

PUBLIC SECTOR COLLECTIVE NEGOTIATIONS
IN NEW JERSEY: THE PAST THIRTY YEARS¹

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ABSTRACT

An overview of the principal developments in New Jersey employer-employee relations between 1968 and 1998. The article discusses the origins of the state's system of collective negotiations, the changing nature of the legislation, and the impact of the courts. Much of the article focuses on how the New Jersey courts have influenced the collective negotiations system by their rulings on scope of negotiations, disciplinary boundaries, and standards to be applied by arbitrators in resolving contract impasses.

This article examines the development of the New Jersey system of public sector employer-employee relations. Because the Rutgers conference focused on scope of negotiations and impasse resolution, the authors concentrated on those two topics. We deal with representation issues only as far as they represent a stage in the historical evolution of New Jersey system. We do not examine the New Jersey approach to unfair practices in any detail, and we do not discuss the "agency shop" legislation passed in 1979, which allows the majority representative to negotiate the right to receive representation fees from represented employees who do not belong to the union. The subject of grievance arbitration also remains for another day.

¹ This article is an amalgamation of the two papers presented by the authors at the Rutgers Conference. Much of the material for this article was taken from [1-3].

The late 1960s were a time of turmoil among public employees across the nation. A number of states responded by enacting public sector bargaining laws in an attempt to provide a procedural framework for dealing with public employee concerns and demands. Wisconsin was the first state to pass such a law, and in 1967, neighboring New York State passed what came to be known as the Taylor Law after George Taylor, a nationally prominent professor of industrial relations at the University of Pennsylvania.

In New Jersey, there had been unrest among public employees for some years. Bills had been introduced in the legislature every year since 1954, but these bills did not go far, because there was no consensus on the part of the unions. The AFL-CIO unions were pulling in one direction and the New Jersey Education Association (NJEA) in another. The NJEA at the time was heavily influenced by supervisors and superintendents and very concerned with being a professional association and distinguishing itself from a union. At the same time, there was fierce competition between the NJEA and the American Federation of Teachers.

Several bitter strikes served as an impetus for the enactment of a bill that created a Public and School Employees' Grievance Procedure Study Commission in 1966. This body issued a report in January 1968 that recommended the enactment of a fairly comprehensive collective bargaining statute. Several bills were introduced, and one finally received sufficient support to be passed by both houses in June 1968. The New Jersey Employer-Employee Relations Act became law on September 13, 1968, over the conditional veto of Governor Hughes. The governor, among other concerns, believed it should contain an explicit strike prohibition. Popularly known as Chapter 303, this statute established collective bargaining in the public sector in this state.

CHAPTER 303

The new law created a seven-member, tripartite commission with two representatives of public employee organizations, two representatives of public employers, and three public members. The law was comprehensive in the sense that it covered all public employers at the state, county, municipal, and school district levels. It also covered a broad range of public employees. Only elected officials, board and commission members, managerial executives, and confidential employees were excluded. Supervisors—defined as those having the power to hire, discharge, discipline, or effectively recommend the same—were included, although they generally had to be in separate bargaining units.² The law

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This was common in almost all of the public sector bargaining laws. The authors believe this was an error. They believe that, as in the private sector, supervisors should not have been covered. Their conclusion has served to divide the loyalties of public sector supervisors and to hinder the development of the kind of supervisory thinking and leadership that would be in the interest of public institutions.

specified that employees had the right to form, join, and assist any employee organization or to refrain from that activity, and provided a mechanism for resolving questions concerning representation and for assisting in resolving negotiation disputes.

The impasse procedure was one of the interesting features of the law. Most states, including New Jersey, were unwilling to give public employees the right to strike. At the same time, there was a concern that bargaining was only meaningful if the two parties had relatively equal bargaining power and the ability to impose costs on each other. Without the availability of strikes and lockouts, it was necessary to devise a substitute.

