



**STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

PERC AFTER 30 YEARS*

- * This paper reproduces an article written by James W. Mastriani on the 25th Anniversary of the New Jersey Employer-Employee Relations Act. That article was published in the *Labor and Employment Law Quarterly* of the New Jersey State Bar Association. Updates to that article have been included in italics in this paper. The updates were prepared by Robert E. Anderson, General Counsel, and Susan E. Galante, Special Counsel to the Chair.

HISTORY AND BACKGROUND

The State of New Jersey was an early player in the evolution of the public sector negotiations process. When the New Jersey Employer-Employee Relations Act was extended to public employees in 1968,¹ only the states of New York and Wisconsin had enacted similar comprehensive legislation. Since New Jersey is a highly unionized state, it was inevitable that public employees in massive numbers would seize upon the opportunity to organize and engage in the collective negotiations process.

There is some dispute over whether public sector labor legislation spawned the organization of public employees or merely confirmed the existence of an evolving trend towards formalizing the labor-management relationship. It is not necessary to engage in a "chicken or egg" analysis. The simple fact is that during the last 25 years, both in New Jersey and throughout the nation, there has been an explosion of public employee membership in labor organizations and in the promulgation of collective bargaining laws for federal, state and local employees.

While membership in organized labor for all categories of employees diminished to 16.1%, the percentage of public sector employees who are unionized is now estimated at

¹ L. 1968, c. 303 amended and supplemented the Labor Mediation Act which was enacted in 1941, L. 1941, c. 100, and which dealt solely with the mediation of private sector impasses.

36.9%. There is a parallel in the growth of government employment and in public sector labor relations laws. The following statistics² confirm these developments:

	Public Employment (Federal, State & Local)	Unionized Public Employment (Federal, State & Local)
1960	8,808,000	903,000
1970	13,000,000	4,012,000
1980	16,222,000	5,695,000
1990	18,369,000	6,627,000

In New Jersey, as elsewhere, legislators had to come to grips with some very basic issues. Would they transplant the private sector processes or develop a process which reflected government's unique characteristics? Should there be a right to strike? Should supervisors have protections under the law? What should the standards be for unit determination? Could there or should there be a union shop? If strikes were unlawful, should there be prohibitions and penalties? In the absence of a right to strike, should there be compulsory terminal procedures such as interest arbitration? What should be the role of the legislative branch of government? What issues should lawfully be negotiable? Could labor organizations with general membership represent police officers? Should the public be given a formal role in the processes? There were few answers to these questions since there was virtually no formal labor relations experience. Ultimately each state had to make its own policy judgments. For this reason, public sector laws have been

² Information provided by the International Office of the American Federation of State, County and Municipal Employees.

referred to as experiments or laboratories as each state developed its own system in the absence of the national uniformities created in the private sector by the National Labor Relations Act. Today over 40 states have developed their own public sector labor relations scheme.

Whatever arguments exist in support of, or in opposition to, the labor relations process in public employment, without doubt it has created a substantial impact on governmental and political processes. The purpose of this article, however, is not philosophical and instead will seek to review where the process has been, where it is today, and where it may be going in the future.

THE COMMISSION

When the Legislature extended the Act to public sector employers and employees, it also created the New Jersey Public Employment Relations Commission. The Commission is a tripartite body composed of two members representative of public employers, two members representative of public employee organizations, and three members representative of the public. One public member is the full-time Chairman. The Legislature entrusted the Commission with accomplishing the Act's purposes and policies. The Act, as originally enacted, specifically entrusted the Commission with resolving representation disputes.

REPRESENTATION

The cornerstone of the Act is the exclusivity principle: an organization selected by a majority of employees in a negotiating unit shall be the exclusive representative of all employees in that unit. The constitutionality of collective negotiations and the exclusivity

principle was confirmed in Lullo v. IAFF, 55 N.J. 419 (1970). Lullo also drew a distinction between private sector "collective bargaining" and public sector "collective negotiations" and concluded that by using the latter phrase, the New Jersey Legislature intended to recognize inherent limitations on the bargaining power of public employers and employees.

In the early days of the law, most negotiating units resulted from informal recognition. Since most of the practitioners were more experienced with the private sector, it was not surprising that many units were narrowly defined and that some fragmentation was therefore caused.

Section 5.3 of the Act directs that negotiations units be defined "with due regard for the community of interest among the employees concerned, but the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute." The key early indication of how PERC would interpret this section arose in a case involving the State of New Jersey and several labor organizations.^{3/} The Commission found that anything less than statewide units would be inappropriate. While recognizing that a kind of community of interest did exist for similar employees at single institutions, the Commission found that these commonalities were subservient to a higher level of common interest derived from the fact that employees' terms and conditions of employment were established by centralized authority. Thus, generic statewide units were created for employees engaged in health care and rehabilitation services and for employees engaged in operations, maintenance and services, regardless of which department or agency

³ State of New Jersey, P.E.R.C. No. 50, NJ Supp. 176 (¶50 1972).

employed them. Later, statewide units of administrative and clerical employees and supervisors were determined to be appropriate.

In 1974, the Supreme Court upheld PERC's approach towards defining broad-based appropriate units in State of New Jersey v. Professional Ass'n of N.J. Dept. of Education, 64 N.J. 231 (1974). The Commission had dismissed petitions seeking separate representation for professional nurses and professional educators employed by the State. The Commission found that while each State professional group possessed a separate community of interest, all professional employees shared a broader community of interest as professionals. The Commission reversed a Hearing Officer's recommendation that each proposed unit constituted an appropriate unit since each was regarded as a logical, functional group of professional employees. On appeal, the Court rejected the unions' argument that a unit of all 6300 professional employees would be inappropriate because the diversity of functions and occupations might preclude effective representation. The Court also expanded upon the definition of the appropriate negotiating unit. In addition to the "community of interest" standard, the Court found certain other standards to be clearly implicit. These standards include the compatibility of the joint responsibilities of the public employer and public employees to serve the public and the ability of the public employer to effectively recommend negotiating decisions. The Court also stressed that PERC's determination of appropriate units would stand absent a demonstration that the agency's decision was arbitrary.

