# COMMENTS

## AFTER *RIDGEFIELD PARK* AND *STATE SUPERVISORY EMPLOYEES*: THE SCOPE OF COLLECTIVE NEGOTIATIONS IN THE PUBLIC SECTOR OF NEW JERSEY

Historically, public sector employees have been treated differently in regard to collective negotiations than have their private sector counterparts.[1] This difference in treatment is based on the recognition that local government, unlike the private employer, "may not legally delegate any of its authority as to matters properly within its legislative discretion as defined by charter or by statute nor abdicate any of its responsibility to private parties."[2] In the private sector, a refusal to bargain over a particular subject matter by one party may invite an unfair labor practice charge from the other party.[3] In the public sector, however, the public employer may refuse to bargain on the ground that the subject matter raised during contract negotiations is outside its authority to delegate, and therefore is not negotiable.[4]

The rights of public sector employees were virtually non-existent until the 1950s.[5] Over the past two decades, however, it has been generally recognized that public employees have a right to organize and join labor unions,[6] while management has been deemed to have

---

[1] *See, e.g.*, the Wagner Act of 1935, which developed a comprehensive scheme for collective bargaining in the private sector, but specifically exempted public employees from coverage. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935). Section 2(2) specifically excluded the United States government from the definition of employer. *Id.* § 2(2) 49 Stat. at 450.

[2] Kilberg, *Appropriate Subjects for Bargaining in Local Government Labor Relations*, 30 MD. L. REV. 179, 183 (1970). Fearful that in the give-and-take of the bargaining process a significant issue of the public interest may be sacrificed to achieve industrial peace, the public employer has been prohibited from negotiating in some areas absent specific statutory or constitutional authority. For a further discussion of this concept, see notes 181–82 *infra* and accompanying text.

[3] National Labor Relations Act § 8(a), (b)(3), 29 U.S.C. § 158(a), (b)(3) (1976). *See* note 1 *supra*.

[4] *See* notes 126–66 *infra* and accompanying text.

[5] As previously noted, public employees were specifically exempted from the National Labor Relations Act. *See* note 1 *supra*. In addition, most courts had found that public employees did not have a constitutional right to join or form unions and, as a corollary, that legislatures could specifically forbid the joining or forming of unions. *See* Local 201, AFSCME v. City of Muskegon, 369 Mich. 384, 120 N.W.2d 197, *cert. denied*, 375 U.S. 833 (1963), where the court held that the regulation which prohibited police officers from being members of any federation or labor union did not deprive the officers of any constitutional rights.

[6] *See, e.g.*, Lontine v. Van Cleave, 483 F.2d 966, 967–68 (10th Cir. 1968). Much of the force behind the change came from President Kennedy's Executive Order 10,988, which granted federal employees the right to form organizations for the purpose of employee represen-

the corresponding duty to bargain with the employees' chosen representative.[7] In 1968, the New Jersey Legislature followed the trend of extending greater rights to public employees by enacting the New Jersey Employer-Employee Relations Act,[8] a comprehensive statute concerning public sector labor relations. This statute provided certain protections to public sector employees,[9] established the Public Employment Relations Commission (PERC) to deal with various problems encountered in public sector employment,[10] and required public sector employers to negotiate with employees regarding "terms and conditions" of employment.[11] The statute, however, did not provide a workable definition for "terms and conditions" of employment and failed to address the validity of agreements on subjects other than "terms and conditions."[12] In addition, the statute did not specify the proper limitations on collective negotiations which are undeniably necessary in light of the inherent limitations in the public employer's authority to negotiate.[13] In 1974, the New Jersey Legislature amended the 1968 Act, but again failed to specify the proper limitations on collective negotiations.[14] Recent New Jersey supreme court decisions have addressed these problems and have attempted to give further meaning to the 1974 amendments. This comment will

---

tation. Employee Management Cooperation in the Federal Service, Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963).

[7] *See, e.g.*, McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Delaware River Bay Auth. v. International Organization, 45 N.J. 138, 211 A.2d 789 (1965), where the court held that public employees have full collective bargaining rights, but under no circumstances are they permitted the right to strike. *Id.* at 142, 211 A.2d at 791.

[8] Ch. 303, 1968 N.J. Laws 891 (current version at N.J. STAT. ANN. §§ 34:13A-1 to -13 (West 1968 & Cum. Supp. 1979)).

[9] The Act statutorily granted public employees the right to meet "freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity." N.J. STAT. ANN. § 34:13A-5.3 (West 1968). In addition, the Act provided a mechanism for the resolution of unfair labor practices. N.J. STAT. ANN. 34:13A-54.4 (West 1968). For a discussion of unfair labor practices under this Act, see Tener, *The Public Employment Relations Commission, The First Decade*, 9 RUT.-CAM. L.J. 609 (1978).

[10] N.J. STAT. ANN. § 34:13A-5.2 (West 1968). For a discussion of PERC's function, see notes 18–20 *infra* and accompanying text and Tener, *supra* note 9, at 611–50.

[11] N.J. STAT. ANN. § 34:13A-5.3 (West 1968).

[12] *Id.*

[13] These limitations have been described by Professors Wellington and Winter as the "doctrine of illegal delegation of power." Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1101, 1109 (1969). The authors observed that the doctrine "commands that certain discretionary decisions be made solely on the basis of the judgment of a designated official. *Id.* Any delegation of this authority would be in contravention of the public official's duties, and the grant of power illegal. *Id.* at 1111.

[14] Ch. 123, 1974 N.J. Laws 560 (amending N.J. Stat. Ann. §§ 34:13A-1 to -13 (West 1968)); *see* notes 48–52 *infra* and accompanying text for a discussion of the amendments and their effect on the scope of regulation in New Jersey.

discuss the effect of these decisions on the statute while presenting the history and current status of the scope of negotiations in the public sector of New Jersey.

The original version of the New Jersey Employer-Employee Relations Act,[15] known as the Chapter 303 Law,[16] extended the rights of collective representation to public employees by providing a scheme for mandatory negotiation in the public sector.[17] But perhaps the most significant aspect of this legislation was the establishment of PERC to "[m]ake policy and establish rules and regulations concerning employer-employee relations in public employment relating to dispute settlement, grievance procedures and administration including enforcement of statutory provisions concerning representative election and related matters . . . ."[18] PERC's powers included mediation, recommendation of fact-finding, and the holding of conferences and formal hearings.[19] As a result of the establishment of PERC, the duties of the Commissioner of Education, who was previously given broad power to hear and determine "all controversies and disputes arising under the school laws," were substantially diminished.[20]

In regard to negotiations between public employers and employees, the legislature implicitly limited the Act's scope by au-

---

[15] Ch. 303, 1968 N.J. Laws 891 (current version at N.J. STAT. ANN. § 34:13A-1 to -13 (West 1968 & Cum. Supp. 1979-1980)). In order to enact this bill, the legislature had to override a conditional veto by Governor Richard J. Hughes. *See* Veto Messages of Hon. Richard J. Hughes, Governor of New Jersey 221 (Sept. 10, 1968). This act provided the framework for implementing the applicable provisions of article 1, paragraph 19 of the New Jersey Constitution which provides that:

> Persons in private employment shall have the right to organize and bargain collectively. Persons 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.

N.J. CONST. art. 1, para. 19. In interpreting this section of the constitution, New Jersey courts have consistently held that it does not give public employees the right to strike. *See, e.g., In re* Educ. Ass'n, 117 N.J. Super. 255, 261–62, 284 A.2d 374, 377–78 (App. Div. 1971), *certif. denied*, 60 N.J. 198, 287 A.2d 458 (1972) (holding defendant education association in contempt of court for violating order enjoining strike).

[16] *See, e.g.*, Board of Educ. v. New Jersey Educ. Ass'n, 53 N.J. 29, 46–47 (1968).

[17] This scheme was embodied in section 34:13A-5.3, which requires that the public employer meet with the representative of the public employees and negotiate over "the terms and conditions of employment of the employees in such unit." N.J. STAT. ANN. § 34:13A-5.3 (West Cum. Supp. 1979-1980).

[18] *Id.* For a further discussion of PERC's functions under Chapter 303, see Tener, *supra* note 9, at 64–73.

[19] N.J. STAT. ANN. § 34:13A-5.2 (West Cum. Supp. 1979-1980).

[20] N.J. STAT. ANN. § 18A:6-9 (West Cum. Supp. 1979-1980). *See* notes 53–59 *infra* and accompanying text for a discussion of the Commissioner of Education's duties.

thorizing employers and employees to meet at reasonable times and "negotiate in good faith with respect to grievances and terms and conditions of employment."[21] The only other guideline in the statute concerning the scope of negotiations prohibited modification of any existing agreement or New Jersey statute.[22] Because the legislature did not specifically set forth certain subjects as negotiable under Chapter 303, the courts of New Jersey were left the responsibility of establishing which issues were "terms and conditions" and hence negotiable and which were beyond the scope of negotiation.[23]

The Supreme Court of New Jersey first addressed the issue of what subjects are negotiable under Chapter 303 in *Lullo v. Fire Fighters Local 1066*.[24] The court in *Lullo* was principally concerned with the constitutionality of the Act.[25] Recognizing the distinction between the public and private sectors, the court suggested that there are some areas which were beyond the lawful authority of the public employer to negotiate. The court noted that "[t]he 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."[26] The court, however, failed to specify what specific subjects were nonnegotiable.[27]

In the next set of cases, commonly known as the *Dunellen* Trilogy,[28] the supreme court established the parameters for determining

---

[21] N.J. STAT. ANN. § 34:13A-5.3 (West Cum. Supp. 1979-1980).