New Jersey followed the lead of New York State and developed a two-part procedure. The first part, mediation, was simply the well-established procedure imported from the private sector. The second and unique component was fact-finding, which was intended to serve as a proxy or substitute for the first to strike or lock out. The theory was that if the parties were unable to resolve their negotiations impasse directly or through mediation, a factfinder would be appointed. The factfinder would listen to the evidence and arguments of the parties and then issue a written report and recommend terms of settlement. The parties were given a short time to reach an agreement on the basis of this report and, if no settlement was reached, the report was to be made public. The theory was that the publication of the report in the local press would bring the weight of public opinion to bear on the dispute and would compel a reluctant party to accept the recommendations, thereby ending the impasse and leading to an agreement.

APPROPRIATE NEGOTIATING UNITS

Much of the commission's early attention went to the determination of appropriate negotiating units. This was particularly difficult at the state level and in police departments, but decisions were made and patterns were established that generally continue to guide the commission. Section 5.3 of the act directs that negotiations units be defined with "due regard for the community of interest of the employees concerned." The commission generally found statewide units were appropriate for state employees [4], and PERC created generic statewide units for employees engaged in health care, rehabilitation services operations, maintenance, service, and later authorized statewide administrative and clerical units. In 1974, the New Jersey Supreme Court upheld PERC's approach toward defining broad-based units in *State of New Jersey and Professional Association of New Jersey Department of Education* [5].

PERC and the courts wrestled repeatedly with supervisory representation as well. In the end, most supervisory employees were granted representation rights, but they could not be commingled with nonsupervisors in a single negotiating unit or represented by a union that admitted nonsupervisory personnel to

membership. Very high-level supervisors, termed managerial executives, and confidential employees are excluded from the protection of the act.³

EARLY COURT DECISIONS

There were several extremely important judicial decisions in the early years. Governor's Hughes' concern that an implied right to strike would be found in the law was put to rest in 1968 when the Supreme Court issued its *Union Beach* decision holding that strikes were prohibited at common law in the absence of express legislative enactment [6]. In 1970, the state's supreme court upheld the constitutionality of exclusive representation by an employee organization, in the face of some potentially troubling language in the State Constitution [7]. Thus, the law withstood its only serious constitutional challenge.

Later that year, however, the commission was less fortunate. While the original enactment did not explicitly provide that PERC had the authority to remedy unfair labor practices, the commission believed this authority was inherent. The law set forth employee rights, and the commission believed it made sense for it to enforce those rights. For several years, the commission adjudicated unfair practice charges in accordance with procedures contained in the commission's Rules. In *Burlington County Evergreen Park Mental Hospital v. Cooper*, New Jersey's supreme court determined that while the statutory rights existed, they were to be enforced and remedied in court and not by PERC [8]. The commission could no longer enforce the statute.

The other extremely important judicial decision was issued in 1973, and its three cases became known collectively as the *Dunellen Trilogy* [9-11]. In those cases, New Jersey's supreme court established the framework for determining whether disputed issues were negotiable and arbitrable. The court determined that only subjects that intimately and directly affected working conditions were negotiable. Excluded were major educational policies that only indirectly affected working conditions [9-11]. The *Dunellen* decisions created two categories of negotiation issues: A topic would be either a mandatorily negotiable term or condition of employment or a nonnegotiable matter of managerial prerogative [9-11].

CHAPTER 123

The effect of these decisions on unfair practices and the scope of negotiations was to mobilize public employee organizations to attempt to overturn them

³ Managerial executives are defined as persons who formulate management policies and practices and are charged with the responsibility of directing their implementation. Illustrating the narrowness of the definition, in school districts this term includes only the superintendent or other chief administrator, and the assistant superintendent of the district.

through legislation. In 1974, the efforts produced a set of amendments to New Jersey's Employer-Employee Relations Act known as Chapter 123. The amendments enumerated employer and employee organization unfair practices, stated the parties were required to negotiate in good faith concerning terms and conditions of employment, and empowered PERC to prevent and remedy unfair practices. PERC was authorized to determine whether disputed issues were within the scope of negotiations, and the position of chair was converted to a full-time position.

Subsequent cases involving unfair practices established PERC's remedial authority, accepted federal private sector cases as a guide in interpreting the New Jersey law, and adopted several important private sector principles, including a prohibition against unilateral changes in terms and conditions of employment [12, 13]. The court also affirmed the right of a majority representative to file grievances in its own name [14]. In *Township of West Windsor v. PERC*, the court held that grievances affecting terms and conditions of employment were to be defined as appeals from "the interpretation, application or violation of policies, agreements, and administrative decisions affecting [public employees]" [15, at p. 98]. It held that the grievance procedure itself, including the terminal step, is negotiable, but it also held that what is grievable is not necessarily arbitrable [15].