Earlier, in Bd. of Ed. of West Orange v. Wilton, 57 N.J. 417 (1971), the Supreme Court addressed standards for determining appropriate negotiating units in a case

involving a dispute over whether the Director of Elementary Education should be excluded from a consensually created unit of all supervisors and school administrators. The Legislature granted supervisors the right to organize and engage in collective negotiations, subject to certain limitations.⁴ The Commission found that the statute did not prohibit combining various ranks of supervisors in the same unit; but the Court disagreed, finding that an existing conflict of interest is a significant factor in determining whether employees share a community of interest. Where sufficient conflict of interest appears, the desire of employees to be included in the same unit is not controlling. The Court stated that "[o]bviously no man can serve two masters" and that "[i]f performance of the obligations or powers delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other included employees, the community of interest required for inclusion of such supervisor is not present." *Id.* at 416, 425. Indicators of a conflict include the authority to evaluate other employees in the same negotiations unit and to influence disciplinary and grievance determinations affecting them. Since Wilton, the Commission has uniformly considered the conflict of interest factor in determining the appropriate unit.

⁴ Supervisors generally cannot be commingled with non-supervisors in a single negotiating unit or represented by an employee organization that admits non-supervisory personnel to membership. The bar on commingling, however, can be overcome by demonstrating an established practice, a prior agreement or special circumstances. This exception, to date, has been interpreted to be operative only upon a demonstration of pre-1968 negotiations activity in a commingled unit. See N.J.S.A. 34:13A-5.3.

While supervisors are covered by the Act, managerial executives and confidential employees are explicitly excluded. N.J.S.A. 34:13A-5.3. In contrast to the National Labor Relations Act, the Employer-Employee Relations Act specifically defines these terms. N.J.S.A. 34:13A-3(f) and (g). The Commission has applied these definitions on a case-by-case basis. There has not been too much litigation or controversy over the application of the "managerial executive" definition.⁵ But the "confidential employee" definition, which requires duties and knowledge connected to negotiations issues and not just access to confidential information, has continued to breed litigation at both the Commission and judicial levels.⁶

In 1997, the New Jersey Supreme Court issued a major decision addressing the standards for excluding managerial executives and confidential employees from the coverage of the Employer-Employee Relations Act. New Jersey Turnpike Auth. v. AFSCME, Council 73, 150 N.J. 381 (1997). This decision approves, with one exception, the standards used by the Commission for

⁵ There had been some disputes over the status of police chiefs in small communities with active governing officials, but after the Legislature amended N.J.S.A. 40A:14-118 to require that police chiefs be given certain managerial powers, the Commission held that police chiefs would be considered managerial executives per se. Egg Harbor Tp., P.E.R.C. No. 85-46, 10 NJPER 632 (¶15304 1984). The status of deputy police and fire chiefs continues to be decided case-by-case. See, e.g., City of Newark, P.E.R.C. No. 92-116, 18 NJPER 300 (¶23128 1992) (employer's deputy fire chiefs were no longer managerial executives since their authority and discretion had been curtailed).

⁶ See, e.g., State of New Jersey, P.E.R.C. No. 90-22, 15 NJPER 596 (¶20244 1989), aff'd App. Div. Dkt. No. A-1445-89T1 (1/22/92); Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd App. Div. Dkt. No. A-4740-86T7 (2/18/88).

evaluating managerial executive claims and approves the standards used by the Commission for evaluating confidential employee claims.

N.J.S.A. 34:13A-3(f) defines "managerial executives" as:

(f) persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

The Supreme Court has approved these standards for applying that definition:

*A person formulates policies when he develops a particular set of objectives designed to further the mission of a segment of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [*Id.* at 356.]*

Those standards were set forth in Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980), but were partially modified by the Supreme Court to clarify that an employee need not have organization-wide power to be deemed a managerial executive. Compare Gloucester Cty., P.E.R.C. No. 90-36, 15 NJPER 624 (¶20261 1989) (excluding welfare reform coordinator as a managerial executive even though she did not have authority outside her own department).

N.J.S.A. 34:13A-3(g) defines "confidential employees" as:

[E]mployees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations

process would make their membership in any appropriate negotiating unit incompatible with their official duties.

Turnpike Authority affirmed these standards for applying that definition:

We scrutinize the facts of each case to find for whom each employee works, what he [or she] does, or what he [or she] knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employee's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit.

Those standards were set forth in State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985). The Court rejected dictum in Wayne Tp. v. AFSCME Council 52, 220 N.J. Super. 340 (App. Div. 1987), suggesting that mere access to confidential information necessitates an employee's exclusion.

In addition to the statutory exclusions, the Supreme Court has implied an exclusion for Judiciary employees based on the constitutional separation of powers.⁷ However, given the Commission's expertise, the Court has authorized it to make recommendations in labor relations disputes involving Judiciary employees.⁸

In 1994, the Legislature established a statewide Judiciary system paid for by State funds and made enforceable a letter of agreement between the Judiciary and majority representatives of

⁷ Passaic Cty. Probation Officers Ass'n v. Passaic Cty., 73 N.J. 247 (1977).

⁸ In re Judges of Passaic Cty, 100 N.J. 352 (1985).

Judiciary employees. N.J.S.A. 2B:11-1 et seq. That letter empowers the Commission to resolve Judiciary labor relations cases and sets the standards for resolving such disputes.

The Commission is committed to resolving questions concerning representation speedily. For example, the Commission used to hold hearings on post-election objections routinely, but now objections will generally be resolved through an administrative investigation. A party filing objections must furnish affidavits or exhibits precisely and specifically showing that conduct has occurred which would warrant setting aside the election as a matter of law. N.J.A.C. 19:11-9.2(h). The Appellate Division has approved that stringent standard and the courts have generally deferred to the Commission's special expertise in conducting elections. AFSCME v. PERC, 114 N.J. Super. 463 (App. Div. 1971), aff'g P.E.R.C. No. 43 (1970); State of New Jersey, App. Div. Dkt. Nos. A-3275-80T2 and A-4164-80T3 (11/10/82), aff'g P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981), P.E.R.C. No. 81-112, 7 NJPER 189 (¶12083 1981), P.E.R.C. No. 81-127, 7 NJPER 256 (¶12114 1981).

SCOPE OF NEGOTIATIONS

The most difficult, most controversial and most frequently litigated area of our public sector labor relations law deals with defining the scope of negotiations -- that is, what subjects must be negotiated, what subjects may be negotiated, and what subjects can't be negotiated. I'll now trace the development of legislative and judicial standards for resolving scope of negotiations disputes.