[22] *Id.* The statute specifically provided:

> Nothing in this Act shall be construed to annul or modify, or to preclude the removal or continuation of any agreement during its current term 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.

*Id.*

[23] *See, e.g.*, Board of Educ. v. Englewood Teachers Ass'n, 64 N.J. 1, 311 A.2d 729 (1973), where the court noted that, although mentioned in the statute, "[t]he lines [of what constitutes a term and condition of employment] are obscure and, pending further definitive legislation, they must be drawn case by case." *Id.* at 7, 311 A.2d at 732.

[24] 55 N.J. 409, 262 A.2d 681 (1970). In *Lullo*, an employee of the Jersey City Fire Department challenged the selection of the International Association of Fire Fighters as the majority representative of the department, arguing that this selection deprived him of the right to be represented by an organization of his own choice. *Id.* at 420, 262 A.2d at 687. The court found this argument to be unpersuasive, and held that the legislature was allowed to provide for exclusive representation by an employee organization. *Id.* at 430, 262 A.2d at 692.

[25] *Id.* at 430, 262 A.2d at 692.

[26] *Id.* at 440, 262 A.2d at 698.

[27] *Id.* at 441, 262 A.2d at 698. Instead, the court mentioned that a gradual development based upon "decisions both by PERC and the courts awaiting presentation of individual problems" would be in harmony with the legislative intent of the Act. *Id.*

[28] Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 311 A.2d 737 (1973); Burlington County College Faculty Ass'n v. Board of Trustees, 64 N.J. 10, 311 A.2d 733 (1973);

what subjects are negotiable under the Chapter 303 laws. In *Dunellen Board of Education v. Dunellen Education Association*,[29] the court held that a school board's decision to consolidate a local high school's humanities and social studies department's chairmanships did not amount to a negotiable term and condition of employment.[30] Speaking for the court, Justice Jacobs reasoned that the decision to consolidate was "predominantly a matter of educational policy which had no effect, or at most only a remote and incidental effect, on the 'terms and conditions of employment.' "[31] The test established in *Dunellen* to determine if an item is within the category of "terms and conditions" was found to be "those matters which intimately and directly affect the work and welfare" of the teachers' group.[32] Those items which only indirectly affected teachers' working conditions were deemed nonnegotiable and remained decisions to be made by local school boards or state commissions.[33] Expanding these guidelines, the court also declared that matters which "fall exclusively within management's prerogatives . . . would not be subject to compulsory negotiation."[34]

---

Board of Educ. v. Englewood Teachers Ass'n, 64 N.J. 1, 311 A.2d 729 (1973). Although not the first supreme court cases which interpreted the Act, *see, e.g.*, Burlington County Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579, 267 A.2d 533 (1970); Lullo v. Fire Fighters Local 1066, 55 N.J. 409, 262 A.2d 681 (1970), these decisions have become the accepted standard for determining which issues are appropriate for negotiations under Chapter 303. The *Dunellen* Trilogy consists of three separate decisions, all decided on the same day.

[29] 64 N.J. 17, 311 A.2d 737 (1973). For a further analysis of *Dunellen's* impact, see *Scope of Collective Bargaining in Public Education: Defining Terms and Conditions of Employment*, 28 RUT. L. REV. 468 (1974).

[30] 64 N.J. at 31, 311 A.2d at 744.

[31] *Id.* at 29, 311 A.2d at 743.

[32] *Id.* at 25, 311 A.2d at 742.

[33] *Id.* at 31, 311 A.2d at 743. The court in *Dunellen* agreed with a Nebraska supreme court decision, which held that the scope of negotiations does not include matters which were predominantly concerns of educational policy, management prerogatives or statutory duties of the public employer. School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, 774–75, 199 N.W.2d 752, 754 (1972). The management prerogatives mentioned by the court included

> the right to hire, to maintain order and efficiency; to schedule work; to control transfers and assignments; to determine which extra-curricular activities may be supported or sponsored; and to determine the curriculum, class size and types of specialists to be employed.

*Id.* at 784, 199 N.W.2d at 759.

[34] 64 N.J. at 26, 311 A.2d at 741. In the decision, the court also referred to the duties of the Commissioner of Education, finding it illegal to submit to arbitration matters which concerned major educational policy: "so far as our educational laws are concerned, it is equally clear that the Commissioner ha[s] an overall responsibility for supervising such educational determinations . . . and for hearing controversies and disputes with respect thereto as 'arising under the school laws.' " *Id.* at 30, 311 A.2d at 743 (citations omitted).

Applying the *Dunellen* guidelines, the supreme court, in *Burlington County College Faculty Association v. Board of Trustees*,[35] found that control over a college calendar by its board of trustees was a matter of educational policy and therefore beyond the mandatory scope of negotiations.[36] Following the *Dunellen* approach, the court found the college calendar to be an educational policy because of its interrelationship with the budget.[37] Although recognizing the practical effect that a calendar might have on faculty working conditions, the court nevertheless concluded that the board of education had properly refused negotiations and arbitration.[38] As in *Dunellen*, the *Burlington* court held that there was a required category of negotiations, and approved the trustees' decision to negotiate such subjects as compensation, hours and sick leave.[39]

In the final case of the *Dunellen* Trilogy, *Board of Education v. Englewood Teachers Association*,[40] the court expanded the list of negotiable items under Chapter 303 by including working hours and compensation as negotiable terms and conditions of employment.[41] Justice Jacobs authored the unanimous opinion which reversed the lower court's finding that a change in working conditions without compensation did not violate the parties' collective bargaining agreement.[42] The court ruled that the legislature had clearly intended that hours and compensation, along with physical arrangements and

---

[35] 64 N.J. 10, 311 A.2d 733 (1973).

[36] *Id.* at 13, 311 A.2d at 735. The decision in *Burlington* reversed the law division's finding that the Board was required to negotiate the college calendar with the plaintiff's chosen representative. Burlington County College Faculty Ass'n v. Board of Trustees, 119 N.J. Super. 276, 286, 291 A.2d 150, 155 (Law Div. 1972), *rev'd*, 64 N.J. 10, 311 A.2d 733 (1973). In holding the calendar to be subject to mandatory negotiation, the lower court emphasized the calendar's impact in determining the time period of the teacher's performance. *Id.* at 283, 291 A.2d at 153.

[37] 64 N.J. at 13, 311 A.2d at 735.

[38] *Id.* at 16, 311 A.2d at 736. The court also suggested that the Board of Trustees should have considerable influence over the county college's internal affairs. *See* N.J. STAT. ANN. §§ 18A:64-11, -12 (West 1968), which sets forth the powers and the general responsibilities of the Board of Trustees.

[39] 64 N.J. at 14, 311 A.2d at 735.

[40] 64 N.J. 1, 311 A.2d 729 (1973).

[41] *Id.* at 8–9, 311 A.2d at 733. The education association argued that the Board breached the contract when it unilaterally altered the working hours of some teachers, denied reimbursement to a teacher for graduate course tuition and refused to place a teacher on a higher pay scale when that teacher received his master's degree. *Id.* at 4–6, 311 A.2d at 730–31.

[42] *Id.* at 8, 311 A.2d at 733. The court stressed the narrowness of its holding, finding that the contractual "interpretations would directly and most intimately affect the employment terms and conditions of the five individuals involved without affecting any major educational policies." *Id.*

facilities, would be within the scope of terms and conditions, and therefore negotiable and subject to arbitration.[43]

Thus, under the *Dunellen* test, the public employer was required to "negotiat[e] 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."[44] Additionally, even if an item qualified as a term and condition under *Dunellen*, it was deemed to be nonnegotiable if an agreement on it would "contravene any other statute of the State."[45] Furthermore, the court expressed reluctance to expand the scope of negotiations approved in *Dunellen*: "[t]he 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."[46] Although subsequent cases discussed the scope of negotiations under Chapter 303, the *Dunellen* Trilogy established the guidelines that other courts used.[47]

Severely dissatisfied with the restrictive limitations on the scope of negotiations, employee groups lobbied to alter the scope of negotiability in New Jersey.[48] In 1974, the legislature responded by passing Senate Bill No. 1087.[49] The significant changes in regard to

---

[43] *Id.* at 8–9, 311 A.2d at 733.

[44] 64 N.J. at 25, 311 A.2d at 741.

[45] N.J. STAT. ANN. § 34:13A-8.1 (West Cum. Supp. 1979-1980). The statute expressly protects existing provisions of other statutes and thus pre-empts the applicability of the Act.

[46] 64 N.J. at 25, 311 A.2d at 741. It was further held that the court would interpret the Act narrowly until the legislature provided more definitive guidelines. *Id.* Likewise, in *Burlington*, the court found that, absent "clear and distinct" legislative expression, "the sounder judicial course is to hold . . . that the college calendar is not a proper subject of mandatory negotiation. . . ." 64 N.J. at 16, 311 A.2d at 736.

[47] *See, e.g.*, Association of New Jersey State College Faculties v. Dungan, 64 N.J. 338, 316 A.2d 425 (1974) (guidelines from Board of Education on tenure decisions not subject to mandatory negotiation); Rutgers Council v. New Jersey Bd. of Higher Educ., 126 N.J. Super. 53, 312 A.2d 677 (App. Div. 1973) (student facility and college calendar not mandatorily negotiable); Prosecutor's Detectives, Essex County v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 324 A.2d 897 (App. Div. 1974), *certif. denied*, 66 N.J. 330, 331 A.2d 30 (1974) (compensation for overtime is mandatorily negotiable).

