

CHAMPIONS OF SUBSTANTIVE DUE PROCESS:
THE CONTINUING INFLUENCE OF THE NEW JERSEY
COURTS ON THE SCOPE OF NEGOTIATIONS

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ABSTRACT

One of the issues that arises repeatedly in many public sector jurisdictions pertains to the range of issues that may be negotiated. Although a very broad scope of negotiations is permitted in private sector collective bargaining, New Jersey and many other public jurisdictions have attempted to restrict that scope. This paper traces the approaches that have been taken by PERC, the Legislature, and the court system to scope of negotiation in the New Jersey public sector. It focuses on how the courts have served as the guardians of managerial prerogatives.

“The very foundation of representative democracy would be endangered if decisions on significant matters of governmental policy were left to the process of collective negotiation, where citizen participation is precluded” [1, at 163]. That rather ominous warning from the New Jersey Supreme Court is symptomatic of its black-or-white approach to collective bargaining in the state’s public sector.

Reacting to what it perceived as an exclusion of the true managers (the people) in the negotiation of contracts over the terms and conditions of employment in the public sector, the court has repeatedly cited the legal principle of substantive due process to narrow the scope of those negotiations. Substantive due process is a legal tenet forbidding the delegation of governmental authority to private groups. This paper traces the development of this doctrine in the collective bargaining arena and the role of the court as the dominant player in employer-employee relations in the public sector. We show that what started as an attempt by the legisla-

ture to bring about equity and labor-management peace in the public sector resulted in the court's ongoing entanglement and the continued generation of employer-employee controversy.

BACKGROUND

In the 1947 New Jersey Constitution, public employees were given organizing and grievance rights through their chosen representatives, but not the right to bargain collectively over conditions of employment.

Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the state, or any political subdivisions or agencies, their grievances and proposals through representatives of their own choosing [2, Art. 1, ¶ 19].

Most of the early court decisions that dealt with this provision construed it narrowly. In most cases, the two sides were required only to "meet and discuss" [3]. One of the important cases from this era came from the New Jersey Turnpike Authority [4]. A suit had been filed by the turnpike commission to prohibit a strike. The court held that, while workers did not have the right to strike, both sides had to meet in good faith to try to resolve grievances and proposals, but bargaining was *not* required. Perhaps because of such rulings, labor remained defiant. This defiance was the end product of years of frustration in dealing with salary increases that failed to match both the continuing high rates of inflation and the gains of their private sector counterparts through their collective bargaining agreements. There were many instances of work stoppages, sickouts, mass resignations, and other forms of protest. The New Jersey courts responded by upholding the dismissal of public sector employees for striking and by jailing strike leaders who disobeyed restraining orders [5].

By the 1960s, however, the civil rights and labor movements were shifting into high gear. President Kennedy issued Executive Order 10988, which allowed federal workers some bargaining rights and laid the groundwork for legislation by the states. Prior to the New Jersey law, only Wisconsin (1962) and New York (1967) had legislated comprehensive codes for public sector employer-employee relations [6]. With labor pushing hard for collective bargaining legislation in many of the industrialized states and deliberate disobedience of court injunctions by labor on the rise [7], the situation had reached a boiling point. Stimulated by these conditions and the lobbying efforts of the National Education Association, the American Federation of State, County and Municipal Employees (AFSCME), and other unions, the legislature passed New Jersey's first public sector bargaining law, hereinafter called Chapter 303, on September 13, 1968.

CHAPTER 303: A NEW ERA

In 1966, the Public and School Employee's Grievance Procedure Study Commission, known as the Bernstein Commission, was set up by the legislature to make recommendations for a law to establish procedures for resolving grievances and proposals concerning terms and conditions of employment for government employees [8]. Chapter 303 was a result of this commission's work. This statute empowered virtually all of the public employees in the state to meet "freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity" [9]. More importantly, the law also placed upon both labor and management the obligation to negotiate collectively over terms and conditions of employment.

A new state agency was formed by the act: the Public Employment Relations Commission (PERC).¹ PERC was charged with making ". . . policy and establishing rules and regulations concerning employer-employee relations in public employment relating to dispute settlement, grievance procedures and administration including enforcement of statutory provisions concerning representative election and related matters" [9, § 34:13A-5.1(a)]. PERC's new functions provided fertile soil for fresh conflicts with the Civil Service Board and commissioner of education. Prior to the act, those agencies were the ones that made policy, established rules and regulations, and settled disputes involving the employees under their jurisdiction.

