

Landmark Decisions

Many aspects of collective bargaining by public school employees are governed by court and PERC decisions as well as administrative code and regulations. The following landmark decisions address the subject of collective negotiations:

Constitutionality of Bargaining Law

Lullo v. Int. Assn. Firefighters, 55 N.J. 419 (1970)

The New Jersey Supreme Court established the constitutionality of collective negotiations and the principal of exclusive representation. It drew the distinction between the private sector term “collective bargaining” and “collective negotiations” to recognize inherent limitations on the bargaining power of public employers and employees.

Broad Units Preferred

State of New Jersey v. Professional Association of N.J. Department of Education, 64 N.J. 231 (1974)

PERC’s approach to defining appropriate broad based bargaining units was upheld.

Scope of Negotiations

Dunellen Bd. of Ed. v. Dunellen Ed. Assn. 64 N.J. 17 (1973); *Burlington County College Faculty Assn. v. Bd. of Trustees, Burlington County College* 64 N.J. 10 (1973); *Bd. of Ed. of Englewood v. Englewood Teachers Assn.*, 64 N.J. 1 (1973)

The *Dunellen Trilogy* further explained the Supreme Court’s perception that private sector bargaining and public sector negotiations were different. The Court narrowly interpreted “terms and conditions of employment” under Section 5.3 of the PERC Act and broadly interpreted the preemptive effect of “other statutes” under *Section 8.1*.

P.L. 1974, Ch. 123 was adopted as the Legislature’s response to the Dunellen decisions.

Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156 (1978) banned the permissive category of negotiations.

In State v. State Supervisory Employees Assn., 78 N.J. 54, 80-82 (1978), the Court interpreted P.L. 1974, Ch. 123, holding that the insertion of the word “pension” in Section 8.1 required modification of Dunellen. Negotiations are not preempted on employment conditions covered by statute unless such statute or regulation speaks in the imperative and specifically sets a term or condition of employment.

In Woodstown-Pilesgrove Reg. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Assn., 81 N.J. 582 (1980) the 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.

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

The Court recognized in *Hunterdon County and CWA*, 116 N.J. 322, 328-329 (1980) the Commission’s “broad authority and wide discretion in a highly specialized area of public life” and confirmed that the Commission’s decision should stand unless it is clearly demonstrated to be arbitrary.

In 1977, *Paterson Police PBA v. City of Paterson*, 87 N.J. 78 (1981), interest arbitration for police officers and fire fighters was added to the statute (N.J.S.A. 34:13A-14 et seq.). The Legislature expressly created a permissive category of negotiations for police and firefighters only. The Supreme Court, however, established a narrow view of what is 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.

In 1990, the scope of negotiations was expanded under the provisions of N.J.S.A. 34:13A-22, et seq. The provisions applied only to school board employees and dealt with "minor discipline" and extracurricular activities. The Act requires that all discipline disputes must be submitted to binding arbitration. Increment withholdings for performance are excluded from arbitration.

In *Scotch Plains-Fanwood Bd. of Ed. v. Scotch Plains-Fanwood Ed. Assn.*, 139 N.J. 141 (1995), the Supreme Court affirmed the negotiability of the "just cause" standard and found that when parties have not negotiated a standard for the imposition of discipline, it is reasonable for an arbitrator to apply a just cause standard in assessing the merits of discipline, including the withholding of a salary increment.

Unfair Practices

In *Burlington County Evergreen Park Hospital v. Cooper*, 56 N.J. 579 (1970), the Supreme Court determined that PERC lacked the statutory authority to determine unfair labor practice charges. The 1974 amendments to the Act defined unfair practices by both employers and employee representatives and established the authority of the Commission to determine if an unfair practice has been committed and direct a remedy.

N.J.S.A. 34:13A-5.4 (a)(1) prohibits public employers from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." An employer violates this subsection if its actions tend to interfere with an employee's right and lack a legitimate and substantial business justification. *Commercial Twp. Bd. of Ed.*, PERC No. 83-25, 8 NJPER 550 (3/25/1982), Aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83)

The Supreme Court in *Bridgewater Twp.*, 95 N.J. 235 (1984) set a two-step test for appealing violations of NJSA 34:13A-5.4(a)(3), which prohibits an employer from "discriminating 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."

