bd. of Education v. Dunellen Education Assn., 64 N.J. 10, 24-25, 311 A.2d 737, 741 (1973).

[47] *Id.* at 25, 311 A.2d at 741.

> Nothing in this act shall be construed to annul or modify, or to preclude the renewal or continuation of any agreement heretofore entered into between any public employer and employee organization, nor shall any provision hereof annul or modify any statute or statutes of this state.

As amended, this section reads:

> Nothing in this Act shall be construed to annul or modify, or to preclude the continuation of any agreement during its current terms heretofore entered into between any public employer and any employee organization nor shall any provision hereof annul or modify any *pension* statute or statutes of this State. (emphasis added)

It was the insertion of the word "pension" into this section of the Act which gave rise to the claim that L. 1974, c. 123 changed the scope of negotiations established by the Dunellen Trilogy. The argument relies heavily upon the last two above quoted statements from the *Dunellen* case, wherein the court recognized that its decision relied, at least to some extent, upon this statutory section as it read prior to its amendment and wherein the court indicates that its concept of scope of negotiations could be changed by further legislative definition of "terms and conditions of employment."

Upon closer examination, this argument can be seen to be incorrect. The correct interpretation of the amendments and supplements contained in L. 1974, c. 123 does not include an alteration of the scope of negotiations as interpreted by the Supreme Court in the Dunellen Trilogy.

It is a well-recognized rule of statutory construction that a statute should not be construed in a manner that would render any part thereof inoperative, superfluous or meaningless.[48] When seeking the Legislature's intent in enacting a statute, that statute must be viewed as a whole and isolated terms contained within the statute should not be invoked to defeat a reasonable construction.[49] Therefore the insertion of the word "pension" in this statutory section[50] should not be read as implicitly bringing all matters, other than those covered by pension statutes within the scope of negotiations. While the maxim *"expressio unius est*

---

[48] State v. Sperry and Hutchinson Co., 23 N.J. 38, 46, 127 A.2d 169, 174 (1956).

[49] Giles v. Gossert, 23 N.J. 22, 34, 127 A.2d 161, 167 (1957).

[50] N.J. STAT. ANN. § 34:13A-8.1 (Supp. 1976-77). *See* Englewood Teachers' Assn. v. Englewood Bd. of Education, No. A-1473-75 (App. Div. Dec. 10, 1976), concurring opinion of Judge Allcorn.

exclusio alterius''[51] is recognized in New Jersey, it is at best a mere aid to interpretation and usually serves to describe a result rather than to assist in reaching one.[52]

There is an elementary canon of statutory construction which is more applicable in the instant endeavor. In interpreting a statute, courts must attempt to give effect and meaning, if possible, to every word, clause and sentence in the statute. It is said that every provision has significance in the delineation of the Legislature's intent and purpose.[53] To construe the insertion of the word "pension" into this statutory section[54] as bringing all matters except those matters covered by pension statutes would render the grant of authority to PERC to make scope of negotiations determinations[55] superfluous and essentially meaningless. This grant of authority to PERC would be transformed to a simple determination of whether or not a specific matter in dispute was governed by a pension statute. Surely, such a result is unreasonable.

This same line of reasoning is involved with the portion of this statutory section[56] which makes PERC determinations on the scope of negotiations appealable to the Appellate Division of Superior Court. It is as reasonable to say that the sole question on appeal would be whether or not a matter governed by a pension statute is involved. A statutory construction which achieves an unreasonable result should be avoided when one which achieves a reasonable result consistent with the indicated purpose of the whole act is available.[57] The purpose of a statute is not to be frustrated by an unduly narrow interpretation.[58]

The contrary argument also would require the implied repeal of numerous other statutes dealing with the prerogatives and powers of public employers and rights and benefits of public employees.[59] Repeals by implication are not favored in the law and to be found must be supported by a clear and compelling indication of legislative intent.[60] Such indication is not present here.

---

51 The expression of one thing excludes the other.

52 Reilly v. Ozzard, 33 N.J. 529, 539, 166 A.2d 360, 365 (1960).

53 Crater v. County of Somerset, 123 N.J.L. 407, 8 A.2d 691 (E&A 1939); Mahoney v. Parole Bd., 10 N.J. 269, 90 A.2d 8 (1952), appeal dismissed 344 U.S. 871 (1952).