With regard to scope of negotiations, the legislature clearly stated that employee representatives and management were required to negotiate in "good faith with respect to grievances and terms of employment" [9, § 34:13A-5.3]. And here we come across two critical points. First, because the act was silent as to what exactly constituted terms and conditions of employment, the judiciary had to sort out what was and what was not negotiable. Second, further complicating the task of determining negotiability of an issue was language in the act banning modification of any existing agreement or New Jersey statute [10]. The statute specifically stated that:

Nothing in this Act shall be construed to annul or modify, or to preclude the removal or continuation of any agreement during its current term heretofore entered into between any public employer and employee organization, *nor shall any provision hereof annul or modify any statute or statutes of this State* [9, §34:13A-5.3, emphasis added].

The public sector labor-management waters, already roiled by union activism and economic pressures, were now muddied by the nonspecific language of the act with regard to scope of negotiations.

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PERC is composed of seven commissioners appointed by the governor and approved by the state senate. Two members are from the public employees sector, two from the employer/government sector, and the remaining three are appointed from the public.

THE DUNELLEN TRILOGY

While it was not the first case to come before the New Jersey State Supreme Court for clarification of Chapter 303 scope issues, the *Dunellen Trilogy* is commonly accepted as the first of two bellwether sets of cases. Dunellen was one of three cases decided on the same day by the state supreme court in 1973 [11-13]. In the trilogy's namesake case, an action had been brought by the board of education to restrain the teacher's bargaining unit, the Dunellen Education Association, from proceeding to arbitration on an issue involving consolidation of academic departments. The association filed a grievance in accordance with its existing contract and appealed for arbitration to PERC when its grievance was rejected by both the superintendent of schools and the board. The board maintained the position that allowing arbitration on such an issue ". . . would amount to an illegal and unenforceable delegation of the Board's statutory responsibilities" [11, at 22].

The board reasoned that ". . . the controversy was one arising under the School Laws of New Jersey and was therefore within the exclusive jurisdiction of the Commissioner of Education" [11, at 22]. The chancery division rejected the board's arguments, and agreed with the association that ". . . the Commissioner has no function at all in connection with the controversy and that the matter should be permitted to proceed to arbitration" [11, at 22]. The court thought the dispute "was one arising from the contract" [11, at 22]. Following the superior court's affirmation of this ruling, the board filed an appeal with the state supreme court, and the court accepted the appeal.²

The supreme court held the board's decision to consolidate two academic departments did not amount to a term and condition of employment and, therefore, was not negotiable [11, at 31]. The court reasoned that the consolidation of the departments ". . . was predominantly a matter of educational policy which had no effect, or at most only a remote and incidental effect, on the `terms and conditions of employment'" [11, at 29]. However, the court in *Dunellen* did not draw a clear line in the sand. It noted that the distinction lines between what is negotiable and nonnegotiable ". . . will often be shadowy" [11, at 25] and suggested that a case-by-case approach would provide the greatest clarity [7, p. 69]. With this ruling, the court delineated the legal principle that there are only two categories of topics regarding collective negotiations in the public sector: terms and conditions of employment and matters of policy. Terms and conditions of employment are mandatorily negotiable. Matters of policy are nonnegotiable.

This newly minted legal precedent was quickly put to work in *Dunellen's* sister cases, *Board of Education v. Englewood Teachers Association* [13] and *Burlington*

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Ironically, at the time the case was argued before the New Jersey Supreme Court, the Dunellen Board of Education had changed its position with regard to the consolidation and even thought the controversy was moot. However, both parties wished to have the New Jersey Supreme Court make a ruling.

County College Faculty Association v. Board of Trustees [12]. At issue in the *Englewood* case were teachers' pay, fringe benefits, length of the work day, and the physical layout. The court ruled these were questions concerning terms and conditions of employment and, therefore, subjects for mandatory negotiation [13, at 6-7].

In *Burlington County College*, the issue was the structure of the school's academic calendar. Accumulated credit hours were a key driver for financial reimbursement to the college from the state. The college had an extended academic calendar year that contributed to an increase in the number of students attending classes and maximized its "student credit hours." Here the employer acknowledged its obligation to negotiate about work hours, but maintained the calendar structure was a linchpin to its economic well-being and a policy decision. The court agreed with the employer and ruled that the academic calendar format was a matter of management policy and not negotiable [12, at 13].

Of further interest to the court was Chapter 303's provision that the act not be construed to annul or modify any existing state statute [14]. Because the law placed management responsibility for county colleges with boards of trustees [15], the court felt this also excluded the issue from negotiation. The *Burlington* court then established a standard requiring "clear and distinct phraseology" from the legislature if it wanted to expand on what matters were to be subject to mandatory negotiations [12, at 16]. Not pleased with the limitations articulated by *Dunellen*, labor sought relief in the political process.