Borrowing a phrase from the private sector, our Legislature in section 5.3 initially required the parties to meet at reasonable times and negotiate in good faith with respect to grievances and other "terms and conditions of employment." It also prohibited in section 8.1 any provision of a labor agreement which would "annul or modify any statute or statutes of this State." Since the New Jersey Supreme Court decided in Burlington County Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579 (1970) that PERC lacked the statutory authority to determine unfair labor practice charges, there was virtually no administrative law guiding the parties over the scope of negotiations or any administrative procedure to resolve scope disputes. The parties therefore presumed the existence of the traditional private sector categories of mandatory, permissive and illegal and followed the private sector approach of agreeing to what was substantively agreeable and disagreeing over what was substantively disagreeable. For example, many parties creatively resolved issues involving the discipline and discharge of civil service employees by agreeing to a bifurcated procedure whereby the employees would decide whether to pursue civil service review procedures or instead waive those procedures and submit disciplinary disputes to an arbitrator. This approach was later held to be preempted by Civil Service statutes.

Lullo's hint that private sector bargaining and public sector negotiations were significantly different became reality in the Dunellen trilogy.⁹ There, the New Jersey Supreme Court narrowly interpreted "terms and conditions of employment" under section 5.3 and broadly interpreted the preemptive effect of other statutes under section 8.1.

⁹ Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n 64 N.J. 17 (1973); Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, Burlington Cty. College, 64 N.J. 10 (1973); Bd. of Ed. of Englewood v. Englewood Teachers Ass'n, 64 N.J. 1 (1973).

Thus, the Court restricted the category of mandatory negotiations to those subjects which intimately and directly affect the employees' work and welfare, but do not significantly interfere with the public employer's determination of governmental policy. And the Court concluded that section 8.1 required it to follow the general education laws so long as the goals of the Employer-Employee Relations Act were not frustrated.

In 1974, the Legislature responded to the Dunellen trilogy by amending section 8.1 to insert "pension" before "statute." This change triggered extensive litigation, but our Supreme Court eventually agreed with the Commission that the Legislature had not changed Dunellen's basic test for determining whether a subject was mandatorily negotiable. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156 (1978). However, in State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978), the Court held that the new word "pension" in section 8.1 required modifying Dunellen's holding that employment conditions are not negotiable if covered by general statutes. Under State Supervisory, negotiations are not preempted now unless a statute or regulation speaks in the imperative and specifically sets a term and condition of employment.

Ridgefield Park achieved notoriety for another reason: it banned the permissive category of negotiations. The Court concluded that such a category was not legislatively authorized and suggested that it might not even be constitutionally sustainable. Thus, parties were prohibited by case law from reaching agreement on any subjects that were not mandatorily negotiable and employers were allowed to negate any such agreements they had already reached.

Ridgefield Park had a substantial impact on practitioners. Many contracts contained provisions which were non-mandatory and which were now deemed illegal subjects. Management insisted on their removal and unions insisted on their retention. In some cases, the provisions remained in the agreement and management waited until the existence of a dispute to challenge their enforceability. In other cases, the provisions were simply removed. Other parties turned to more creative solutions. Some provisions were removed from the text of the contract and placed in an appendix with the understanding that they were now unenforceable. Some parties agreed to their continuation, but insisted upon their exclusion from the arbitration clause. In certain instances unions demanded a "resurrection" clause -- a provision automatically restoring these non-mandatory provisions if Ridgefield Park was legislatively overridden. It was not uncommon for PERC to receive substantial portions of contracts and issue scope of negotiations determinations on many contract provisions. The staff affectionately referred to these petitions as "laundry lists."

Two years later, Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980), recast Dunellen's basic negotiability formula into a balancing test: a proposal's effect on the employees' work and welfare must be balanced against a proposal's interference with the employer's prerogatives. The Supreme Court stated that "a viable bargaining process in the public sector has also been recognized by the Legislature in order to produce stability and further the public interest in efficiency"; negotiations are required when, on balance, that policy is preeminent. But when the dominant issue is a governmental policy goal, negotiations over that issue, including its impact, are not required. Under the Dunellen trilogy,

negotiability determinations had generally been made by category; under Woodstown-Pilesgrove, negotiability determinations are to be based on the circumstances of each case.

The subject of permissive negotiations was revisited in Paterson Police PBA v. City of Paterson, 87 N.J. 78 (1981). In the 1977 interest arbitration statute covering police officers and firefighters, N.J.S.A. 34:13A-14 et seq., the Legislature had expressly created a permissive question of negotiations. After finding legislative authorization for such a category, Paterson found constitutional authorization as well. But the Court rejected private sector standards for determining permissive negotiability and substituted this narrow test: an issue is not permissively negotiable if an agreement would place "substantial limitations on government's policymaking powers." So far few subjects have been found permissively negotiable.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), consolidated the balancing test and preemption standards into one tripartite test:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

With some statutory exceptions, this formulation remains the test for resolving negotiability questions. Local 195 itself applied the balancing test and held that subcontracting was not mandatorily negotiable.

In 1982, the Legislature amended section 5.3 to make disciplinary disputes and review procedures mandatorily negotiable. The discipline amendment overruled two 1981 decisions which, to the surprise of the labor relations community, had held that disciplinary disputes were never negotiable or arbitrable.¹⁰ Under the discipline amendment, employees may negotiate for contractual protection against unjust discharges and other discipline, and employers may agree to submit a disciplinary dispute to binding arbitration if the employee has no alternate statutory appeal for contesting that discipline.¹¹

The cases which the discipline amendment overruled marked the extreme swing of the pendulum towards non-negotiability. The enactment of the discipline amendment began a swing back towards expanding the scope of negotiations. Since then, other case law and legislative developments have continued that trend.

The discipline amendment negates any suggestion that a public employer has a prerogative to discharge employees without cause or some form of neutral review. Judicial dictum has stated that decisions to "dismiss" public employees are not negotiable,¹² but

¹⁰ Jersey City and Jersey City POBA, 179 N.J. Super. 137 (App. Div. 1981), certif. den. 89 N.J. 433 (1982); State v. Local 195, IFPTE, 179 N.J. Super. 146 (App. Div. 1981), certif. den. 89 N.J. 433 (1982).

¹¹ CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984); Bergen Cty. Law Enforcement Group v. Bergen Cty., 191 N.J. Super. 319 (App. Div. 1983).