The Commission determines whether the charging party has proved that hostility towards protected activity was a substantial and motivational factor in the personnel action which prompted the charge. If so, the burden shifts to the employer to prove that it would have taken the same course of action, absent an illegal motive.

An employer's refusal to negotiate in good faith over a contract or to process grievances violates N.J.S.A. 34:13A-5.4(a)(5) *State of New Jersey*, E.D. No. 79; *NJPER* 39 (1975), *Aff'd* 141 N.J. Super. 470 (App. Div. 1976)

In *Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Assn.*, 78 N.J. 25 (1978), the Court addressed a second type of violation under N.J.S.A. 34:13A-5.4(a)(5) when an employer unilaterally changed employment conditions during negotiations for a successor agreement. In *Galloway* the board refused to pay automatic salary increments during negotiations for a successor contract. The Court sustained the Commission's determination that the salary increment must be paid.

In *Saginario v. Attorney General*, 87 N.J. 480 (1981), the Court held that arbitrary, discriminatory, or bad faith conduct on the part of an employee representative violates NJSA 34:13A-5.4 (b)(1)

In *Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Assn. of Ed. Secs.*, 78 N.J. 1 (1978), the Court accords the Commission great discretion in choosing remedies designed to make victims whole.

Payment of increments upon the expiration of a contract was addressed by the Supreme Court in *Board of Education of Township of Neptune v. Neptune Township Ed. Assn.* 144 N.J. 16 (1996)

The Court determined that under N.J.S.A. 18A:29-4.1, school boards are prohibited from paying increments to employees covered by either a "teacher-only" or "all-inclusive" bargaining unit after the expiration of a three-year contract. While the Court did not indicate any intention to overrule *Galloway*, it held that the legislative changes made in 1986 to section 18A:29-4.1 modified the impact of *Galloway* on those employees upon the expiration of a three-year contract.

This prohibition does not apply to contracts covering only supportive staff (ESP) employees.

In *Lumberton Twp. Board of Education v. Lumberton Education Assn.*, Unfair Practice Charge (CO-H-99-229), the Lumberton Education Association filed a charge against the Lumberton Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, *et seq.*, when it adopted a Family/Medical Leave Policy and when it applied that Policy to an employee who took disability leave immediately followed by a Leave pursuant to the Family Medical Leave Act, 29 U.S.C.A. §2601 *et seq.* In addition, the Board allegedly refused to negotiate with the Association concerning this subject.

In this case, PERC ruled that the Board could not require an employee to exhaust his or her sick time concurrently with FMLA leave, without contract language or a past practice in lieu of contract language. Additionally, they ruled that the Board had a requirement to bargain with the Association over policies affecting leaves of absence including the Board Policy on Family/Medical Leave.

Representation Fee

In 1979, the Legislature enacted N.J.S.A. 34:13A-5.5 - 5.9 to the Act, allowing the majority representative to negotiate the right to receive a representation fee in lieu of dues from non-members in the negotiations unit, provided it offers all unit members "membership on an equal basis." Such fees are capped at 85 percent of the union dues.

In *Boonton Bd. of Ed. v. Kramer*, 99 N.J. 523 (1985), Cert. Den. 106 S. Ct. 1388 (1986), the Court agreed with the Commission that the appeal board has sole jurisdiction over challenges to the amount of a representation fee.

In 2002, N.J.S.A. 34:13A-5.5(a) was enacted by which if a demand for bargaining is made relative to representation fee, if no agreement is reached, the majority representative may petition the Commission to conduct an investigation. If the Commission determines during the investigation that a majority of the employees in the negotiations unit are voluntary dues-paying members of the majority representative and that the majority representative maintains a demand and return system as required by subsection c. of this section and section 3 of P.L.1979, c.

477 (C.34:13A-5.6), the Commission shall order the public employer to institute a payroll deduction of the representation fee in lieu of dues from the wages or salaries of the employees in the negotiations unit who are not members of the majority.