CHAPTER 123: LABOR FIGHTS BACK

Hobbled in their efforts to expand collective negotiations, public employees picked up the gauntlet thrown down by the court in *Dunellen*. They returned to the legislature in search of the "clear and distinct phraseology" prescribed in the *Burlington County College* decision. Earlier efforts by labor to enact a more favorable law were not successful. Some bills died in committee in 1971, and another was vetoed by the governor in 1972. Finally, amendments to the Employer-Employee Relations Act were signed into law by Governor Brendon Byrne in late 1974. The amendments, popularly known as Chapter 123, were sponsored by a Teamsters Union and state AFL-CIO official, Senator John Horn (D-Camden), and a labor-leader, Assemblyman Christopher J. Jackson (D-Hudson). Primary support for the bill came from a broad labor coalition led by the New Jersey Education Association.³

³ In addition to court-imposed limits on the scope of negotiations, other court rulings also prompted the Legislature to amend the Act. In *Burlington County Evergreen Park Mental Hospital v. Cooper*, [16] the court ruled that, absent specific language in the statute, PERC "does not have authority to hear and decide unfair labor practice charges and to issue various types of affirmative remedial orders respecting them" [16, at 579]. The new language in Chapter 123 certified PERC's authority over unfair labor practices. It gave them the power to issue cease-and-desist orders and mandated a proactive policy approach to provide for effective reinforcement [17].

The debate was heated and acrimonious. Because sponsors of the amendment were labor officials and at least six assemblymen were New Jersey Education Association (NJEA) members, opponents of the bill sought a conflict of interest ruling from the state attorney general's office [18]. The attorney general ruled no conflict of interest existed because the legislators involved would not benefit directly or monetarily from the pending legislation [18]. Newspaper accounts of the day described the atmosphere as charged. Over 200 labor activists and lobbyists crowded the assembly floor, galleries, and halls, urging passage of the bill. Lobbyists, who are barred from the assembly floor, exchanged their identification badges with friendly aides and mingled with legislators on the floor during the debate [19]. During a three-hour debate, the bill was amended and re-amended four times.

Although the union forces were attempting to secure very specific language expanding the scope of bargaining, the new amendments, which became law on October 21, 1974, contained only this language:

Nothing in this Act shall be construed to annul or modify, or to preclude the removal or continuation of any agreement during its current term heretofore entered into between any public employer and employee organization, nor shall any provision hereof annul or modify any *pension* statute or statutes of this State [20, emphasis added].

With the placement of the word *pension*, the bill sponsors claimed they had gutted a prominent underpinning of the *Dunellen* court's rationale for determining an issue to be nonnegotiable. Because almost every area of government was subject to some previous law that had granted policy-making responsibility to the public employer, it was relatively easy for these authorities to use this provision as a shield against submitting issues to an arbitrator for resolution. The new legislation seemed to carve out only pension issues from negotiation. Labor felt it had a bill that would widen the scope of negotiations.

Following the bill's passage, senate sponsor John Horn said, "In too many cases, the subject of negotiations is whatever the school board or city council feels like giving up, and that just should not be. This bill makes everything negotiable—and it will necessitate a give-and-take on both sides to arrive at a fair contract [21]. Press reports about the assembly's passage of the amendments describe desperate, last-minute procedural maneuvers by the opposition to ". . . delete a provision which makes virtually everything negotiable except pensions [22]. Senator Raymond Bateman (R-Monmouth) articulated the opposition's distress when he said the provision is a "time bomb which in about two years will explode and bankrupt the state" [23]. However, the state supreme court was once again about to slam the door on expanded negotiations.

RIDGEFIELD PARK

In the years that immediately followed the 1974 amendments, PERC interpreted the Chapter 123 amendments as expanding the scope of mandatory negotiation and creating a permissive category. PERC's expanded list of mandatorily negotiable topics included grievance procedures, changes in duties and responsibilities, disciplinary procedures, increments, salary holdbacks, evaluation and fair-dismissal procedures, holidays, job postings, promotion procedures, safety, sick leave, and many others [24, p. 639].

PERC also acted on the belief that the parties could voluntarily negotiate matters which were not strictly terms and conditions of employment. Some of the subjects PERC found to be permissively negotiable were selection of administrators, academic calendars, collegiality, curriculum review, qualifications of department chairs, assignment of duties, bus duty, coaching assignments, evaluation criteria, qualifications for hiring, criteria for promotions and for rating teaching effectiveness, staffing, involuntary transfers, and the decision to carry weapons [24, p. 643]. Following the private sector approach, PERC did not require the parties to negotiate permissive topics to the point of impasse.