¹² Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 16 (1983).

that dictum is too broad given the discipline amendment and other cases recognizing the fundamental importance of job security to employees.¹³ In 1985, the Supreme Court implicitly recognized this point when it held that contractual tenure provisions protecting custodians against unjust discharge are mandatorily negotiable.¹⁴

As outlined in the main article, the negotiability of disciplinary disputes has gone through a confusing history. That history grew even more convoluted in 1993 when the Supreme Court held that the discipline amendment did not apply to State troopers or any other police officers and also questioned whether it applied to any disciplinary disputes involving employees covered by Civil Service or other tenure laws. State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993). Compare New Jersey Turnpike Auth. v. New Jersey Turnpike Supervisors Ass'n, 143 N.J. 185 (1996) (permitting arbitration over three-day suspension of toll plaza supervisor accused of sexual harassment). The Legislature responded by once again amending N.J.S.A. 34:13A-5.3, this time to make clear that public employers could agree to arbitrate minor disciplinary disputes involving any public employees except State troopers. L. 1996, c. 115, §4, eff. Jan. 9, 1997. This statute, as construed in Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997), defines minor discipline as a suspension or fine of five days or less unless the employee has been suspended or fined an aggregate of 15 or more days or received three minor suspensions or fines in one calendar year. This definition permits Civil Service employees to negotiate for neutral review of disciplinary determinations that cannot be appealed as of right to the Merit System Board.

¹³ Woolley v. Hoffman-LaRoche, Inc., 99 N.J. 284 (1985).

¹⁴ Wright v. East Orange Bd. of Ed., 99 N.J. 112 (1985).

Because Woodstown-Pilesgrove and In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J., 292 (1979), state that the "impact" of managerial decisions is not negotiable, some practitioners had believed that no issues which are related in any way to a managerial prerogative can ever be negotiable. That is not the case: issues which are severable from the exercise of a managerial prerogative may still be mandatorily negotiable. For example, a public employer has a prerogative to reduce its vehicle fleet and thus to stop permitting employees to use vehicles to commute, but it must negotiate the severable issue of offsetting compensation for the loss of that economic benefit.¹⁵ And a public employer has a prerogative to require employees on sick leave to produce doctor's notes, but it must negotiate over the severable issue of who pays for the doctor's visit.¹⁶ The Commission's severability doctrine accommodates the parties' interests and promotes the purposes of the Act by barring negotiations over a prerogative and its necessary impact while permitting negotiations over severable compensation claims.

An Appellate Division panel has concluded that Maywood spoke too broadly when it stated that "impact" issues are not negotiable. Piscataway Tp. Bd. of Ed. v. Piscataway Tp. Ed. Ass'n, N.J. Super. (App. Div. 1998), pet. for certif. pending. Under Woodstown-Pilesgrove, an "impact" issue is mandatorily negotiable if negotiations over that issue would not significantly interfere with

¹⁵ Morris Cty., P.E.R.C. No. 83-31, 8 NJPER 561 (¶13259 1982), aff'd App. Div. Docket No. A-795-82T2 (1/12/84), certif. den. 97 N.J. 672 (1984).

¹⁶ City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 1240, IAFF, 198 N.J. Super. 382 (App. Div. 1985).

the exercise of the prerogative. Piscataway specifically held that a school board's prerogative to change the school calendar because of excessive snow days did not automatically mean that all issues related to that decision are non-negotiable. The Court remanded the case to the Commission to determine whether any particular "impact" issues are negotiable under the Woodstown-Piles Grove balancing test.

Dicta in two Appellate Division decisions¹⁷ suggested that work schedules for police officers were never negotiable. But in 1987, the Appellate Division agreed with the Commission that this dicta was too broad and that work schedules for uniformed employees are mandatorily negotiable unless the facts of a particular case demonstrate a governmental policy need to act unilaterally.¹⁸ The Commission has issued many decisions accommodating the interests of police officers and firefighters in negotiating over their work hours and the interests of public employers in achieving such governmental policy goals as effective supervision and training, improved responses to emergencies, and having officers with special skills perform special tasks.

For a comprehensive analysis of the negotiability of a work schedule proposal in an interest arbitration setting, see Maplewood Tp. and Maplewood FMBA Local No. 25, P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997). There, the Commission held that a firefighters' work schedule

¹⁷ Irvington PBA Local 29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980); Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984)

¹⁸ In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987).

proposal could be submitted to interest arbitration. The proposal called for one 24-hour day on duty, followed by three whole days off.

In 1990, the Employer-Employee Relations Act was again amended, this time to expand the scope of negotiations for school board employees. N.J.S.A. 34:13A-22 et seq. Under N.J.S.A. 34:13A-23, "[a]ll aspects of assignment to, retention in, dismissal from, and any terms and conditions of employment concerning extracurricular activities shall be deemed mandatory subjects for collective negotiations" except the establishment of qualifications. This section overrules the actual holding of Teaneck that extracurricular non-reappointments are never negotiable. Under N.J.S.A. 34:13A-26, "[d]isputes involving the withholding of an employee's increment...for predominately disciplinary reasons" shall be subject to binding arbitration. This section overrules the holding of Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979), that teachers may never contest withholdings through binding arbitration.¹⁹

In Edison Tp. Bd. of Ed. v. Edison Tp. Principals and Supervisors Ass'n, 304 N.J. Super. 459 (App. Div. 1997), an Appellate Division panel agreed that an increment withholding based on a principal's allegedly excessive absenteeism had to be arbitrated. Unless a withholding is predominately based on an evaluation of actual teaching performance, it must be arbitrated.

¹⁹ If the reasons for a withholding relate predominately to an evaluation of teaching performance, the withholding must still be appealed to the Commissioner of Education. N.J.S.A. 34:13A-27.

Moreover, N.J.S.A. 34:13A-24 permits a negotiated schedule of offenses and penalties for minor discipline to displace the need to file tenure charges when reducing compensation, and N.J.S.A. 34:13A-25 prohibits disciplinary transfers between work sites.

Absent further legislative changes, the major scope of negotiations issues have been resolved. Having fairly and reasonably applied the Legislature's directives and the Court's precedents, the Commission has earned and received deference from the courts. Thus, in Hunterdon Cty. and CWA, 116 N.J. 322, 328-329 (1980), the Supreme Court recognized the Commission's "broad authority and wide discretion in a highly specialized area of public life" and confirmed that the same narrow standard of review in a scope case as applies in a representation case: the agency's decision will stand unless it is clearly demonstrated to be arbitrary. And in 1991, the Supreme Court endorsed the Commission's standards for resolving negotiability disputes involving bus drivers covered by the Public Transportation Act.²⁰ This decision, although legally applicable to only a narrow group of employees, demonstrates the Court's confidence in the Commission's resolution of scope of negotiation cases.