54 N.J. STAT. ANN. § 34:13A–8.1 (Supp. 1976-77).

55 N.J. STAT. ANN. § 34:13A–5.4 (d) (Supp. 1976-77).

56 *Id.*

57 Clifton v. Passaic County Board of Taxation, 28 N.J. 411, 421, 147 A.2d 1, 6 (1958).

58 Commorata v. Essex Co. Park Comm. 26 N.J. 404, 411, 140 A.2d 397, 401 (1958).

59 *See generally* N.J. STAT. ANN. Title 18A and N.J. STAT. ANN. Title 40. *See* Union County Regional High School Bd. of Education v. Union County Regional High School Teachers' Assn., Inc., No. A-4394-75 (App. Div. Dec. 10, 1976).

60 Loboda v. Clark Twp., 40 N.J. 424, 435, 193 A.2d 97, 103 (1963).

Where the Legislature desires to enact a statute which drastically alters prior law and policy it must do so by a deliberate expression rather than by implication.[61] It is clear that in enacting L. 1974, c. 123, the Legislature proceeded in this very manner, i.e. in enacting the unfair practice provisions[62] and by including a comprehensive definition of "managerial executive."[63] Both of these provisions had been found lacking in prior judicial interpretations[64] and the Legislature responded by express action.

This is not to say that L. 1974, c. 123 did not effectuate any changes in public sector labor relations in New Jersey, but rather that it did not effectuate any changes in the specific area of the scope of negotiations. Only those matters that were mandatory matters for negotiations under L. 1968, c. 303 are still mandatory matters for negotiations after L. 1974, c. 123.

Standards by Which PERC is Guided

There has been no express definition by the Legislature as to what specific matters are within the scope of negotiations. Such an express definition was considered by the Legislature but was not enacted in the final version of the bill.[65] Without such a legislative definition, one must look to the rules of statutory construction for guidance in interpreting those amendments and supplements.

---

[61] Delaware River and Bay Auth. v. Internat. Org., 45 N.J. 138, 148, 211 A.2d 789, 794 (1965).

[62] N.J. STAT. ANN. § 34:13A-5.4(a), (b) and (c) (Supp. 1976-77).

[63] N.J. STAT. ANN. § 34:13A-3(b) (Supp. 1976-77).

[64] The former in Burlington Cty. Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579, 267 A.2d 533 (1970) and the latter in Elizabeth Fire Officers Association v. City of Elizabeth, 114 N.J. Super. 33, 274 A.2d 817 (App. Div. 1971) and Board of Education, Orange v. Wilton, 57 N.J. 404, 273 A.2d 44 (1971).

[65] As introduced, section 6 of S-1087 read in part:

> Nothing in this act shall be construed to annul the duty, responsibility or authority vested by statute in any public employer or public body except that the impact on terms and conditions of employment of a public employer's or a public body's decisions in the exercise of that duty, responsibility or authority shall be within the scope of collective negotiations.

The Senate Conference and Coordinating Committee recommended that the above be deleted and the following substituted:

> It is the right of any public employer to determine the standards of services to be offered; determine school and college curricula; determine the standards of selection for employment; direct its employees; take disciplinary action; maintain the efficiency of operations; determine the methods, means and personnel by which operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of any public employer on the aforesaid matters are not within

The Act, as amended and supplemented, grants PERC the power and duty "to make a determination as to whether a matter in dispute is within the scope of collective negotiations."[66]

The granting of an express power to an administrative agency is always attended by the incidental authority fairly and reasonably necessary or appropriate to make it effective.[67]

If PERC has the power and duty to determine whether a matter is within the scope of collective negotiations, it follows that there are some matters which are not within this term. To construe otherwise this grant of authority would do violence to commonly accepted rules of statutory construction, and would render this grant of authority to PERC a nullity.