[48] *See generally* Dorf, *The New Jersey Employer-Employee Relations Act—How Senate Bill 1087 (Chapter 123) Affects Municipalities*, N.J. MUNICIPALITIES, Jan. 1975. Governor Brendan Byrne's proposal to increase the scope of negotiability in the public sector was introduced as S. 1087, 196th Legis., 1st Sess. (1974).

[49] The final version of the bill was passed by the Senate on June 17, 1974 after the original bill was twice amended. *See* Newark Star Ledger, June 18, 1974, at 1, col. 1. As originally introduced, the bill contained the words "nor shall any provision hereof annul or modify any statute or statutes of this State." N.J. STAT. ANN. § 34:13A-8.1 (West 1968). These words were replaced by the following language:

> 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

negotiability were evidenced in New Jersey Statutes Annotated sections 34:13A-5.3 and 34:13A-8.1. These sections, under which the employee groups hoped to expand the scope of negotiability, contained changes in the grievance procedure mechanism included in the employee's contract and the addition of the word "pension" to the scope of negotiation provision of the statute.[50] In addition, the amendments authorized PERC's primary jurisdiction to determine if a particular subject matter is within the scope of negotiability.[51] As

---

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.

S. 1087, 196th Legis., 1st Sess. 6 (1974). After this version met with considerable controversy, the Senate Conference and Coordinating Committee suggesting this section be replaced with the following management rights clause:

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 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.

*Id.* The Senate voted, however, to delete this language and adopted the present language which Governor Byrne signed into law on October 21, 1974. *See* Newark Star Ledger, Oct. 22, 1974, at 20, col. 2.

[50] The final amended version of the statutes, in pertinent part, reads as follows:

Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance procedures may provide for binding arbitration as a means for resolving disputes. Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organizations shall be utilized for any dispute covered by the terms of such agreement.

N.J. STAT. ANN. § 34:13A-5.3 (West Cum. Supp. 1979-1980) and

Nothing in this act shall be construed to annul or modify, or to preclude the continuation of any agreement during its current term 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.

N.J. STAT. ANN. § 34:13A-8.1 (West Cum. Supp. 1979-1980). This final version of S. 1087 also encountered criticism. *See, Is It Goodbye, Civil Service*?, 97 N.J.L.J. 364 (1974); Hayes, *Some Projected Consequences of Those Amendments*, 97 N.J.L.J. 1002, 1003 (1974).

[51] N.J. STAT. ANN. § 34:13A-5.4(d) (West Cum. Supp. 1979-1980). This statute reads in pertinent part:

these amendments directly involved the statutory language relied on by the New Jersey supreme court in the *Dunellen* Trilogy, they were significant in the further interpretation of the statute.[52]

The first meaningful case which addressed the 1974 amendments was *Red Bank Board of Education v. Warrington*.[53] In *Red Bank*, the teachers' association sought arbitration after the board of education assigned twenty-nine primary level teachers an additional period while the teachers' regular classes were being taught by other teaching specialists.[54] The board argued that this decision involved a management prerogative not subject to negotiation.[55] Initially, the appellate court found "a clear legislative intent [from the 1974 amendments] that disputes over contractual terms and conditions of employment should be solved, if possible, through grievance procedures."[56] Inasmuch as the decision to assign the additional period

---

> 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.

*Id.* For a discussion of PERC's procedure in scope of negotiation matters, see Tener, *supra* note 9, at 633–45.

[52] *See* Association of State College Faculties v. New Jersey Bd. of Educ., 66 N.J. 72, 77, 328 A.2d 235, 237–38 (1974), where the court took notice of the amendments and their importance in light of the *Dunellen* decisions. See also the specific statutory authority relied upon in the *Dunellen* decisions that was amended in 1974. N.J. STAT. ANN. § 34:13A-5.3, 8.1 (West Cum. Supp. 1979-1980).

[53] 138 N.J. Super. 564, 351 A.2d 778 (App. Div. 1976).

In the first opportunity to address the amendments, the appellate division applied the *Dunellen* test to determine that the decision to judge the quality of faculty performance was a management prerogative beyond the scope of negotiations, without addressing the specific statutory charge. Clifton Teachers Ass'n v. Board of Educ., 136 N.J. Super. 336, 339, 346 A.2d 107, 110 (App. Div. 1975).

[54] 138 N.J. Super. at 566, 351 A.2d at 780. The former practice of the board was to give the teachers a free period during this time. *Id.* As this assignment eliminated this period, the teachers' association argued that the collective bargaining agreement had been violated, and requested arbitration as the terminal stage in the grievance procedure. *Id.* The contractual provision provided that "[a]ny matter for which a method of review is prescribed by law or any rule or regulation of the State Commissioner of Education or any matter which according to law is either beyond the scope of Board authority or limited to action by the Board alone." *Id.* (emphasis omitted).

[55] The board alleged that the change was exempt from arbitration as the decision to eliminate the free period was " 'limited to action by the Board alone.' " *Id.* at 568, 351 A.2d at 781 (citation omitted).

[56] *Id.* at 572, 351 A.2d at 783. The court found that the 1974 amendments to sections 8.1 and 5.3 had provided the necessary clarification which the *Dunellen* court had sought. *Id.*

directly affected the teachers' workload, and as such, involved a term and condition of employment, the court reversed the law division and directed the parties to proceed to arbitration in accordance with the contractual provision.[57] Thus, the court extended jurisdiction over grievances concerning negotiable terms and conditions, previously held by the Commissioner of Education under Title 18A,[58] to the arbitrator designated in the collective bargaining agreement. In so holding, the court recognized that the purpose of the 1974 amendment was to alter the court's previous deference to Title 18A.[59]

In *Union County Board of Education v. Union County Teachers' Association*,[60] the court recognized that under certain circumstances Title 18A would preclude the right to negotiate when the subject matter was clearly a management prerogative.[61] Narrowing the applicability of the *Red Bank* decision, the court in *Union County* held that local boards of education were free to reduce their personnel by not renewing contracts made with nontenured teachers.[62] Similarly, in *In re Board of Education*,[63] the appellate division found that "[t]he determination not to renew the contract of a nontenured teacher is a discretionary matter for the local board, and where it results from a reduction in the force there exists no right of reemployment."[64] Basing its finding on the concept of management

---

[57] *Id.* at 574, 351 A.2d at 784. The court, however, was careful to note that the decision involved controversies between teachers and the Commissioner of Education, refusing to consider the 1974 amendment's effect upon disputes between teachers and boards of education. *Id.* at 572, 351 A.2d at 783.

[58] *Id.* at 574, 351 A.2d at 784. In a similar decision, another appellate division court held that the board's right to select candidates for promotions was a managerial prerogative outside the scope of negotiation. Board of Educ. v. North Bergen Fed'n of Teachers, 141 N.J. Super. 97, 357 A.2d 302 (App. Div. 1976). Instead, the court found that the board is permitted to establish its own criteria for promotion even to the point of selecting candidates for advancement outside the school district. The court held that "[t]he board, in seeking the best qualified candidates for promotions, should not be restricted in its search for the faculty of the North Bergen schools." *Id.* at 103, 357 A.2d at 305.

[59] 138 N.J. Super. at 572, 351 A.2d at 783. Although Title 18A appears to be a specific provision, the court preferred to classify it as general, thus negating any possible preemptive effect of Title 18A. *Id.*

[60] 145 N.J. Super. 435, 368 A.2d 364 (App. Div. 1976).

[61] *Id.* at 437–38, 368 A.2d at 365.

[62] *Id.* at 437, 368 A.2d at 365. The court noted that the contract between the board and the teachers' association "contained no provisions whatever for reductions in force" and the reemployment rights of teachers so affected are not visible. *Id.*

[63] *In re* Board of Educ., 150 N.J. Super. 265, 270, 375 A.2d 669, 672 (App. Div.), *certif. denied*, 75 N.J. 525, 384 A.2d 505 (1977).

[64] *Id.* at 270, 375 A.2d at 672. The dispute arose when a school had to be closed for financial reasons and some forty non-tenured teachers were put out of work. *Id.* at 267, 375 A.2d at 670.

discretion, the court found this subject matter to be outside the scope of mandatory negotiability.[65]

Another decision which addressed the amendments' effect upon other laws of the state was *Taureck v. City of Jersey City*.[66] This case involved an action by municipal firemen who sought to obtain credit for prior service with other municipalities which would be a factor in computing their vacation pay, longevity pay, and retroactive backpay.[67] In light of a narrow reading of the 1974 amendments,[68] the court found compensation not to be one of the terms and conditions of employment subject to negotiation within the statute.[69] The court noted that the appellate division had found, in a previous case interpreting the statute, that the ambiguous 1974 amendment could not divest the Civil Service Commission's "traditional and statutory authority over issues affecting the rights of civil service employees including policemen and firemen . . . ."[70]

In *In re Byram Township Board of Education*,[71] the appellate division found that the 1974 amendments did not cut back on the *Dunellen* Trilogy and that PERC should determine the scope of

---

[65] *Id.* at 270, 375 A.2d at 672. In addition, the court held the statutory power to reduce the size of the faculty as found in section 18A:28-9 "cannot be the subject of negotiation or arbitration." *Id.* at 271, 375 A.2d at 672.

[66] 149 N.J. Super. 503, 374 A.2d 70 (Law Div. 1977).