SCOPE OF NEGOTIATIONS

Probably the most difficult, most controversial, and most frequently litigated area of New Jersey 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 cannot be negotiated.

One significant part of Chapter 123 dealt with the scope of negotiations. Chapter 303 contained language which said that nothing in the statute should be construed so as to annul or modify "any statute or statutes of this State." The new law inserted the word "pension" before the word "statute." As originally interpreted by PERC, this change provided for the same classification of subjects in effect in the private sector and in most public sector jurisdictions. Subjects were mandatory, permissive, or illegal. PERC issued many decisions using this system, and it often distinguished between managerial decisions that were not mandatorily negotiable and the mandatorily negotiable effect or impact of those decisions.

In August 1978, almost four years after the law was passed and after PERC had issued 225 scope of negotiations and unfair practice decision, New Jersey's supreme court weighed in with its review of these amendments. Six decisions were issued that dealt not only with the scope of negotiations, but unfair practices, the enforcement of statutory rights, and the availability of grievance and arbitration procedures.

The most controversial decisions concerned the scope of negotiations. In *State v. State Supervisory Employees Association*, the court held that terms and conditions of employment were negotiable only to the extent that employers had the legal authority to vary them [16]. Terms and conditions set by statute cannot be negotiated, while statutes that provide for minimum or maximum standards have only a limited preemptive effect [16].

The more far-reaching decision, *Ridgefield Park Education Association v. Ridgefield Park Board of Education*, held that matters not pertaining to terms and conditions of employment, as defined by the court, were *not* permissively negotiable [17]. Echoing the 1973 *Dunellen* decisions, the court held that New Jersey has two—rather than the usual three—classes of subjects: mandatorily negotiable terms and conditions of employment and nonnegotiable matters of management prerogative [17]. The effect of these decisions has been to provide for a very narrow scope of negotiations in New Jersey.

Two years later, New Jersey's supreme court recast *Dunellen's* basic negotiability formula into a balancing test. A proposal's effect on the employee's work and welfare must be balanced against a proposal's interference with the employer's prerogatives. When the dominant issue is a governmental policy goal, including its impact on terms and conditions of employment, negotiations over that issue are not required [18].⁴ In 1982, the supreme court consolidated the balancing test into one tripartite test: A subject is negotiable 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 government policy [20].

Although the courts have sometimes suggested that the impact of managerial decisions on terms and conditions of employment is not negotiable, issues severable from the exercise of a managerial prerogative may still be mandatorily negotiable. Thus, a public employer has a nonnegotiable prerogative to reduce a vehicle fleet and thereby stop employees from using those vehicles to commute. But it must negotiate the severable issue of offsetting compensation for the loss of that economic benefit [21]. PERC's severability doctrine bars negotiations over a prerogative and its necessary impact while permitting negotiations over severable compensation claims.

In 1990, the Employer-Employee Relations Act was again amended, this time to expand the scope of negotiations for school board employees. The amendment made assignment to, retention in, dismissal from, and terms and conditions of

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In the interest arbitration statute covering police and firefighters (Chapter 85), the legislature had created a permissive area of negotiations. However, the court rejected private sector standards for determining permissive negotiability. It held a subject is not permissively negotiable if it placed substantial limitation on government's policy-making powers and has found few subjects to be permissively negotiable [19].

employment associated with extracurricular activities subjects of mandatory negotiations, saving only the establishment of qualifications as a matter of prerogative.

DISCIPLINE

In 1981, the New Jersey courts had determined that “the power to discipline a public employee for misconduct, inefficiency, or other good cause is one of the most significant powers reposed in public employers and is essential to the maintenance of an adequate, efficient, and effective public work force” [22, at 152-153]. This effectively removed the topic of discipline and disciplinary procedures from the scope of negotiations.

In 1982, the legislature amended Section 5.3 of the act to make disciplinary disputes and review procedures mandatorily negotiable. The discipline amendment negated the suggestion that a public employer had a right to discharge employees without cause or some form of neutral review.