Grievance Arbitration

In the private sector, the "*Steelworkers Trilogy*" assumes that grievance arbitration will be the end of contract litigation. *United Steelworkers of America v. American Mfg. Co.* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Steel and Car Corp.*, 363 U.S. 593 (1960)

In *Bloomfield Bd. of Ed. v. Bloomfield Ed. Assn.*, 126 N.J. 300 (1991), Affl. 251 N.J. Super. 570 (App. Div. 1990), the Court adopted the Appellate Division's embrace of the "*Steelworkers Trilogy*" and the strong public policy favoring arbitration of labor relations grievances.

In *State of New Jersey v. Local 195, IFPTE*, 169 NJ 505 (2001), the N.J. Supreme Court abolished the "no work, no pay" doctrine when it upheld an arbitration award which ordered payment for work which should have been assigned in accordance with standard overtime rotation language.

Certification and Subcontracting

In *Guttenberg Ed. Assn. and Zenaida Franqui v. Leo Klagholz and Guttenberg Bd. of Ed.*, 1999 S.B.D. (Decided March 3, 1999), the State Board of Education held that a substitute certificate is not equivalent to a teaching certificate. It affirmed the certification requirements for teaching staff members employed in the public schools throughout the state.

Discipline

Disciplinary issues are constantly being affected through court agencies and appellate decisions. Following is a judicial and legislative history.

1968-1979 Disciplinary disputes are routinely submitted to binding arbitration under generic "just cause" provisions of collectively negotiated agreements.

1981-1982 Disciplinary disputes are not negotiable and cannot be submitted to binding arbitration.

Jersey City v. Jersey City Police Officers' Benevolent Association, 179 N.J. Super. 137 (App. Div. 1981), *certif. den.* 89 N.J. 433 (1982) (matter of discipline of members of municipal police department was subject of essential inherent managerial prerogative; mandated statutory procedures for review of members of municipal police department could not be supplanted, modified or change in any respect such as by submitting to grievance reasonableness of penalty imposed by municipality).

1982 The New Jersey Employer-Employee Relations Act ("Act") is amended to overturn *Jersey City*. See P.L. 1982, c. 103.

L. 1982, c. 103 amends Section 5.3 of the Act to state:

"Public employers shall negotiate written polices setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, provided that such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws."

1984 The Appellate Division favorably interprets P.L. 1982, c.103.

Communications Workers v. PERC, 193 N.J. Super. 658 (App. Div. 1984), *certif. den. sub nom Willingboro Bd. of Educ. v. Willingboro v. Employees' Ass'n of Willingboro Schools*, 99 N.J. 169 (1984); *certif. den. sub nom. County of Atlantic v. JNESO, New Jersey State Nurses Association*, 99 N.J. 190 (1984) (consolidated cases involving public employees represented by CWA, JNESO, NJEA and NJCSA statute governing the rights of public employees to organize permits binding arbitration in disciplinary

actions not subject to review under civil service or other tenure law; statute was clearly ameliorative and curative, and gave parties right to bargain for more expeditious and inexpensive method of resolving disciplinary proceedings than instituting action in Law Division in lieu of prerogative writs).

1989 The Act is amended as to school employees only to cover negotiability of assignment to extracurricular activities, imposition of minor discipline and arbitration of salary increments withheld for disciplinary reasons. See L. 1989, c. 269, eff. January 4, 1990.

1995 The NJ Supreme Court decides that the "just cause" standard for disciplinary disputes is inherent in collectively negotiated agreements.

Scotch Plains-Fanwood Bd. of Ed. v. Ed. Ass'n., 139 N.J. 141, 156 (1995). Therein, the contract did not contain a just cause provision for the imposition of disciplinary actions. Citing *Local No. 153 OPEIU v. Trust Company of New Jersey*, 105 N.J. 442, 452 (1987), the Court noted that it is the role of the arbitrator to fill in gaps in the collective bargaining agreement. Consequently, the Court held:

"We believe that the arbitrator properly applied a just-cause standard of review, which collective-bargaining agreements and arbitrators generally adopt as the appropriate standard for resolving disciplinary disputes . . . in fact, [t]he weight of arbitral opinion is that a standard of just cause may be imposed upon disciplinary actions even though such a standard is not spelled out in the agreement".

1995 - 2004 The Appellate Division tampers with the arbitrability of disciplinary disputes.