I anticipate that there will be continual debate over whether there should be legislative modifications to the current law regulating scope of negotiations issues. After Ridgefield Park, there have been many unsuccessful attempts to accomplish this objective. Prior to this year, lobbying efforts to expand the scope of bargaining have been conducted solely by labor organizations. However, during the past year an interest has been expressed to expand the scope of negotiations from management's point of view. This

²⁰ In re N.J. Transit Bus Operations, 125 N.J. 41 (1991).

interest stems from the observation that while statutory preemption caps certain terms and conditions of employment, it also guarantees the continuation of benefits outside the collective negotiations process. In the last legislative session a bill was introduced to make mandatorily negotiable some benefits now guaranteed by law, including vacations, personal and sick leaves of absence, and paid health insurance coverage.²¹ Continued interest in this approach could result in an expanded scope of bargaining, assuming that the labor, management and political communities can arrive at a consensus on a new approach.

UNFAIR PRACTICES

The other major amendment to the law in 1974 was the provisions granting PERC the authority to prevent unfair practices, to adjudicate unfair practice charges, and to issue remedial orders. The expansion of PERC's authority in scope of negotiations disputes and unfair labor practices necessitated dramatic changes in PERC's staff and budget. Prior to the amendments, the agency staff was small. I can personally recall a point in time in 1973 when only six professionals were employed. And, before the 1974 amendments, the Commission staff had great experience in handling mediation and representation cases, but no experience in addressing unfair practice and scope of negotiations issues. The staff therefore had to be expanded and realigned. For example, anticipated court challenges required an expansion of the General Counsel staff. And the special expertise required to perform new functions and a vastly increased caseload required dividing the staff into conciliation and adjudication divisions. Generalists had to become specialists.

²¹ S-649 introduced March 30, 1992.

The Act's unfair practice provisions are found in N.J.S.A. 34:13A-5.4. Subsection 5.4(a) prohibits certain unfair practices by employers, their representatives or agents; subsection 5.4(b) prohibits certain unfair practices by employee organizations, their representatives, or agents. These subsections are patterned on sections 8(a) and 8(b) of the National Labor Relations Act and thus the substantive case law on unfair practices in the New Jersey public sector has tracked the case law on unfair practices in the private sector. There is, however, one major procedural difference between NLRB proceedings and PERC proceedings: the NLRB investigates a charge to determine whether there is probable cause to uphold it and, if there is, the NLRB's General Counsel prosecutes it whereas the Commission by law must issue a Complaint when a charge's allegations, if true, would establish an unfair practice and the charging party by law must prosecute the Complaint. The Commission thus sits as a neutral adjudicator of unfair practice charges, not an investigator or prosecutor.

N.J.S.A. 34:13A-5.4(a)(1) prohibits public employers from "[i]nterfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by this act." Those rights, in turn, are found in section 5.3. In particular, that section grants employees the right to form, join and assist any employee organization without fear of penalty or reprisal, the right to refrain from any such activity, and the right to have the majority representative negotiate on their behalf without discrimination and without regard to employee organization membership. The test for determining whether subsection 5.4(a)(1) has been violated is an objective one: an employer violates this subsection if its actions tend to interfere with an employee's rights and lack a legitimate and substantial

business justification.²² An instructive illustration is found in Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), where the Commission held that an employer must differentiate between an employee's status as an employee representative and the individual's coincidental status as an employee. As a matter of free speech, the employer may criticize an employee representative's conduct; but as a matter of economic power, the employer may not express its dissatisfaction by affecting the individual's employment status.

Another example of a right protected by N.J.S.A. 34:13A-5.4(a)(1) is the right to request union representation when an employee reasonably believes that an investigatory interview may lead to disciplinary action. See UMDNJ and CIR, 144 N.J. 511 (1996) (approving Commission cases applying Weingarten v. NLRB, 420 U.S. 251 (1975)).

N.J.S.A. 34:13A-5.4(a)(3) prohibits employers from "[d]iscriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act." In re Bridgewater Tp., 95 N.J. 235 (1984), sets forth a two-step test for assessing alleged violations of this subsection. First, the Commission determines whether the charging party has proved that hostility towards protected activity was a substantial or motivating factor in the personnel action which prompted the charge. If it hasn't, the Complaint is dismissed.

²² Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83).

If it has, the Commission reaches the second step of its analysis: has the employer proved that it would have taken the same course of action absent the illegal motive? If the employer carries this burden of proof, no violation will be found. In Bridgewater itself, a violation was found when a union supporter was discriminatorily transferred and demoted. In contrast, no violation was found in Teaneck Tp., P.E.R.C. No. 81-142, 7 NJPER 351 (¶12158 1981) where an employee was fined and suspended. A classic example of an unfair practice under this subsection is firing an employee who tries to organize a union.²³

N.J.S.A. 34:13A-5.4(a)(5) prohibits a public employer from "[r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative." This subsection typically gives rise to two distinct claims: (1) an employer has refused to negotiate in good faith over a contract or to process grievances, or (2) an employer has changed a term and condition of employment without prior negotiations with the majority representative.

The first type of violation occurs when the totality of circumstances indicates a pre-determined intention to avoid an agreement rather than an open mind and a sincere desire to reach an agreement. State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976) (no violation). An employer, however, may engage in "hard bargaining" and may not be forced to accept any particular proposal.

²³ Mantua Tp., P.E.R.C. No. 84-151, 10 NJPER 433 (¶15194 1984).

*The refusal to negotiate in good faith includes not only an intention to avoid reaching an agreement, but also a repudiation of a contract already reached. Bridgewater Tp. and Bridgewater PBA Local 174, P.E.R.C. No. 95-28, 20 NJPER 399 (¶25202 1994), *aff'd* 21 NJPER 401 (¶26245 App. Div. 1995).*

The second type of violation occurs when this provision of section 5.3 is violated: "[p]roposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established." Our Supreme Court elaborated upon this statutory obligation in Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). This rule protects the right of employees through the majority representative to have a say over their employment conditions. Despite this rule, however, no violation will be found if the employer establishes that it had a contractual right to change an employment condition or that the majority representative waived its right to negotiate.²⁴

The holding of Galloway required the school board to continue to pay increments during successor contract negotiations. That holding was based on N.J.S.A. 18A:29-4.1, an education statute later amended and then construed by the Supreme Court to prohibit paying increments to teachers during negotiations after a three-year contract has expired. Neptune Tp. Bd. of Ed. v. Neptune Tp. Ed. Ass'n, 144 N.J. 16 (1996).