[67] *Id.* at 506–07, 374 A.2d at 71. The plaintiff relied upon section 40A:9-5, which provides that:

> Wherever heretofore or hereafter a transfer has been or shall be effected by appointment, assignment or promotion of a municipal employee to any other department or position in municipal employment, . . . the period of such prior service in said county or municipal employment, for any purpose whatsoever, shall be computed as if the whole period of employment of such employee had been in the service of the department, or in the position, to which the said employee had been transferred.

N.J. STAT. ANN. § 40A:9-5 (West Cum. Supp. 1979-1980). In response, the defendant argued that, as the plaintiff's rights concerning prior service credits are governed solely by the collective bargaining agreement of the parties, any protection afforded by the statute does not apply. 149 N.J. Super. at 507–08, 374 A.2d at 72.

[68] 149 N.J. Super. at 517, 374 A.2d at 76.

[69] *Id.* at 513, 374 A.2d at 74. More precisely, the court found that the benefits afforded by Title 40A could not be waived by the parties in a collective bargaining agreement: "[a]n employee is clothed with these rights prior to his representatives' engagement in any collective bargaining." *Id.* at 513–14, 374 A.2d at 74. *See* N.J. STAT. ANN. § 40A:9-5 (West Cum. Supp. 1979-1980).

[70] 149 N.J. Super. at 519, 374 A.2d at 77 (citing Patrolmen's Benevolent Ass'n v. Elizabeth, 146 N.J. Super. 257, 369 A.2d 931 (App. Div. 1977)). Since the court found the Title 40A statute to control, the plaintiffs were granted the rights and benefits claimed. 149 N.J. Super. at 522, 374 A.2d at 79.

[71] 152 N.J. Super. 12, 377 A.2d 745 (App. Div. 1977).

negotiability on a case-by-case basis.[72] The *Byram Township* court stated that the 1974 amendments "do not reflect a legislative design to deprive boards of education of their exclusive managerial prerogative in matters involving predominantly educational policies."[73] It agreed with all but two of PERC's determinations of negotiability,[74] finding reporting procedures,[75] performance of nonteaching duties,[76] matters relating to work loads,[77] posting of vacancies,[78] and the establishment of facilities for teachers[79] to be terms and conditions of employment, subject to negotiation and ultimately arbitration.

The final appellate division decision involving the 1974 amendments prior to the Supreme Court of New Jersey's major pronouncements in 1978 was *Board of Education v. Piscataway Maintenance & Custodial Association*.[80] In *Piscataway*, the court held that the general provisions of the amendment should yield to specific sections of the Education Law that dealt with the same subject.[81] In finding

---

[72] *Id.* at 18–19, 377 A.2d at 749. The parties sought to determine if certain matters were within the scope of mandatory negotiation by filing a petition with PERC, pursuant to section 34:13A-5.4(d). *Id.* at 16, 377 A.2d at 747. *See* note 51 *supra*.

[73] 152 N.J. Super. at 21, 377 A.2d at 750. The court found that the 1974 amendments did not render the *Dunellen* Trilogy obsolete. *Id.* at 22, 377 A.2d at 750.

[74] *Id.* at 24–27, 377 A.2d at 752–53. The court suggested that PERC's administrative judgment pertaining to negotiability should be respected, unless the determination is arbitrary or capricious. *Id.* at 23–24, 377 A.2d at 751. In this case, the court reversed PERC's determination that a contractual provision granting teachers a duty-free lunch period, except in emergencies, was a negotiable term and condition of employment. *Id.* at 24–25, 377 A.2d at 752. In addition, the court found that the determination for deciding criteria for promotions was a matter of "major educational policy" beyond the scope of negotiation, contrary to PERC's interpretation construing the proposals as steps to be followed in filling vacancies. *Id.* at 27, 377 A.2d at 753.

[75] *Id.* at 25, 377 A.2d at 752.

[76] *Id.* at 25–26, 377 A.2d at 752.

[77] *Id.* at 25, 377 A.2d at 752. In this context, the court cited *Board of Educ. v. Englewood Teachers Ass'n* which found working hours and compensation to "[s]urely [be] . . . terms and conditions of employment within the contemplation of the Employer-Employee Relations Act." Board of Educ. v. Englewood Teachers Ass'n, 64 N.J. 1, 6–7, 311 A.2d 729, 731 (1973).

[78] 152 N.J. Super. at 26, 377 A.2d at 753.

[79] *Id.* at 27–30, 377 A.2d at 753–54. These proposals included an air-conditioned work area, a private pay phone, clean rest rooms with a full-length mirror and adequate off-street parking facilities for the exclusive use of the faculty. *Id.* at 28, 377 A.2d at 754.

[80] 152 N.J. Super. 235, 377 A.2d 938 (App. Div. 1977). Judge Seidman, who authored this opinion, also wrote the *Red Bank* and *In re Byram Twp. Bd. of Educ.* decisions, discussed at notes 52–58, 68–76 *supra* and accompanying text.

[81] 152 N.J. Super. at 247–49, 377 A.2d at 944–45. A specific section of Title 18A, concerning the procedure that the board was to follow in the case of an absence which exceeded the annual sick leave of an individual employee stated that:

> the board of education *may* pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, *for such length of time as may be determined by the board of education in each individual case*. A day's salary is defined as 1/200 of the annual salary.

that the payment of salary for prolonged absence beyond allowable sick leave was a matter left to the discretion of local boards of education and not subject to negotiation,[82] the court determined that the legislature, in adopting Chapter 303, "did not contemplate that local boards of education could or would abdicate their statutorily imposed management responsibilities."[83] Thus, it was concluded that the judiciary was to decide "on a case-by-case basis how the statutes [title 18 and the 1974 amendments] may co-exist harmoniously."[84]

As indicated above, the courts at this time demonstrated an unwillingness to expand the impact of the 1974 amendments by generally reaffirming the *Dunellen* test for negotiability.[85] PERC, however, acting on a suggestion in both *Dunellen* and *Burlington* as to the existence of a permissive category of negotiations,[86] expanded these categories by developing a tripartite test to determine whether a particular matter was within the scope of negotiations. PERC classified a subject as a mandatorily negotiable term and condition of employment, a nonnegotiable management prerogative, or, a permissive subject for negotiations.[87] A permissive subject was viewed

---

N.J. STAT. ANN. § 18A:30-6 (West 1968) (emphasis added). The board argued that this section, along with section 18A:30-7, precluded negotiations in this area. 152 N.J. Super. at 239, 377 A.2d at 940. In opposition, the association argued that the statutes supply the board with "discretionary authority" and do not act as a complete bar to negotiation. *Id.*

[82] 152 N.J. Super. at 249, 377 A.2d at 945. The court conceded that "sick leave or other leaves of absence are matters that directly and intimately affect the terms and conditions of employment," but are nonetheless non-negotiable because of their effect on major educational policy. *Id.* at 243–44, 377 A.2d at 943.

[83] *Id.* at 246, 377 A.2d at 944. The court emphasized that the individual was still entitled to sick leave compensation pay, but only *"for such length of time as may be determined by the board of education in each individual case." Id.* (emphasis in original).

[84] *Id.* at 247, 377 A.2d at 945. Again the court refused to view the 1974 amendments as constituting the " 'strong qualifying statement' " that the supreme court requested in *Dunellen* to give a different interpretation of the statute. *Id.* (citation omitted).

[85] Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 31, 311 A.2d 737, 744 (1973); Burlington County College Faculty Ass'n v. Board of Trustees, 64 N.J. 10, 14, 311 A.2d 733, 735 (1973).

[86] Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 32, 311 A.2d 737, 744 (1973); Burlington County College Faculty Ass'n v. Board of Trustees, 64 N.J. 10, 16, 311 A.2d 733, 736 (1973).

[87] *See* N.J. ADMIN. CODE § 19:13-3.7 (1977), codifying PERC's tripartite scheme, which is nearly the same as that used by the NLRB in the private sector. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348–50 (1958). In this case, Justice Burton, speaking for five members of the Court, found that a permissive category of negotiations existed in the private sector in which "each party is free to bargain or not to bargain, and to agree or not to agree." 356 U.S. at 349. The classification of a subject is significant as the duties and obligations of the employer and employee differ according to which category the subject falls under. *Id.*

as one that the parties may negotiate, although negotiating to the point of impasse was not required, as would be the case in a mandatorily negotiable term and condition of employment.[88] Parties would be free to negotiate on permissive subjects and incorporate any agreement upon areas of concern into the contract.[89] Although there was no explicit support for the creation of a permissive category in the 1974 amendments,[90] PERC determined the following items to be included as permissive subjects for negotiation; selection of school administrators,[91] teacher evaluation criteria,[92] qualifications for hiring,[93] and involuntary teacher transfers.[94] Until the Supreme Court of New Jersey's decision in *Ridgefield Park Education Association v. Ridgefield Park Board of Education*,[95] there was judicial silence concerning the permissive classification, suggesting a sanctioning of PERC's tripartite scheme.[96]

*The Supreme Court's Response:* State Supervisory Employees Association *and* Ridgefield Park

In *State v. State Supervisory Employees Association*,[97] Justice Pashman, speaking for a unanimous court, specifically addressed the issue of how the 1974 amendment to section 34:13A-8.1 affected the

---

[88] Bridgewater-Raritan Regional Bd. of Educ., 3 N.J.P.E.R. 23, 24 (1976). In this case, PERC held that the decision not to renew the contract of a nontenured teacher constituted a major educational policy, but could be permissively negotiated by the parties. *Id.*

[89] *Id.* If one party decided, however, not to negotiate on a permissive subject, that party could not be forced to negotiate to the point of impasse. In fact, a charge of refusing to negotiate in good faith could be brought against either party who was to insist, to the point of impasse, as to the inclusion of a permissive subject in contract negotiations. City of Jersey City, 3 N.J.P.E.R. 66, 68 (1977).