The history in this area became more convoluted in 1993 when New Jersey’s supreme court held that the discipline amendment did not apply to state troopers or any other police officers and questioned whether it applied to any disciplinary disputes involving employees covered by civil service or tenure laws [23]. The legislature responded to this by amending the statute to make clear that public employers could agree to arbitrate *minor* disciplinary disputes involving any public employees except state troopers [24]. As later construed, minor discipline is a suspension or fine of five days or less unless the employee has been suspended or fined an aggregate of fifteen or more days or received three minor suspensions or fines in one calendar year [25].

IMPASSE RESOLUTION, INTEREST ARBITRATION, AND CHAPTER 85

As cited above, Chapter 303 entrusted PERC with authority over impasse resolution mechanisms, but it provided the commission access only to mediation and factfinding. On the same day Chapter 123 was signed into law, the governor also signed a bill that created the Public Employer-Employee Relations Study Commission. The commission was given a broad mandate because of the turmoil, the strikes, and public dissatisfaction with the way things were going. Following an open and extended process, this commission made a number of recommendations and issued what was essentially a unanimous report. The most significant recommendation was that final-offer arbitration be required as the terminal step of the impasse procedure for *all* public employees. There was insufficient legislative support for this proposal, but the recommended procedure was adopted for police officers and firefighters in 1977 and became known as Chapter 85.

The most notable feature of this legislation was the adoption of a specific form of last-best-offer (LBO) arbitration. The law gave the parties a choice of several forms of arbitration. However, unless they were able to agree on another form, they were required to develop final offers on economic issues as a package and on noneconomic issues on an issue-by-issue basis. The arbitrator would then select one or the other package of economic issues and either party's position each of the noneconomic topics. The parties rarely adopted another form of arbitration.

The early court decisions focused on the relationship between the interest arbitration process and the New Jersey "budget cap law," which restricted the amount by which a governing authority could increase its operating budget without voter approval. The courts decided the arbitrator was not restricted to the percentage specified in the cap law in determining the increase awarded, but the governing authority was still bound by the cap law. Thus, an arbitrator might award an increase larger in percentage terms than the cap, but the governing authority could not use that award as a basis for expanding its expenditures beyond the cap. The courts also made rulings permitting the parties to revise their final offers but gave the arbitrator the right to terminate the process of revision.

In a series of significant cases beginning in 1994, the courts vacated arbitration awards under review, holding:

1. that the arbitrations had unduly emphasized comparisons with police salaries in other communities;
2. that they had improperly placed a burden on the municipalities to prove their inability to pay;
3. that they had too often ignored the statutory invitation to compare with other public and private sector jobs;
4. that the statutory direction to consider the financial impact on the municipality demanded more than answering the question of whether the municipality can raise the money to pay;
5. that arbitrators must identify and weigh all of the relevant statutory factors, analyze the evidence pertaining to those factors, and explain why other factors are relevant.⁵

The final piece in the arbitration puzzle came two years later. In January 1996, the Police and Fire Public Interest Arbitration Reform Act was signed into law. Among other things, the Reform Act made conventional arbitration the terminal procedure unless the parties opted for another. Through conventional arbitration, the arbitrator is not restricted to a choice between the final positions adopted by the parties and may select some intermediate position. The new law also required

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The statutory factors included public interest and welfare, comparisons with other employees, total compensation packages, party stipulations, employer authority, financial impact on taxpayers and the government unit, cost of living, and employment stability [26, 27].

the commission to assign arbitrators by lot when the parties do not agree on an arbitrator.

FINAL THOUGHTS

The public sector labor relations process has had a dramatic impact on employee rights and government processes through the nation. Public employees in New Jersey and elsewhere have responded to the call of the unions. There are approximately 3,500 negotiating units in New Jersey. In this state, employees vote for representation in over 90 percent of elections. In those elections, 90 percent of the employees cast their ballots vote for representation, and rarely is a public employee organization decertified.

The processes of organizing, negotiations, and dispute resolution have worked thus far. But whether they will be viable thirty years from now will depend on their ability to adapt to the changing needs of the society, society's continued ability and willingness to support government service, and broad public policy concerns. After three decades of explosive growth in services and employment, can the system of employer-employee relations adapt, for example, to force retrenchment?