At first some New Jersey courts continued to reaffirm *Dunellen's* test for what was and was not negotiable [10, p. 570] while others remained silent with regard to the idea of permissive topics, or gave tacit support by affording PERC "a broad and flexible latitude of interpretation of the statute . . ." [25, at 23]. In 1978, the supreme court cleared the air with its second major pronouncement on scope of negotiations (the other being *Dunellen* [11-13]).

The Ridgefield Park Education Association sought an order to make the local board of education submit grievances about teacher transfers and reassignments to binding arbitration. A provision in the then-existing collective bargaining agreement did in fact call for such a process. However, the board argued that arbitrating such a topic was illegal and asked that the matter be transferred to PERC for a determination of scope.

The chancery division denied the transfer request and ruled against the board, telling it to proceed to arbitration. Almost simultaneously, the board sought an injunction from PERC, but PERC concluded the matter was a permissive topic for negotiations, arbitrable under the contract's arbitration clause. According to PERC, the expansion of arbitrable issues was one of the main points in the 1974 amendments [1, at 152]. PERC relied on the legislature's formation of a study commission as its authority for making such a ruling [26]. New Jersey lawmakers had empowered the commission to look into what was mandatory, illegal, and *voluntary* within the scope of negotiations following the enactment of the amendment. PERC seized on the commission's mandate to investigate voluntary subjects for negotiations as its reasoning on creating a permissive category.

In its August 2, 1978 decision, *Ridgefield Park Education Association v. Ridgefield Board of Education*, the NJ Supreme Court was not as sanguine as

PERC about the legislature's intent regarding the study commission and voluntary topics for negotiation [1, at 157]. A study commission was one thing; the force of law was quite another. In unequivocal language, the court reaffirmed the *Dunellen* holding that in New Jersey's public employment sphere there are only two categories of subjects: mandatorily negotiable terms and conditions of employment, and nonnegotiable policy matters. The court saw the transfers as a policy matter and, therefore, nonnegotiable [1, at 157].

In its ruling, the court explained that *Dunellen* was built on a rock-solid foundation of "fundamental, constitutionally-rooted considerations of policy" and not mere statutory factors [1, at 160-161]. The source of its protection for management's prerogatives and policymaking lie in the state and federal doctrines of substantive due process. This doctrine bars the delegation of governmental power to private parties (like arbitrators) without safeguards such as judicial review. Toward the end, the court addressed the legislature and the possible future enactment of laws aimed at overturning its ruling by admonishing it on "the limits which our democratic system places on delegation of government powers" [1, at 166-167].

To labor's chagrin, the window on an expanded scope was now nailed shut by *Ridgefield Park*. In the two decades following the ruling, the situation has not changed. What has emerged is a slow shifting of the shadowy line between what is negotiable and nonnegotiable by the court. This is the very process outlined in *Dunellen* [7, p. 69].

RIDGEFIELD PARK EPILOGUE: BEND BUT DON'T BREAK

Ridgefield Park cemented the dichotomy established in *Dunellen*. In its wake came an inevitable case-by-case distillation and explanation of what was negotiable. The court continues to bend its definition of what is negotiable, but does not break its closely held tenet that issues can either be categorized as negotiable terms and conditions of employment or nonnegotiable matters of public policy or managerial prerogative. What follows are some cases that illustrate this ongoing process.

State v. State Supervisory Employees Association, decided on the same day as *Ridgefield Park*, answered certain questions about terms and conditions of employment. At issue were various management rules on layoffs, promotions and transfers [27, at 63]. The court held that a general statute was sufficient to preclude negotiations on a topic [27, at 80]. Negotiations could only be proscribed by legislation if the terms and conditions of employment were set by "statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the employer" [27, at 81]. The court held that issues such as layoffs were without question a managerial function and not subject to negotiation [27, at 88].

In *Local 195 v. State*, the court cited *Ridgefield Park* [1] and *State Supervisory* [27] when it ruled discipline constituted a key managerial prerogative that cannot be a subject for negotiation [28]. At issue was a preexisting binding arbitration grievance procedure in the collective bargaining agreement. In 1979, the state refused to abide by the procedure, and the union sought a scope ruling from PERC. PERC agreed with the union, but was reversed by the appeals court. The court said, “the power to discipline a public employee for misconduct . . . 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” [28, at 393].