Although it is clear that PERC has been granted the authority to determine whether or not a matter is within the scope of collective negotiations, the statute does not set forth any standards to guide PERC in its determination. While there is no requirement, constitutional or otherwise, that the Legislature supply an administrative agency with a detailed set of specific standards for its guidance, it is settled that the Legislature may not vest an administrative agency with completely arbitrary power.[68] Furthermore, the Legislature is assumed to be thoroughly conversant with its own legislation and the judicial construction which the courts have applied to its statutes.[69] The fact that the Legislature has continued to use the same language in a statute after a judicial construction of that language is evidence that the construction is in accordance with the legislative intent.[70] The persuasive effect of such acquiescence is increased where the statute has been amended after a judicial construction without any change in the language so interpreted.[71]

---

the scope of collective negotiations; provided, however, that questions concerning the practical impact that decisions on said matters have on employees, such as questions of workload or manning, are within the scope of collective negotiations.

Assembly Bill No. 1705, introduced on May 6, 1974, contained provisions in section 4, similar to those considered by the Senate in the various amendments to S-1087. Assembly Bill No. 1705 was never released from committee.

66 N.J. STAT. ANN. § 34:13A-5.4(d) (Supp. 1976-77).

67 Lane v. Holderman, 23 N.J. 304, 315, 129 A.2d 8, 14 (1957); 3 SUTHERLAND, STATUTORY CONSTRUCTION § 6604 (3rd ed. 1943).

68 N.J. Bell Telephone Co. v. Communications Workers, etc., 5 N.J. 354, 370, 75 A.2d 721, 729 (1950); 1 SUTHERLAND, STATUTORY CONSTRUCTION § 314 (3rd ed. 1943).

69 In re Keogh-Dwyer, 45 N.J. 117, 120, 211 A.2d 778, 779 (1965).

70 Egan v. Erie R. Co., 29 N.J. 243, 250, 148 A.2d 830, 834 (1959).

71 Lemke v. Bailey, 41 N.J. 295, 301, 196 A.2d 523, 526 (1963).

There are several specific phrases and clauses which were used in L. 1968, c. 303, which had received extensive construction by the courts and were not changed by L. 1974, c. 123.

For example, the New Jersey Supreme Court pointed out that by using the term "collective negotiations" rather than "collective bargaining" the Legislature obviously intended to recognize inherent limitations upon negotiations in the public sector.

> *It is crystal clear that in using the term "collective negotiations" the Legislature intended to recognize inherent limitations on the bargaining power of public employer and employee.* The reservation in section 7 of the Civil Service rights of the individual employee is a specific indication of that fact. The lawmakers were sensitive that Civil Service Statutes in many areas provide for competitive employment examinations, eligible lists, fixed salary lists, for promotion, transfer, reinstatement and removal, and require all employees to be dealt with on the same basis. And undoubtedly they were conscious also that public agencies, departments, etc., cannot abdicate or bargain away their continuing legislative or executive obligations or discretion. Consequently, absent some further changes in pertinent statutes public employers may not be able to make binding contractual commitments relating to certain subjects. [citations omitted] *In our judgment, therefore, the authorization for "collective negotiations" in the 1968 Act was designed to make known that there are salient differences between public and private employment relations which necessarily affect the characteristics of collective bargaining in the public sector.* [emphasis added][72]

Not only did the Legislature acquiesce in the court's prior interpretation of the phrase "collective negotiations" by not changing this language where it was originally used in P. L. 1968, c. 303,[73] but it included this very language in the section of the amendments which gives PERC the authority to determine whether "a matter in dispute is within the *scope of collective negotiations.*"[74]

Another phrase which had received prior judicial construction was the phrase "terms and conditions of employment." This

---

[72] Lullo v. International Assn. of Fire Fighters, 55 N.J. 409, 440, 262 A.2d 681, 697 (1970).

[73] N.J. STAT. ANN. § 34:13A-5.3; N.J. STAT. ANN. § 34:13A-6(d) (Supp. 1976-77).

[74] N.J. STAT. ANN. § 34:13A-5.4(d) (Supp. 1976-77).

phrase was used in L. 1968, c. 303 in several places.[75] This phrase was also contained in L. 1974, c. 123.[76] It should be noted that the section of L. 1974, c. 123 in which this phrase was used makes a refusal by a board to negotiate in good faith "concerning terms and conditions of employment of employees"[77] an unfair practice. Therefore, a refusal to negotiate in good faith over other matters—other than terms and conditions of employment—is not an unfair practice under that section of the act.