²⁴ Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978).

Subsection 5.4(b)(1) prohibits employee organizations from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act." The most common type of alleged violation under this subsection is a claim that a majority representative has violated the duty of fair representation it owes the employees it represents. Such a violation will be found if the charging party proves that the majority representative's conduct was arbitrary, discriminatory, or in bad faith.²⁵ But the case law also establishes that the majority representative has a wide range of discretion in conducting negotiations and resolving grievances.

This discussion of unfair practices has focussed on the more common type of alleged violations and has not been meant to be exhaustive. Whatever the alleged violation, however, the courts have accepted the Commission's expertise in analyzing unfair practice cases and its discretion in selecting remedies. Bridgewater and Hunterdon thus stress that reviewing courts should defer to the Commission's findings of fact if supported by the record and its conclusions of law if not arbitrary. And Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secs., 78 N.J. 1 (1978), accords the Commission great discretion in choosing remedies -- including reinstatement and back pay -- designed to make the victims of unfair practices whole.

REPRESENTATION FEES

As enacted in 1968, the Act contained no agency shop provisions. Because section 5.3 protects the rights of employees to refrain from assisting unions, the Supreme Court

²⁵ Saginario v. Attorney General, 87 N.J. 480 (1981); Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982).

held illegal clauses requiring all members of a negotiating unit to pay their "fair share" of a majority representative's expenditures on their behalf.²⁶ But in 1979 the Legislature added N.J.S.A. 34:13A-5.5 through 5.9 to the Act. These provisions allow a majority representative to negotiate the right to receive a "representation fee in lieu of dues" from non-members in its negotiating unit, provided it offers all unit employees "membership on an equal basis." This representation fee legislation capped the fee at 85 percent of union member dues, mandated procedures to protect non-members' rights, and created the Public Employment Relations Commission Appeal Board. That Board is a tripartite body charged with resolving disputes between majority representatives and non-members who pay representation fees.

The legislation was immediately attacked in both federal and state court on constitutional grounds. It withstood those challenges.²⁷

In Boonton, the Supreme Court agreed with the Commission that the Appeal Board has sole jurisdiction over challenges to the amount of representation fees. The Board has resolved several such challenges.²⁸ It has also addressed the types of activities that a

²⁶ N.J. Turnpike Employees Union v. N.J. Turnpike Auth., 64 N.J. 579 (1974), aff'g 123 N.J. Super. 461 (App. Div. 1973).

²⁷ Robinson v. N.J., 547 F. Supp. 1297 (D.N.J. 1982), supp. opinion 565 F. Supp. 942 (D.N.J. 1983), rev'd and rem'd 741 F.2d 598 (3rd Cir. 1984), cert. den. 469 U.S. 1228 (1985); Robinson v. N.J., 806 F.2d 442 (3rd Cir. 1986), cert. den. 481 U.S. 1070 (1987); Boonton Bd. of Ed. v. Kramer, 99 N.J. 523 (1985), cert. den. 106 S. Ct. 1388 (1986).

²⁸ See, e.g., Talamini v. Cliffside Park Ed. Ass'n, A.B.D. No. 86-6, 12 NJPER 187 (¶17070 1986); Mallamud and Rutgers Coun. of AAUP Chapters, A.B.D. No. 86-9, 12 NJPER 324 (¶17127 1986), app. dism. as moot, App. Div. Dkt. No. 4715-85T6 (6/1/87); Stracker v. Local 195, IFPTE, A.B.D. No. 86-10, 12 NJPER 333 (¶17128

representation fee can subsidize.²⁹ Both the Appeal Board and the Commission have dealt with the procedures necessary to protect the rights of non-members not to subsidize activities unrelated to collective negotiations or contract administration.³⁰ And the Commission has exercised its unfair practice jurisdiction to ensure that membership is offered on an equal basis to non-members required to pay representation fees.³¹

The vast majority of Appeal Board cases have been settled. The Appellate Division has affirmed the Appeal Board's policy of holding that a union's offer of a full refund of representation fees moots any other issues in an Appeal Board petition.³²

MEDIATION AND FACT-FINDING

Several teacher strikes in the mid-sixties led to intense legislative review culminating in the 1968 passage of the Act. These strikes demonstrated that collective negotiations were moving forward in the State without formally adopted legislative policy. In the absence of a statute or a formal impasse resolution mechanism, parties were left

1986).

²⁹ Charney v. East Windsor Reg. Supportive Staff Ass'n, A.B.D. No. 86-1, 11 NJPER 680 (¶16235 1985); Mallamud.

³⁰ Boonton; Bacon and District 65, UAW, P.E.R.C. No. 87-72, 13 NJPER 57 (¶18025 1986), aff'd App. Div. Dkt. No. A-2994-86T8 (8/16/88), certif. den. 114 N.J. 308 (1988); Daly v. High Bridge Teachers' Ass'n, A.B.D. No. 89-1, 14 NJPER 700 (¶19300 1988).

³¹ See, e.g., Bergen Cty., P.E.R.C. No. 88-9, 13 NJPER 645 (¶18243 1987), aff'd 227 N.J. Super. 1 (1988), certif. den. 111 N.J. 591 (1988).

³² Daly v. High Bridge Teachers Ass'n, 242 N.J. Super. 12 (App. Div. 1990), certif. den. 122 N.J. 356 (1990).

without direction and the public was negatively impacted. When the Legislature finally acted in 1968, it entrusted PERC with authority over impasse resolution mechanisms.

PERC would assign a mediator upon request after determining the existence of an impasse. If mediation failed to result in voluntary resolution of the impasse, the Commission, upon the mediator's recommendation or at the parties' request, could invoke fact-finding. Absent a voluntary settlement during the fact-finding process, the fact-finder would issue a written report with recommendations for settlement.