Management prerogatives regarding education policy are guarded very jealously by the court, even when they need to be balanced against competing civil rights policies. In *University of Medicine v. American Association of University Professors*, the court upheld a previous PERC determination that an “institution’s substantive decision to retire tenured employees upon reaching age 70 was [a] nonnegotiable management prerogative” [29, at 323]. In its ruling, the court pointed out that an amendment to the state’s civil rights law provides for an exemption to its ban against mandatory retirement if the individual is seventy, tenured, and employed at an institution of higher learning [30]. It further explained that it viewed such a policy as necessary to protect the actuarial soundness of the pension system, as well as make available faculty positions for new hires, who are essential to the vitality of the academic environment. However, the court also said that the manner and means used to implement the decision to retire an employee was negotiable.

Even when an issue can reasonably be classified as a term and condition of employment, an agency can promulgate a regulation fixing those terms and conditions, thereby precluding negotiations. Such controversy arose in *N.J. State College Locals v. State* [31]. The New Jersey State Board of Higher Education issued new regulations regarding appeals of classification and reclassification determinations in conjunction with the newly enacted College Autonomy Law [32]. The union demanded negotiations on the regulations, but the board refused. PERC found for the board, and the union appealed. The key issue for the appellate court was whether mandatory negotiations were required prior to issuing the new regulations [31, at 581]. The court determined that the board’s rules were “presumptively valid and the burden rests with an appellant to establish their invalidity” [31, at 583]. Having failed to rebut the presumed validity before the court, the union was enjoined from trying to negotiate on the subject. Nevertheless, because the regulations provided for some discretion by the employer to use an outside consultant in reaching a decision on change in a classification plan, the court found requests by the union to negotiate procedural protections around this issue should be honored.

It is galling to labor that courts will sometimes sweep away existing contract provisions freely entered into by management. Turnpike workers in this next case

sacrificed years of economic benefits in exchange for the job security of a no-layoff clause. However, *In the Matter of New Jersey Turnpike Authority*, the court held decisions regarding layoffs were a managerial function even though a twenty-five-year-old clause in the contract stated that “. . . layoffs will only occur as a result of an Act of God” [33, at 174]. The union argued that the legislation creating the turnpike authority permitted management to enter into contracts necessary or convenient for its operations. Furthermore, the legislature chose a privatized business model when fashioning the authority, where managers are free to act like private section managers, unfettered by public sector concerns. The court was unimpressed with the union’s arguments and held the authority is no different from other government agencies with regard to employee negotiations. It ruled that negotiations on the topic of layoffs were permanently enjoined [33].

SUMMARY AND CONCLUSIONS

The basic principles pertaining to what is negotiable and what is not have been drawn by the New Jersey courts rather than by the legislature or by PERC. Although the *Dunellen* court described the line that separated negotiable issues from nonnegotiable ones as “shadowy,” that court also enunciated the basic principle that has continued to govern in this area: there are only two kinds of topics for negotiation, mandatorily negotiable terms and conditions of employment and unlawful matters pertaining to managerial policy or prerogatives. After the 1974 amendments failed to produce a clear and precise definition of the territory for negotiation, the state’s supreme court reaffirmed its *Dunellen* principle in the 1978 *Ridgefield Park* decision.

In most of the post-*Ridgefield Park* decisions, the courts have generally reinforced management’s ability to make rules unilaterally, even to the extent of abrogating long-standing clauses in collective bargaining agreements. The New Jersey courts, distrustful of the motives and abilities of those involved in labor relations, has shielded the public—“the true managers”—under an umbrella constructed of the doctrine of substantive due process and “semantic formulas” for determining scope of negotiations [34, p. 399].

Labor must shoulder some of the blame for the court’s unwillingness to expand the scope of negotiations. Its strident, heavy-handed lobbying to enact the 1974 amendments probably exacerbated the existing suspicions of both the public and the courts. Moreover, labor probably needs to moderate its demands for economic gains with a greater degree of appreciation for the positive tradeoffs of employment in the public sector. Recent state efforts at privatization, the establishment of merit pay, and the reduction of bumping rights highlights the urgency for a new architecture for public sector labor negotiations.

Management, for its part, might be better served if it stopped resorting to the shield of public policy to avoid negotiations where no substantive public interest

is involved. In too many cases, it has sought relief from the court to eviscerate contract provisions it freely entered into with public sector employee bargaining units. These tactics only fan the flames of union activism. It is no coincidence that public sector union membership in New Jersey is by some estimates as high as 85 percent, the highest in the nation.

Finally, a new study commission needs to be convened to craft a new framework to address the problem. Many previous observers have also pointed to the formation of a new commission as a first step for a lasting solution. After thirty years of mixed results, a fresh approach is certainly warranted.

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