The Supreme Court recognized that in and of itself this phrase provides little guidance as to its meaning.[78] The Court said that pending further definitive legislation concerning the scope of negotiations, the definition of "terms and conditions of employment"—those matters concerning which public employers have an obligation to negotiate—must be decided by the judiciary on a case by case basis.[79] L. 1974, c. 123 did not contain any further definition of "terms and conditions of employment" and therefore, it is submitted that the previous case by case definitions are still the standards by which scope of negotiation determinations should be made.

The Use of Federal Precedent

One additional question which arises in the scope of negotiations area is that of the use of federal precedent under the National Labor Relations Act.[80] The judicial pronouncements on this issue have been conflicting and ambiguous.

At one point in an early decision[81] the Court said:

> Adoption by the Legislature of the federal act's language establishing the exclusive representation of the elected representative demonstrates acceptance of the Commission's[82] recommendation in that regard. Further, for purposes of judicial interpretation in a context such as is presented to us here, such legislative approval brings

---

75 *See, e.g.*, N.J. STAT. ANN. §§ 34:13A-5.3 and 34:13A-6(b) (Supp. 1976-77).

76 N.J. STAT. ANN. § 34:13A-5.4(a)(5) (Supp. 1976-77).

77 *Id.*

78 Dunellen Bd. of Education v. Dunellen Education Assn., 64 N.J. 10, 24-25, 311 A.2d 737, 741 (1973).

79 *Id.*

80 29 U.S.C. §§ 151-168.

81 Lullo v. International Assn. of Fire Fighters, 55 N.J. 409, 424, 262 A.2d 681, 689 (1970).

82 The commission being mentioned here by the court was the New Jersey Study Commission, whose report was the basis of L. 1968, C. 303.

> to the fore the well known tenet of statutory construction that the experience and the adjudications under the copied act were probably accepted as an intended guide for the administration of the later act.

It must be noted, however, that it was this very case in which the Court drew the distinction, discussed above, between "collective negotiations" and "collective bargaining." This case was cited at a later date[83] by the Court as standing for the proposition that boards of education stood in a different relationship with their employees than private employers in private industry; that their relationship was clearly distinguishable; and that public officials were "charged with public responsibilities which they could not *lawfully* 'abdicate or bargain away.' " (emphasis added)

In a subsequent case, the Court looked at the policy statement contained within the Act[84] and concluded that:

> (T)here is here manifested a special concern by our Legislature with the bargaining interests and negotiating position of the state as an employer—a factor not of particular weight with the National Labor Relations Board or the federal courts in relation to private sector employees.[85]

While the Court was concerned with an issue of employee negotiating units, the rationale appears to be applicable to the scope of negotiations issue. In fact, the Appellate Division appears to have carried this concept a step further, at least with respect to boards of education. When an employee organization relied upon federal labor law decisions in a recent case involving scope of negotiations, the court rejected the position stating:

> However, none of these cases deal in the sphere of education; they are concerned with private sector industrial labor relations. They are clearly irrelevant to the issue before us.[86]

---

83 Dunellen Bd. of Education v. Dunellen Education Assn., 64 N.J. 10, 23, 311 A.2d 737, 741 (1970).

84 N.J. STAT. ANN. § 34:13A–2. This section reads, in pertinent part: ". . . that the interests and rights of the consumers and the people of the state, while not direct parties therein, should always be considered, respected and protected. . . ."

85 State v. Professional Assn. of New Jersey, Dept. of Education, 64 N.J. 231, 247, 315 A.2d 1, 10 (1974).

86 Board of Education of the Township of North Bergen v. North Bergen Federation of Teachers, 141 N.J. Super. 97, 104, 357 A.2d 302, 305 (App. Div. 1976).

Therefore, it is submitted that federal sector labor law precedents generally are not applicable.

From the foregoing, the answer to the question of what was the effect of L. 1974, c. 123 upon those standards concerning the scope of negotiations as established by L. 1968, c. 303 and interpreted by the courts in the Dunellen Trilogy and subsequent court cases is that such standards continue to be applicable. Therefore, PERC, the courts and other bodies, if any, making scope of negotiations determinations should follow and apply such standards.