[90] *See* Local 195, International Fed'n of Professional & Technical Eng'rs, 3 N.J.P.E.R. 116 (1977), *rev'd sub nom.* State v. State Supervisory Employees, 78 N.J. 54, 393 A.2d 233 (1978), in which PERC, although unable to produce the specific legislative history to support its position, found that the 1974 amendments were a legislative response to *Dunellen's* suggestion that a permissive category of negotiations could exist between employers and employees. *Id.* at 121.

[91] Rutgers, The State University, 2 N.J.P.E.R. 13 (1976).

[92] Ridgefield Park Bd. of Educ., 3 N.J.P.E.R. 303 (1977), *rev'd sub nom.* Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 393 A.2d 278 (1978).

[93] Byram Township Bd. of Educ., 2 N.J.P.E.R. 143 (1976), *modified*, 152 N.J. Super. 12, 377 A.2d 745 (App. Div. 1977).

[94] Ridgefield Park Bd. of Educ., 3 N.J.P.E.R. 319 (1977), *rev'd sub nom.* Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 393 A.2d 278 (1978).

[95] 78 N.J. 144, 393 A.2d 278 (1978).

[96] *See In re* Byram Twp. Bd. of Educ., 152 N.J. Super. 12, 377 A.2d 745 (App. Div. 1977), which held that PERC, as the administrative agency charged with implementing the Act, should be afforded " 'a broad and flexible latitude of interpretation of the statute. . . .' " *Id.* at 23, 377 A.2d at 751.

[97] 78 N.J. 54, 393 A.2d 233 (1978).

scope of collective negotiations in the public sector of New Jersey.[98] Fearful for their job security because of large-scale layoffs of union members at the Department of Transportation,[99] Local 195 of the International Federation of Professional and Technical Engineers (IFPTE) and Local 518 of the Service Employees International Union (SEIU) sought to negotiate their seniority rights with respect to layoffs, recall, bumping, and re-employment with the State before the contract expired on June 30, 1975.[100] The State, arguing that these issues involved managerial prerogatives that were controlled by specific Civil Service statutes, refused to negotiate. After filing a joint petition for a scope of negotiations determination with PERC,[101] PERC ordered the State to negotiate seniority as it relates to layoffs, recall, bumping, and re-employment rights.[102] The supreme court granted the State's motion for direct certification after both the State and the Locals appealed PERC's determination to the appellate division.[103]

In the accompanying appeal before the court,[104] the Association requested approval to negotiate proposals relating to the examination process, promotion, and evaluation layoff procedures utilized by the Civil Service Commission.[105] After the State refused to negotiate these matters,[106] the parties filed a joint petition for certification with

---

[98] *Id.* at 60, 393 A.2d at 236. The court was also concerned with the validity of negotiations on hiring and promotional procedures, as such negotiation could potentially be precluded by article VII, section one, paragraph two of New Jersey's constitution, which provides that appointments and promotions be based on "a merit and fitness system." *Id.*

[99] *Id.* at 60–61, 393 A.2d at 236.

[100] *Id.*

[101] *Id. See* note 51 *supra*.

[102] 78 N.J. at 63, 393 A.2d at 236–37. PERC found that the amendments worked a limited expansion of the scope of negotiations, noting that the amendments

> mean[t] that general statutes giving authority to employers are not to be read as shields to the employer's obligation to negotiate regarding terms and conditions of employment, but specific statutes governing terms and conditions of employment cannot be abrogated by collective negotiations.

*Id.* at 62, 393 A.2d at 237 (citations omitted). As the items in question were not governed by a specific statute, PERC found them to be negotiable. *Id.* at 63, 393 A.2d at 237.

[103] 76 N.J. 231, 386 A.2d 856 (1978). The case consists of two separate appeals: first, *State v. Local 195, Int'l Fed. of Professional & Technical Engineers* and second, *State v. State Supervisory Employees Ass'n.*

[104] State v. State Supervisory Employees Ass'n, 78 N.J. at 63, 393 A.2d at 237.

[105] *Id.* at 62, 393 A.2d at 236. These proposals included provisions for the procedure concerning eligibility and the elements of the promotional and competitive examination for state employees, as well as the procedure and effect of layoffs on employees. 78 N.J. at 63–64, 393 A.2d at 237–38.

[106] *Id.* The state argued that all the proposals "concern[ed] fundamental managerial policies entrusted by the Legislature to the Civil Service Commission." *Id.* at 64, 393 A.2d at 238.

PERC.[107] PERC relied on its holding in *Local 195* that the parties must negotiate these items.[108] After the parties appealed PERC's decision to the appellate division, the supreme court granted certification of this case and consolidated it with the appeal of Local 195 and Local 518.[109]

In authoring the *State Supervisory Employees Association* decision, Justice Pashman analyzed the various interpretations concerning the effect of the 1974 amendment to section 34:13A-8.1.[110] Noting that the "1974 amendment to N.J.S.A. 34:13A-8.1 is ambiguous and the legislative intent is less than clear,"[111] Justice Pashman agreed

---

[107] *See* N.J. ADMIN. CODE § 19:12-2.1, where PERC is authorized to make such determinations. *See* notes 18–20 *supra* and accompanying text.

[108] PERC found that "[t]he instant parties will be required to negotiate regarding terms and conditions of employment within the framework of the lawful authority of the public employer." 3 N.J.P.E.R. at 138, 141 (1977). The only proposals that PERC found to be non-negotiable were: the one providing that "[p]romotional examinations must be administered within ninety (90) days of the provisional appointment of an employee" and the proposal that "[t]he State shall eliminate any employee rating other than 'satisfactory' or 'unsatisfactory.' " 78 N.J. at 64, 393 A.2d at 238. PERC held that these items "did not involve terms and conditions of employment." *Id.* at 65, 393 A.2d at 238.

[109] 76 N.J. 231, 386 A.2d 856 (1978). The court, however, denied the state's motion for consolidation of these cases with the appeals in Englewood Teachers Ass'n v. Englewood Educ. Ass'n, 75 N.J. 525, 384 A.2d 505 (1978) and Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 393 A.2d 278 (1978).

[110] 78 N.J. at 72–79, 393 A.2d at 242–45. The court analyzed the amendment in terms of three views on the addition of the word "pension" to section 34:13A-8.1. First, the court reviewed PERC's interpretation, which provided "that while proposals concerning terms and conditions of employment are mandatorily negotiable, the parties may agree only to contractual terms which are within the minima and maxima set by specific statutes." 78 N.J. at 72, 393 A.2d at 242. In short, PERC felt that specific statutes always pre-empted any negotiated agreement on the same subject. *Id.* Second, the court analyzed the state's view of the amendment, which was that it had "no effect whatsoever on the Dunellen trilogy" as it was not clothed in the " 'clear and distinct phraseology' " which *Dunellen* mandated. *Id.* at 75, 393 A.2d at 243. Finally, the court analyzed the Local's view, under which "only negotation concerning matters covered by pension statutes" were non-negotiable, with every other item being within the scope of negotiation. *Id.* at 77, 393 A.2d at 244.

[111] *Id.* at 79, 393 A.2d at 245. The court rejected the state's narrow interpretation of the statute after reviewing the intense legislative battle over the addition of the word "pension." In addition, the court concluded that section 11:5-1(f), which directs the Civil Service Commission to "establish procedures for maintaining adequate employer-employee relations," N.J. STAT. ANN. § 11:5-1(f) (West Cum. Supp. 1979-1980), "would automatically preclude the negotiability of all items within its scope" if such a view was accepted. 78 N.J. at 76, 393 A.2d at 244. To find such a legislative intent, the court concluded, "is at best unrealistic." *Id.* The court also rejected the expansive interpretation of the Locals, noting that such a finding:

> would permit total diversity in the terms and conditions of employment for each public employee negotiating unit in the State. Matters now governed by specific statute would be regulated only by the negotiated agreement of the public employer and the majority representative. Civil Service statutes and regulations could be abrogated entirely if the parties so agreed. Areas where state-wide unifor-

with PERC's view that a "negotiated agreement with respect to matters beyond the lawful authority of the public employer is impermissible."[112] The court differentiated between specific and general statutes and found that a negotiated agreement which contravened a specific statute would exceed the employer's authority and would hence be unenforceable and illegal.[113] Mandatory negotiations may occur, however, in regard to a general statute "over particular terms and conditions of employment as to which the Civil Service Commission could have but has not enacted preemptive regulations."[114] Thus, the court solved the dilemma of establishing the effect of the 1974 amendment on the scope of negotiations in New Jersey by permitting negotiations regarding terms and conditions of employment except when a specific statute established nonnegotiable terms and conditions of employment.[115] In addition, the court found that "[w]here a statute sets both a maximum and a minimum level of employee rights or benefits, mandatory negotiation is required concerning any proposal for a level of protection fitting between and including such maximum and minimum."[116] The court reasoned that its holding was in accord with the practices in the field and that when a matter is specifically exempted by a Civil Service regulation, the party's best remedy "is to seek a modification of such regulation through the administrative process, . . . [and] even petition the Legislature where a particular term and condition of employment is controlled by a statute with which they disagree."[117]

---

> mity has been deemed a necessity would simply break down into a mass of confusion.