In the absence of an express statutory reference to whether a strike was lawful or unlawful, the New Jersey Supreme Court had to decide this issue. It did so in Bd. of Ed. of Union Beach v. N.J. Education Ass'n, 53 N.J. 29 (1968). The Court held that public employees did not have the right to strike in the absence of an express grant and that the 1968 Act did not contain such an express grant. In the absence of a right to strike, the parties have heavily utilized mediation to provide the timing necessary to achieve voluntary resolution.

Mediation has probably been the most effective and least controversial process administered by PERC. PERC annually receives more than 500 demands for the assignment of mediators, and voluntary resolution of impasses is achieved during mediation in 80 to 90% of these cases. PERC's mediators have commanded respect in the labor community. In addition to staff mediators, PERC utilizes ad hoc mediators in approximately 10% to 20% of these disputes because of seasonal demands which must be met promptly. This normally occurs in the fall upon the opening of schools since there are over 600 school districts which must be serviced, some of which have multiple

negotiating units. No significant litigation has arisen from the provision of these mediation services.

Similarly, the fact-finding process has proceeded without much controversy. The fact-finders are appointed after a selection process by the parties similar to that is provided for in grievance and interest arbitration. In the last few years, there has been much less use of fact-finding than during the 1970's. It was not uncommon during the first decade of experience for parties to proceed to fact-finding in 50% of the cases which went to mediation. As the parties' sophistication and confidence in the mediation process grew, the use of fact-finding decreased. Now only about 10% of mediation cases go to fact-finding. Since fact-finding is not binding, its premise is heavily rooted in conciliation and it is rare that the parties expect the fact-finder to serve in an adjudicatory capacity. Much greater emphasis has been placed on either resolution of the dispute or acceptability of the report and recommendations.

PERC decided in 1977³³ that a genuine impasse after the exhaustion of impasse procedures could result in an implementation of the employer's final offer. As a practical matter this has happened on only a few occasions since 1977.

INTEREST ARBITRATION

The only major amendment to the act in the area of impasse procedures came in 1977 when the Legislature decided to grant binding interest arbitration to police and firefighters and their employers.³⁴ The mechanism for interest arbitration in Chapter 85

³³ City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977).

³⁴ L. 1977, c. 85.

was virtually identical to that recommended in 1976 by a tripartite bipartisan study commission created in 1974.³⁵ That study commission had recommended the interest arbitration mechanism for all public employees, but the Legislature limited its action to police and firefighters.

The most notable feature of the interest arbitration law was the adoption of the specific terminal procedure of last best offer. This specific procedure is unique to New Jersey. In the event that the parties do not come to an agreement, they are required to develop final offers on all outstanding issues. Economic issues must be grouped by the parties and the arbitrator must select a final offer. Non-economic issues are to be decided by considering each party's final offer on an issue-by-issue basis. The statute does encourage the parties, if they so desire, to choose among several different kinds of terminal procedures besides this final offer mechanism. To date, the parties have rarely resorted to an alternative mechanism. When they do, however, they most frequently choose conventional arbitration, thus giving the arbitrator full authority to render a decision without having to choose among final offers. This statute has never been amended since its enactment, although in the last few years there has been growing interest on the part of the Legislature to review the law and several bills have been filed towards this objective.

Generally, there has been little litigation relating to the interest arbitration process. The New Jersey Supreme Court first reviewed this process in disputes involving police

³⁵ L. 1974, c. 124.

officers employed in Atlantic City and Irvington.³⁶ The Court decided that the statutorily mandated budget cap of 5% did not create a ceiling on the amount which could be awarded by the arbitrator. Instead, the arbitrator was required to consider all the evidence, including the employer's ability to pay in light of the requirements of the Cap Law, and to give due weight to the statutory criteria set forth in N.J.S.A. 34:13A-16(g), as deemed relevant for the resolution of the dispute. The Court also ruled that so long as Cap Law constraints are considered in interest arbitration, there is no unconstitutional delegation of legislative authority.³⁷

In 1982, a second major opinion was issued by our Supreme Court.³⁸ That case upheld the validity of a Commission rule, N.J.A.C. 19:16-5.7(f), granting arbitrators the discretion to permit revisions of positions at any time before the close of the hearing, so long as the other party has an opportunity to respond. That rule also permits the arbitrator to terminate the parties' ability to revise at any earlier point. The rule's purpose was to permit the parties to continue to negotiate in an effort to minimize the differences in their final offers. Stressing that the selection of impasse resolution procedures was at the heart of the Commission's expertise, the Court deferred to the Commission's interpretation of the interest arbitration statute and its assessment that the rule had worked well in practice.

³⁶ City of Atlantic City v. Laezza, 80 N.J. 255 (1979); New Jersey State PBA, Local 29 v. Town of Irvington, 80 N.J. 271 (1979).

³⁷ Atlantic City, 80 N.J. at 268-69. See also Division 540, ATU v. Mercer Cty. Improvement Auth., 76 N.J. 245 (1978).

³⁸ Newark FMBA, Local No. 4 v. City of Newark, 90 N.J. 44 (1982).

The past five years were marked by major developments in interest arbitration. In 1994, the New Jersey Supreme Court issued two decisions which had a significant impact on the interest arbitration community. PBA Local 207 v. Bor. of Hilldale, 137 N.J. 71 (1994); Washington Tp. v. New Jersey PBA, Local 206, 137 N.J. 88 (1994). The Court vacated the awards under review, holding that the arbitrators had unduly emphasized comparisons with police salaries in other communities and had improperly placed the burden on the municipalities to prove their inability to pay the union's final offer. Hillsdale, 137 N.J. at 86; Washington Tp., 137 N.J. at 92. The Court observed that the statute invited comparison with other public and private sector jobs. Hillsdale, 137 N.J. at 85. Further, the statutory direction to consider the financial impact on the municipality demanded more than answering the question whether the municipality can raise the money to pay the salary increase. Id. at 86. The Court emphasized that arbitrators must identify and weigh all the relevant statutory factors, analyze the evidence pertaining to those factors, and explain why other factors are irrelevant. Id. at 84-85.

On the legislative front, interest in modifying the interest arbitration statute continued and, during 1993-1995, several bills were filed with this objective. In January 1996, the Police and Fire Public Interest Arbitration Reform Act was signed into law. The Reform Act changed the terminal procedure to conventional arbitration (absent an agreement to use another terminal procedure), required the Commission to assign arbitrators by lot where the parties do not agree on an arbitrator, and required that an award be issued within 120 days of an arbitrator's selection or assignment, unless the parties agree to an extension. The comprehensive list of factors that must be considered in deciding a dispute was amended to provide more specific direction to the arbitrator and the parties. Incorporating the language of the Hillsdale decision, the statute was amended to

require the arbitrator to indicate which statutory factors are relevant, analyze the evidence on each relevant factor, and explain why the other factors are not relevant.