While we are confident that the system can adapt, survive, and prosper, we close with one specific thought about an area in which we believe the law has not served the public or the parties well. This discussion relates to professional employees, particularly teachers, and the scope of negotiations as it has evolved in New Jersey.

Teachers are both professionals and employees at the same time. This creates extra challenges for the bargaining process. This process is an adversarial one, where labor's interest and those of management often collide, and the bargaining process is limited to mandatorily negotiable terms and conditions of employment as defined by the courts. The role of law and the administrative agency has been to contain and resolve conflicts in a relatively orderly fashion with a minimum of disruption. This disregards, however, the interests of teachers as professionals.

The early negotiations between school boards and teacher organizations were strongly contested, and this had the immediate effect of reinforcing the adversarial nature of their relationship. We suggest the long-term effects of this have been detrimental to the interests of all stakeholders—teachers, students, the public, school boards, and education associations. By focusing on differences, and particularly on money, the common interests, and particularly the professional and educational interests, have been relegated to a distinctively secondary position or ignored altogether.

At the bargaining table, from the beginning the NJEA focused primarily on raising the salaries and benefits of teachers. Back in 1969, it was clear the NJEA was ready for this law. It had a sample agreement that it distributed to its affili-

ates, and it already had a small professional staff to assist locals as they negotiated with boards. It is fair to say that most school board members were untrained in the process of negotiations and most were not represented by experienced negotiators. Thus, the School Boards Association, and many individual school boards, reacted defensively. Boards tended to cite what they believed were their “managerial prerogatives” in an effort to limit the subjects that could be negotiated. This had the effect of narrowing the scope of negotiations and placing off limits matters of professional concern to the teachers as well as educational policy issues. However, this also had the unfortunate effect of depriving boards of the benefit of input from their professionals on these matters.

The courts viewed with alarm the militance and successes of the NJEA at the bargaining table. They saw that a number of school boards seemed to be overwhelmed by the teacher organizations, and some boards surely made concessions they later regretted. In an attempt to protect what they believed was the public interest, the courts generally agreed with the boards and held that many subjects could not be included in bargaining. By preventing school boards from negotiating many topics, the courts undoubtedly believed they were protecting the boards from making concessions or agreements that might be contrary to the public interest.

This, of course, limited the discretion of boards at the bargaining table by preventing them from discussing items on which professional teacher input might have been useful. There was too little understanding on the part of boards and the courts of the basic concept that good-faith negotiations do not require a party to make a concession or agree to a proposal of the other party and that “no” is a perfectly acceptable response to a proposal.

The effect of this narrow scope of negotiations, as represented by *Dunellen* and *Ridgefield Park*, has been that the parties have less to negotiate. Even if they want to, they cannot negotiate regarding professional issues and issues that affect the provision and quality of education. This represents a loss not only for the teachers but also for students and the public. Who is better trained and qualified to have input into those educational matters than the people who deliver the education to the students? Who knows better the way to effectively educate the students? A valuable resource is being lost by denying the opportunity for teacher input in these areas.

The narrow scope of negotiations means that such decisions are made unilaterally by boards of education, or, with some items, centrally by the New Jersey State Department of Education, which preempts in many important areas. Mandates are imposed from above rather than being developed and experimented with locally. This is not in the interests of students, the public, the teachers, or boards of education.

We are in a global economy. In a time where it is necessary to provide public education more efficiently and effectively, public support for education has fallen. We believe it would be in the best interest of all the stakeholders if teach-

ers were able to provide greater input into professional and educational areas to improve education and, hopefully, make it more thorough and efficient.

On an overall basis, however, we are confident that public sector labor relations as an institution can succeed in responding to future challenges. The process will be judged on its ability to provide solutions rather than confrontation, order rather than chaos. Litigation will not be the answer. It will set the guidelines and define the limits, but it will not resolve the fundamental policy challenges to the process. These challenges can only be met by the actors in the labor relations community. Fortunately, there is an enormous bank of expertise among New Jersey's labor and management practitioners.

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Mr. Tener was one of the first employees of the New Jersey Public Employment Relations Commission and was its chair from 1976 to 1980. Mr. Mastriani chaired the commission from 1981 until 1996.

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