*Id.* at 79, 393 A.2d at 245.

[112] 78 N.J. at 79, 393 A.2d at 245. The court, however, was aware of the legislative struggle for the change and noted that "the 1974 amendment to N.J.S.A. 34:13A-8.1 was not an empty gesture." *Id.* at 80, 393 A.2d at 246.

[113] *Id.* at 81–82, 393 A.2d at 246–47. The court found that "[i]t must be emphasized . . . that the adoption of any specific *statute* or *regulation* setting or controlling a particular term or condition of employment will preempt any inconsistent provision of a negotiated agreement governing that previously unregulated matter." *Id.* at 81, 393 A.2d at 246 (emphasis in original).

[114] *Id.* at 80–81, 393 A.2d at 246. For example, the court noted that:

> [t]here are many areas in which the (Civil Service) Commission has not sought to comprehensively regulate the terms and conditions of public employment . . . . The Legislature has determined that collective negotiation concerning such nonregulated terms and conditions of public employment should be mandatory and any negotiated agreement thereon valid.

*Id.*

[115] *Id.* at 81–82, 393 A.2d at 246.

[116] *Id.* at 82, 393 A.2d at 247.

[117] *Id.*

In the remainder of the opinion, the court considered the various issues in dispute.[118] In the case of Local 195, the court found that the possibility of seniority as it relates to layoffs, recalls, bumping, re-employment, and reinstatement rights was preempted by specific statute and regulation.[119] Even though it was conceded that the subjects all related to terms and conditions of employment, since "[n]othing more directly and intimately affects a worker than the fact of whether or not he has a job,"[120] the court nevertheless found the Civil Service regulations to preempt their negotiability and therefore reversed PERC's findings.[121]

As for the issues raised by the State Supervisory Employees Association, the court again found all of the items to constitute terms and conditions of employment, but generally disagreed with PERC concerning their negotiability, finding the issues to be controlled by administrative regulations.[122] These issues included matters concerning layoffs,[123] promotional procedures,[124] and competitive tests.[125]

---

[118] In addition, the court outlined the correct procedure that is to be followed in these scope of negotiations proceedings, noting that "PERC is the forum for the initial determination of whether a matter in dispute is within the scope of collective negotiations" pursuant to the authority of section 34:13A-5.4(d). 78 N.J. at 83, 393 A.2d at 247. *See* note 51 *supra*.

[119] 78 N.J. at 84, 393 A.2d at 248. The specific statutes and regulations relevant to this case were: N.J. STAT. ANN. § 11:13-2 (West 1976) (concerning computation of seniority credits to determine layoffs); N.J. STAT. ANN. § 11:15-9 (West 1976) (concerning reemployment rights); and N.J. STAT. ANN. § 11:15-10 (West 1976) (concerning reinstatement rights). In addition, the court found that the administrative regulations promulgated pursuant to these sections, such as section 4:1-16.3 (concerning layoff procedures) of the New Jersey Administrative Code, also preempted regulations in these areas. 78 N.J. at 84–86, 393 A.2d at 248–49. PERC viewed such regulations as not having the pre-emptive effect of a statute. *Id.*

[120] 78 N.J. at 84, 393 A.2d at 248.

[121] *Id.* at 86–87, 393 A.2d at 249. Again, the key difference between the court's holding and PERC's determination is the different perception of Civil Service regulations. PERC found that such regulations do not preempt the negotiability of a certain topic, while the court found that "there is nothing upon which the parties could agree concerning these matters, as they are comprehensively regulated by statute and Civil Service rule." *Id.*

[122] *Id.* at 87–98, 393 A.2d at 249–55.

[123] *Id.* at 87–90, 393 A.2d at 249–51. Some of the procedures for layoffs were controlled by sections of the New Jersey Administrative Code, and hence no agreement could be made without contravening a regulation. 78 N.J. at 87, 373 A.2d at 249. For example, N.J. ADMIN. CODE § 4:16(3)(b) recognizes state service as the sole factor to be considered in determining layoffs. *Id.*

[124] In reaching this issue, the court distinguished between promotional criteria, such as qualifications for a position, and promotional procedures, such as the posting of notice of vacancies for certain positions. In finding the former to be not mandatorily negotiable and the latter to be so, the court again emphasized the preemptive effect of administrative guidelines and overturned PERC's findings as to a proposal's negotiability. 78 N.J. at 92–93, 393 A.2d at 252.

[125] *Id.* at 94–96, 393 A.2d at 253–54. Although finding that these proposals "intimately and directly affects employees," the court held that negotiations on the procedure and eligibility for

In *Ridgefield Park Education Association v. Ridgefield Park Board of Education*, another case concerning the scope of negotiations, decided the same day as *State Supervisory Employees Association*,[126] the supreme court considered whether the 1974 amendments to the Act "created a class of permissively negotiable matters which, while not qualifying as mandatorily negotiable terms and conditions of employment, are nevertheless negotiable on a voluntary basis."[127] Teachers in the Ridgefield Park school district had been either involuntarily reassigned grades or courses or had been transferred to other schools in the district.[128] The Association had filed grievances for all teachers so affected.[129] After having the board deny these grievances, the Association filed for binding arbitration of their grievances, pursuant to their contractual agreement.[130] The chancery division judge ordered the parties to proceed to arbitration.[131] After filing for a scope determination and having PERC hold that the matters were negotiable and arbitrable,[132] the supreme court granted certification.[133]

---

such tests remained a managerial prerogative not subject to negotiation. *Id.* at 95, 393 A.2d at 253.

[126] 78 N.J. 144, 393 A.2d 278 (1978).

[127] *Id.* at 149, 393 A.2d at 280. The court again was concerned with PERC's expansive interpretation of the 1974 amendments by noting that "[t]he Public Employment Relations Commission (PERC) has concluded that such a permissive category indeed exists." *Id.*

[128] *Id.* at 149–50, 393 A.2d at 280–81. Both parties agreed that no factual dispute existed in this case. *Id.*

[129] *Id.* On the day after its decision in *Ridgefield Park*, the court delivered an opinion that outlined the correct procedure that is to be followed in determining the means of resolving a grievance, as was the case in *Ridgefield Park*. In Township of West Windsor v. PERC, 78 N.J. 98, 393 A.2d 255 (1978), Justice Pashman found that the amendments to the statute made "the scope of mandatory grievability . . . [the] substantial equivalent to the scope of mandatory negotiability." *Id.* at 107, 393 A.2d at 259. The only difference in the mechanism of the two systems that the court found was that an alleged conflict of a statute and a particular grievance procedure does not preclude the grievability of a dispute, as it would in the scope of negotiations finding. 78 N.J. at 149–50, 393 A.2d at 280–81.

[130] *Id.* at 151, 393 A.2d at 282. The contract defined a grievance as:

> [T]he term, "grievance," means a complaint by an employee, group of employees, or the Association, that, as to him, there has been an inequitable, improper, or unjust application, interpretation, or violation of a policy, agreement, or administrative decision.

78 N.J. at 149–50, 393 A.2d at 280. In addition, the collective bargaining agreement provided for binding arbitration as the final stage in the grievance procedure. *Id.*

[131] *Id.* at 151, 393 A.2d at 281. An adverse opinion against the Board of Education for an order enjoining arbitration of the grievances was filed on March 4, 1977. *Id.*

[132] *Id.* PERC relied on its decisions in Bridgewater-Raritan Regional Bd. of Educ., 3 N.J.P.E.R. 23 (1976) and Board of Educ. of City of Trenton, 2 N.J.P.E.R. 351 (1976) which "mandated a conclusion that the matters in issue, though permissive and not mandatorily negotiable would be arbitrable if otherwise within the contractual arbitration clause." *Id.*

[133] 75 N.J. 584, 384 A.2d 815 (1977). The supreme court granted direct certification while the case was pending in the appellate division. In addition, the court consolidated this case with

Before reaching the merits of the case, the court outlined the correct procedure to be followed when seeking to determine the negotiability and ultimate arbitrability of a topic.[134] It noted that "[w]hen one party claims that a given dispute is arbitrable under the contract and the other party resists arbitration, the party desiring arbitration should seek an order from the superior court compelling arbitration."[135] The court also affirmed PERC's primary jurisdiction to determine if a particular issue is within the scope of negotiations.[136] If PERC finds that a matter is not within the scope of negotiation, it is not arbitrable.[137] If it is negotiable, the matter can proceed to arbitration, where "the arbitrator will reach the merits and render an award."[138] The decision of the arbitrator can be confirmed in the superior court if one of the parties does not abide by it.[139]

Justice Pashman, writing for a majority of the court, initially reaffirmed the *Dunellen* test for negotiable terms and conditions of employment and found teacher transfers to be a negotiable term and condition.[140] Nevertheless, as its negotiability "would significantly interfere with a public employer's discharge of inherent managerial responsibilities," the court found it not to be mandatorily negotiable.[141]

---

the pending appeal in Englewood Teachers Ass'n v. Englewood Bd. of Educ., 75 N.J. 525, 384 A.2d 505 (1978).

[134] Concerned with the incorrect procedures followed by the parties in this case, the court outlined the correct procedure that is to be followed in any dispute over arbitrability, noting the district functions of PERC, the superior court and the arbitrator. 78 N.J. at 153–56, 393 A.2d at 282–83.

[135] *Id.* at 153, 393 A.2d at 282. If the judge decides that the matter does not involve contractual arbitrability, he should not make a decision on the scope of negotiability. *Id.* at 153–54, 393 A.2d at 282.