The Reform Act also gave the Commission new responsibilities in administering the interest arbitration statute. It is now required to conduct an annual mandatory training program for arbitrators and to perform, or cause to be performed, an annual survey of private sector wage increases. The Commission, rather than Superior Court, now has jurisdiction to decide appeals from interest arbitration awards.

GRIEVANCE ARBITRATION

In the private sector, the Steelworkers Trilogy assumes that grievance arbitration will be the end, not the beginning, of litigation. It thus commands that courts accord the arbitration process great deference.³⁹ But in the New Jersey public sector, the courts have been more assertive. That has been especially so when the result of a case has been costly or questionable.

For example, in State v. State Troopers Fraternal Ass'n, 91 N.J. 464 (1982), the Supreme Court held that an award requiring the employee to maintain a \$1.25 co-payment level for prescription drugs was not "reasonably debatable." And in CWA v. Monmouth

³⁹ United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

Cty. Bd. of Social Services, 96 N.J. 442 (1984), the Court found no contractual authorization for an award granting back pay between the time employees were illegally removed from a promotion list and the time they were eventually promoted. But the best example of judicial assertiveness is County College of Morris Staff Ass'n v. County College of Morris, 100 N.J. 383 (1985), where the Court vacated an arbitration award reinstating (with an eight month unpaid suspension) a truly bad employee. To reach that result, the majority construed private sector precedents and concluded -- incorrectly -- that absent express contractual authorization, the arbitrator could not properly consider the absence of any prior warnings in determining whether there was just cause to discharge the employee. Chief Justice Wilentz sharply dissented, emphasizing that arbitration awards should be given great deference, "a deference that necessarily includes a sympathetic rather than a hostile remedy of the arbitrator's opinion." Id. at 406-407. Happily, Morris Cty. has since been limited to its facts and the particular wording of the arbitrator's award.⁴⁰

A recent Supreme Court decision gives reason to believe that the courts are becoming more sympathetic to the arbitration process. In Bloomfield Bd. of Ed. v. Bloomfield Ed. Ass'n, 126 N.J. 300 (1991), aff'g 251 N.J. Super. 370 (App. Div. 1990), the Court held contractually arbitrable a grievance contesting the employer's refusal to pay employee medical expenses for the period following its insurer's declaration of insolvency and before it retained a new insurance carrier. Its per curiam opinion adopted the

⁴⁰ See Local 153 OPEIU v. Trust Co. of New Jersey, 105 N.J. 442 (1987).

Appellate Division's reasoning, including its embrace of the Steelworkers Trilogy and the strong public policy favoring arbitration of labor relations grievances.

A recent Supreme Court case upheld a grievance arbitration award reading a just cause clause into a collective negotiations agreement and restoring the increment of a teaching staff member accused of excessive absenteeism. Scotch Plains-Fanwood Bd. of Ed. v. Scotch Plains-Fanwood Ed. Ass'n, 139 N.J. 141 (1995).

Under the Steelworkers Trilogy and Bloomfield Bd. of Ed. v. Bloomfield Ed. Ass'n, 126 N.J. 300 (1991), aff'g 251 N.J. Super. 379 (App. Div. 1990), contractual arbitrability depends on a reading of the arbitration clause, not on whether a court deems a grievance contractually meritorious or frivolous. However, Marlboro Tp. Bd. of Ed. v. Marlboro Tp. Ed. Ass'n, 299 N.J. Super. 283 (App. Div. 1997), certif. den. 151 N.J. 71 (1997) still bespeaks a judicial willingness to delve into the contractual merits of a dispute under the guise of determining contractual arbitrability. There, the Court restrained arbitration over a non-reappointment of non-professional employee; the union had claimed that the non-reappointment violated the parties' "just cause" clause, but the Court ruled that this clause did not apply.

Another case that evidences some skepticism about public sector grievance arbitration is Policemen's Benevolent Ass'n, Local 292 v. Borough of North Haledon, 305 N.J. Super. 454 (App. Div. 1998), appeal pending. There, the Court held that a common law confirmation action could not be brought after expiration of the three month period for summary confirmation actions under N.J.S.A. 2A:24-7 of the Arbitration Act. The Court was worried that if it permitted common-law confirmation actions, it would be forced to confirm awards "patently contrary to the legislative will

and public policy of this State." Id. at 416. The practical effect of this decision may be to force unions to move to confirm all awards where an employer has not either promptly complied or moved to vacate.

For a discussion of arbitrability principles and the finality of the public sector grievance process, see Mastriani and Anderson, Arbitrability in the Public Sector, §§60.01 and 60.02 contained in Labor and Employment Arbitration (Matthew Bender & Co. 1997).

SUMMARY

The public sector labor relations process has had a dramatic impact on employee rights and governmental processes. There are now approximately 3500 negotiating units in the state. Unorganized public employees continue to organize and a significant number of representation petitions continue to be filed. These efforts have been and remain successful; employees vote for representation in over 90% of elections and 90% of those who vote cast their ballots in favor of representation. It is rare when a public employee organization is decertified. The trend towards unionization and retention of unionization will continue.

The process has worked so far. But, whether it will be as viable 25 years from now will depend upon its ability to be flexible and adapt to public policy concerns. All levels of government in the 1990's will face unprecedented challenges.

After three decades of explosive growth in services and employment, will there be a retrenchment in society's ability to continue to financially support the demands it has placed upon government? A society which requires a certain level of services must

generate the wealth necessary to support these services and must be further willing to apportion that wealth towards the financial support necessary to fund these services. In the long run, the public sector labor relations process must continue to be viewed as working in harmony with the public interest or the public will shape it in such a way as to reflect the public's goals and ambitions.

I am confident that public sector labor relations as an institution can succeed in responding to future challenges. There is enormous expertise among our labor and management practitioners. The process will be judged on its ability to provide solutions rather than confrontation and chaos. Creativity and cooperation will intensify in relation to the complexity of the problems which the process must resolve. Litigation will not be the answer to these challenges. It will set the guidelines and define legal rights, but it will not resolve the fundamental policy challenges to the process. Those challenges can only be met by all of us in the labor relations community.