[136] *Id.* at 154, 393 A.2d at 282. The court emphasized the limited scope of PERC, affirming PERC's determination that scope of negotiations questions are all that PERC is authorized to handle pursuant to section 34:13A-54(d). *Id.*

[137] *Id.* at 154, 393 A.2d at 283. The court also approved PERC's authority to suspend arbitration during scope of determinations and PERC's power to issue an injunction when it determines that a matter is outside the scope of negotiations. *Id.* at 154–55, 393 A.2d at 283. *See also* N.J. STAT. ANN. § 34:13A-5.4(f) (West Cum. Supp. 1979-1980), which authorizes PERC to make such a determination.

[138] 78 N.J. at 155, 393 A.2d at 283.

[139] *Id.* Likewise, the court authorized an appeal directly to the appellate division when a party disagrees with PERC's determination. *Id.*

[140] *Id.* at 156, 393 A.2d at 283–84 (citing State v. State Supervisory Employees Ass'n, 78 N.J. at 67, 393 A.2d at 239, discussed in notes 94–122 *supra* and accompanying text). Using the phraseology of two of the *Dunellen* cases, the court noted that negotiable terms and conditions of employment are "those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogative pertaining to the determination of governmental policy." *Id.* at 156, 393 A.2d at 283–84.

[141] 78 N.J. at 156, 293 A.2d at 283–84. The court emphasized the potential effect that such negotiations could have upon personnel policy, which is essential "to promote the overall goal of

Justice Pashman then considered the arguments of PERC as to why a permissive category of negotiations existed.[142] Initially, PERC pointed out that in adopting the 1974 amendments, the legislature had also created a commission to study and make recommendations on public sector collective negotiations and thereby implicitly approved permissive negotiation.[143] The court, however, stated that legislative authorization of permissive topics of arbitration was not indicated by the mere establishment of the committee, and certainly did not provide the " 'clear and distinct phraseology' " necessary to justify a change of the law that the court had announced in *Dunellen*.[144]

In another argument, PERC cited the recently enacted Police and Firemen Interest Arbitration Act,[145] which specifically authorizes a permissive category of negotiations.[146] This argument was found to be unpersuasive to the court for a number of reasons. First, the court noted that the constitutionality of interest arbitration on permissive topics remained a separate question which the court did not need to address at that time.[147] In addition, the court found that the legislature's need to include the permissive category in that statute lends credence to the argument that such a category would not exist unless it was specifically provided for other employees.[148]

---

providing all students with a thorough and efficient education." *Id.* This rationale originates from the aforementioned illegal delegation theory discussed in note 2 *supra* and accompanying text.

[142] *Id.* at 157–62, 393 A.2d at 284–87.

[143] *Id.* at 157, 393 A.2d at 284–85. The commission was directed to determine if

> [i]t is necessary and desirable either to define the phrase 'terms and conditions of employment' as used in section 7 of the 1968 act [N.J. STAT. ANN. § 34:13A-5.3] and, in so doing, specify what subjects are mandatory, voluntary or illegal within the scope of bargaining or of grievance arbitration, or to require that procedural guidelines be established for determining the same. . . .

L. 1974, c.124 § 3(c).

[144] 78 N.J. at 157, 393 A.2d at 284.

[145] N.J. STAT. ANN. § 34:13A-14 to -21 (West Cum. Supp. 1979-1980).

[146] 78 N.J. at 158, 393 A.2d at 284. The sections which permit such permissive negotiation provide that:

> Factfindings shall be limited to those issues that are within the required scope of negotiations unless the parties to the factfinding agree to factfinding on permissive subjects of negotiation.
>
> Arbitration shall be limited to those subjects that are within the required scope of collective negotiations, except that the parties may agree to submit to arbitration one or more permissive subjects of negotiation.

N.J. STAT. ANN. §§ 34:13A-16(b), 16(f)(4) (West Cum. Supp. 1979-1980). These portions of the statute, however, specifically applied to only police and firemen. *See* N.J. STAT. ANN. § 34:13A-16(a) (West Cum. Supp. 1979-1980).

[147] 78 N.J. at 158, 393 A.2d at 285.

[148] *Id.*

PERC further argued that years of private sector precedent upheld the existence of a permissive category.[149] The court found that, while private sector precedent should guide the interpretation of the PERC law regarding unfair labor practices, "this is not true with respect to the scope of negotiability."[150] Justice Pashman "specifically caution[ed] PERC and the appellate division of the limited relevance of private sector precedents with respect to scope-of-negotiations determinations."[151]

Finally, PERC argued that, by expanding the scope of grievable subjects, the 1974 amendment indicated that a category of permissive topics existed.[152] The court stated that the scope of grievability was defined by the scope of negotiability, not vice versa.[153] In other words, it was determined that the first task is to define negotiability and from that determination will flow the scope of grievability.[154]

The court concluded that PERC's emphasis on the 1974 amendments ignored significant sections of the *Dunellen* Trilogy that involved "more fundamental, constitutionally-rooted considerations of policy" going beyond mere statutory interpretation.[155] For example, in the last section of the opinion, Justice Pashman described the serious problems posed by the existence of a permissive category of negotiable topics:

---

[149] *Id.* The court specifically referred to NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, discussed at note 87 *supra*, in which the United States Supreme Court considered the viability of a permissive category of negotiations in the private sector.

[150] 78 N.J. at 159 n.2, 393 A.2d at 285 n.2.

[151] *Id.* The court emphasized the legislative intent to limit the relevance of federal precedents in public sector scope of negotiations proceedings, citing *Lullo v. Fire Fighters Local 1066* stating:

> It is crystal clear that in using the term "collective negotiations" [as opposed to the NLRA's "collective bargaining, see 29 U.S.C. § 157 (1971)] the Legislature intended to recognize inherent limitations on the bargaining power of public employer and employee, . . . [and] signified an effort to make public employers and employees realize that the process of collective bargaining as understood in the private employment sector cannot be transplanted into the public service.

78 N.J. at 159, 393 A.2d at 285 (quoting Lullo v. Fire Fighters Local 1066, 55 N.J. 409, 440, 262 A.2d 681, 698 (1970)).

[152] 78 N.J. at 159–60, 393 A.2d at 285. PERC reasoned that, as the 1974 amendment to section 34:13A-5.3 "mandates that grievance procedures negotiated by the parties supersede any mechanism for the resolution of disputes provided by any statute," a permissive category was intended by the legislature. *Id.* at 159–60, 393 A.2d at 285.

[153] *Id.*

[154] *Id.* The court also rejected PERC's argument in this instance as Justice Pashman found that PERC overlooked significant policy considerations relied on by the court in the *Dunellen* trilogy. *Id.*

[155] *Id.* at 160–61, 393 A.2d at 286. The court was concerned that negotiation in all areas which affect terms and conditions of public employment would be inconsistent with the legislative mandate of "community involvement in educational decisions" which is mandated by section 18A:7A-2. *Id.* at 161, 393 A.2d at 286.

> [T]he very foundation of representative democracy would be endangered if decisions on significant matters of governmental policy were left to the process of collective negotiations, where citizen participation is precluded. This Court would be most reluctant to sanction collective agreement on matters which are essentialy managerial in nature, because the true managers are the people. Our democratic system demands that governmental bodies retain their accountability to the citizenry.[156]

Thus, the court reaffirmed the *Dunellen* Trilogy by holding that there are only two categories of topics in public sector negotiations—required and illegal.[157] The Ridgefield Park Board of Education had acted in excess of its authority by agreeing to a contract provision limiting its managerial prerogatives regarding teacher transfers.[158] The clause, therefore, was invalid and unenforceable.[159]

In a separate dissent and concurrence, Judge Conford agreed with PERC that the 1974 amendments were intended to create a permissive class of negotiations.[160] Judge Conford believed, however, that although a public employer may negotiate such permissive items,[161] "it may not agree to binding arbitration of a dispute with respect to a negotiated item if so doing would transfer the making of an inherent managerial decision from a governmental official to an arbitrator."[162] As such a transfer of power would occur in this case, Judge Conford agreed with the majority that arbitration of teacher transfers and reassignments should be permanently enjoined.[163]

---

[156] *Id.* at 163, 393 A.2d at 287.

[157] *Id.* at 162, 393 A.2d at 287. The court recognized the potential for legislative change in this area and found that:

> The Legislature is of course free to exercise its judgment in determining whether or not a permissive category of negotiation is sound policy. We wish merely to point out the careful consideration of the limits which our democratic system places on delegation of government powers is called for before any such action is taken.

*Id.* at 165–66, 393 A.2d at 288–89.

[158] *Id.* at 166, 393 A.2d at 289.

[159] *Id.*

[160] *Id.* at 167, 393 A.2d at 289.

[161] Judge Conford felt that the *Dunellen* Trilogy, which prohibited permissive negotiations, was countermanded by the 1974 amendments to the Act for two reasons; first, the addition of the word "pension" to section 34:13A-8.1 and second, the change in section 34:13A-5.3, which found that "grievance procedures established by agreement of the parties should be utilized notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute." *Id.* at 169–70, 393 A.2d at 290–91 (Conford, J., concurring in part and dissenting in part). Parenthetically Judge Conford noted that the language used in section 34:13A-5.3 was "an obvious allusion to the jurisdiction of the Commissioner of Education over school controversies." *Id.* at 170, 393 A.2d at 291.

[162] *Id.* at 167, 393 A.2d at 289.

[163] *Id.* at 173, 393 A.2d at 292.

Thus, in *State Supervisory Employees Association*, the supreme court significantly curtailed PERC's determination that the Civil Service Commission's regulations could be modified, if necessary, to conform with the negotiated agreement between the state and the public employer.[164] Instead, the court determined that the regulations of the Civil Service Commission have the same preemptive effect on negotiated agreements as do specific statutes.[165] In *Ridgefield Park*, the court emphasized that since the ambiguous language of the 1974 amendments was insufficient to conclude that the legislature had approved permissive topics of negotiability, there were only the two categories of subjects for negotiation in the public sector.[166]

Decisions subsequent to *State Supervisory Employees Association* and *Ridgefield Park*, have consistently affirmed the holdings in these cases.[167] In *Bernards Township Board of Education v. Bernards Township Education Association*,[168] Justice Pashman, writing for an unanimous court, found that a collective bargaining agreement which attempted to substitute an arbitrator's judgment for a Commissioner of Education's decision to withhold a salary increment was an *ultra vires* act which would be unenforceable.[169] Using the same

---

[164] 78 N.J. at 86, 393 A.2d at 249.

[165] *Id.*

[166] 78 N.J. at 162, 393 A.2d at 287. With this determination, the court cut back on PERC's finding that a permissive category did in fact exist. *See* notes 89–98 *supra* and accompanying text.

[167] *See, e.g.*, New Jersey State Policemen's Benevolent Ass'n Local 29 v. Town of Irvington, 80 N.J. 271, 403 A.2d 473 (1979), where the court held that the decision to reduce personnel for budgetary reasons was "clearly 'inherent management prerogatives pertaining to the determination of governmental policy.' " 80 N.J. at 296, 403 A.2d at 485. Similarly, in In re Maywood Bd. of Educ., 168 N.J. Super. 45, 401 A.2d 711 (App. Div. 1979), the court held that reductions in the work force of a school system and the impact of such reductions was a nonnegotiable item. It was stated that "[t]o allow such impact to be negotiated would indirectly contravene the *Dunellen* analysis which was so strongly reaffirmed in *Ridgefield Park*." 168 N.J. Super. at 58, 401 A.2d at 717.

[168] 79 N.J. 311, 399 A.2d 620 (1979).

[169] 79 N.J. at 322, 399 A.2d at 626. The dispute arose over the interpretation of a clause in the collective bargaining agreement which provided that:

> An employment or adjustment increment [in salary for any teacher] may be withheld [by the Board] in whole or in part for inefficiency or other just cause related to the performance of duties and only in accordance with the following:
>
> . . . .
>
> 4. Any action by the Board to withhold an increment or any part thereof shall be subject to appeal to arbitration. The arbitrator shall have the authority to advise the restoration of all or part of the increment withheld. . . .

*Id.* at 314, 399 A.2d at 622. A principal decided to withhold the salary increment of a teacher at William Annin Junior High School, and the teachers' association filed a grievance on his behalf. After having this grievance denied by the Board, the association sought arbitration. The Board argued that the decision to withhold a teacher's increment " 'for inefficiency or other good

rationale as in *Ridgefield Park*, the court found that "[s]uch a provision would in effect delegate government policy-making to an individual who is not accountable to the public at large."[170] The court did, however, endorse the procedure of submitting disputes concerning the applicability of managerial prerogatives to particular employees to advisory, as opposed to binding, arbitration.[171] The court reasoned that advisory arbitration was "not detrimental to the public interest, [and] its utilization may well bring about beneficial consequences."[172]

The court in both *State Supervisory Employees Association* and *Ridgefield Park* gave extensive consideration to the legislative history and intent of the 1974 amendments.[173] Justice Pashman stated that it was not the court's function to expand on this intent.[174] The holdings, however, leave the public employee at a decided disadvantage in regard to the scope of negotiations.[175] Initially, it must be noted

---

cause,' " as stated in section 18A:29-14, "is a matter of managerial prerogative and hence not subject to arbitration." 79 N.J. at 315, 399 A.2d at 622. After the trial court granted an injunction enjoining arbitration, which was affirmed by the appellate division in an unpublished opinion, the supreme court granted certification. 77 N.J. 499, 391 A.2d 513 (1978).

[170] 79 N.J. at 322, 399 A.2d at 626. This rationale of delegating authority to an individual who lacks public accountability was also utilized in explaining why the Commissioner of Education should be relieved of his statutory duty to review the Board's decision and why this review process could not be narrowed through agreement of the parties. *Id.*

[171] *Id.* at 324–25, 399 A.2d at 627. The validity of the use of advisory arbitration as a step in resolving disputes over managerial prerogatives was not reached by the court in either *State Supervisory Employees Association* or *Ridgefield Park*. Advisory arbitration involves a procedure which is identical to that of binding arbitration, except that the arbitrator's findings and conclusions serve as "an additional source of information" that the Commissioner of Education can use in resolving disputes over the effect of managerial prerogatives on public employees." 79 N.J. at 325, 399 A.2d at 628.

[172] *Id.* The court also noted that, in addition to the fact that the Commissioner of Education's statutory duties were not affected by advisory arbitration, such arbitration could be useful as an "additional source of information" which would be available to help the Commissioner render a decision. *Id.*

[173] *See* 78 N.J. at 67–83, 393 A.2d at 239–47; 78 N.J. at 157–62, 393 A.2d at 284–87. *See* notes 113–117 *supra* and accompanying text for a discussion of the court's analysis of the 1974 amendments.

[174] 78 N.J. at 165–66, 393 A.2d at 288–89.

[175] As Judge Conford noted in his dissent in *Ridgefield Park*:

> Practical recognition of negotiations in the permissive area has become a fact of life in the course of actual negotiations of collective agreements throughout the State in recent years and the validity thereof has been adjudicated in several leading jurisdictions beyond our borders. Today's holding by the Court is therefore a backward step in the heretofore progressive development of public sector labor law in this State which will not conduce toward the legislative policy of promoting peace and stability in public employment relations.

78 N.J. at 167, 393 A.2d at 289 (Conford, J., concurring in part and dissenting in part). By not having a matter subject to negotiations, the public employee is forced to accept the employer's

that requiring a public employer to bargain collectively over a wide range of subjects, including permissive topics, does not in itself prejudice the interests of the state. As stated by one commentator, "[t]o compel bargaining is not to compel agreement."[176] In addition, the argument that the public employer would impinge on the sovereign authority of the state by bargaining on permissive topics is not justified when the competing policy considerations, which the court emphasized in *Ridgefield Park*,[177] are analyzed. These policy considerations come to light when the two primary distinctions between the public and private sectors—the strike proscription and the nature of the political process—are examined. The strike proscription denies most public employees a potentially powerful economic weapon which is available to other employees.[178] In order to compensate for the loss of this weapon, some adjustments in regard to the duty to bargain requirements should be made to preserve the necessary proscription.[179] Justice Pashman's endorsement of advisory arbitration in *Bernard's Township* to the applicability of management prerogatives to employees, despite its potential positive effects, simply does not provide sufficient protection to the public employee, as the arbitrator's ultimate findings remain only a suggestion to the employer.[180]

---

determination as to the applicability of that non-negotiable item to him, even though that item may have a substantial effect on the employee.

[176] Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 933 (1971).

[177] 78 N.J. at 163, 393 A.2d at 287.

[178] Although there is no constitutional guarantee of an absolute right to strike in private employment, *see* UAW Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245, 259 (1949), private sector employees have traditionally been afforded the right to strike. *See* 29 U.S.C. § 158(b) (1971). In the public sector, however, employees have categorically been denied the right to strike. *See* 29 U.S.C. § 152(2) (1971), which excludes the United States government from the definition of "employer" under the National Labor Relations Act. New Jersey courts have similarly affirmed this "no strike" policy in the public sector. *See, e.g.*, Delaware River and Bay Auth. v. International Org., 45 N.J. 138, 211 A.2d 789 (1965).

[179] The need for legislative reform in this area has been recognized by the appellate division in *In re* Newark, 118 N.J. Super. 215, 287 A.2d 183 (App. Div. 1972). The court in this case, while affirming the convictions of Newark school teachers for violating an injunction, noted that:

> It is unfortunate that resort must be had to contempt of court procedure in this type of situation. Jailing teachers is not the answer to school strikes. The solution is legislative. Public employees have the right to bargain collectively as to the terms and conditions of their employment but cannot do so on equal terms with their employment unit since they have no means of negotiating from a position of strength. If the present policy prohibiting strikes by public employees is to be continued, machinery for the compulsory settlement of deadlocked labor disputes involving public employees should be established.

*Id.* at 222, 287 A.2d at 187.

[180] 79 N.J. at 324, 399 A.2d at 627.

As for the secondary distinction regarding the nature of the political process, it again must be emphasized that to compel bargaining is not to compel agreement.[181] The legitimate expectations of public employees should not be denied by a unilateral determination that an item, although having a substantial effect on an employee, remains a nonnegotiable management prerogative.[182] In the final analysis, the competing policy considerations, which are the ultimate guidelines in this area, must be thoroughly analyzed before denying negotiating rights. Furthermore, the public employee should be denied bargaining rights only when there exists substantial and compelling reasons for such restrictions.

*Thomas M. Moore*

---

[181] Edwards, *supra* note 176, at 933.

[182] Because of the nature of the political process, the denial of public employees' bargaining rights has been criticized in recent years. *See, e.g.*, Edwards, *supra* note 176, at 886–87.