Hunterdon Central Reg. H.S. Bd. of Ed., P.E.R.C. No. 94-75, 20 NJPER 68 (¶25029 1994), *aff'd* 21 NJPER 46 (¶26030 App. Div. 2005), *certif. den.* 140 N.J. 277 (1995) (issue of whether board had just cause to terminate school bus driver was arbitrable; inasmuch as there are no statutorily mandated tenure requirements or appeal procedures for bus drivers, board was free to negotiate over how it would exercise its discretion under N.J.S.A. 18A:11-1 to regulate "conduct and discharge of its employees").

Marlboro Tp. Bd. of Ed. v. Educ. Ass'n., 299 N.J. Super. 283 (1997), *certif. den.*, 151 N.J. 71 (1997) (board's decision not to renew bus driver's contract was not arbitrable where collectively negotiated agreement and board policy expressly incorporated by agreement indicated bus driver's employment could be ended without cause, board merely exercised its clearly enunciated contractual right not to renew her contract, and board did not purport to discipline driver; tenure provision would not be judicially inserted into collectively negotiated agreement where such provision was not negotiated by the parties; *Hunterdon Central* distinguished).

Cresskill Bd. v. Cresskill Ed. Ass'n., 362 N.J. Super. 7 (2003), *certif. den.* 181 N.J. 546 (2004) (nonrenewal of custodian was not arbitrable, where custodian's initial term of employment had expired, and decision not to renew the contract occurred subsequent to board's prior attempt to terminate custodian for disciplinary reasons and was independent of the disciplinary matter; *Hunterdon Central* distinguished).

Governor McGreevey's Conditional Veto Message to Senate Bill No. 514 -P.L. 2003, ch. 95, "Uniform Arbitration Act."

Governor McGreevey conditionally vetoes S-514 in order to "carve out" traditional public and private sector labor arbitration and allow such arbitration to continue under the Arbitration and Award Act, N.J.S.A. 2A:24-1 *et seq.* In his Conditional Veto Message, Governor McGreevey specifically emphasizes that the principles of the *Steelworkers Trilogy* apply to the public sector:

"Although the *Steelworkers Trilogy* originated in the private sector, the same principles have been applied to the public sector. New Jersey has embraced and applied the *Steelworkers Trilogy* principles of favoring arbitration in public sector labor relations. In the public sector, arbitration is also favored and is commonly utilized to settle labor-management disputes ... This system of industrial justice has meaningfully evolved to reach the current status of maintaining labor stability through collective negotiations."

The Legislature responds to Governor McGreevey's Conditional Veto Message by enacting the Uniform Arbitration Act, N.J.S.A. 2A:23B-1 to govern all arbitration matters except traditional

public and private sector labor disputes, and by amending the Arbitration and Award Act accordingly. See N.J.S.A. 2A:24-1.1 ("Applicability to collective bargaining agreements"): "N.J.S. 2A:24-1 through N.J.S. 2A-11 shall only apply to an arbitration or dispute arising from a collective bargaining agreement or collectively negotiated agreement."

2004 The NJ Supreme Court ignores Governor McGreevey's Veto Message in deciding *Camden Bd. of Educ. v. Alexander*, 181 N.J. 187 (2004).

The New Jersey Supreme Court, split 3-3, brought up a judge from the Appellate Division to be the deciding vote. The Court ruled 4-3, with the Appellate Division judge in the majority, that: (1) a board had a right under N.J.S.A. 18A:27-4.1 to renew, or not, a fixed term employee for non-arbitrary and non-capricious reasons without being subject to review of that decision by an arbitrator where the collectively negotiated is silent about whether the parties intended the board to give up that statutory right; and (2) the presumption of contractual arbitrability did not apply to the public sector. Justice Zazzali, joined by Justices Albin and Long, dissented, noting in part that the Court's ruling ignored the history of public sector labor relations in New Jersey and Governor McGreevey's Conditional Veto Message to Senate Bill No. 514.

2005 Section 5.3 of the Act is amended to restore the presumption of arbitrability. See L. 2005, c.380, §1, effective January 12, 2006.

"In interpreting the meaning and extent of a provision of a collective negotiation agreement providing for grievance arbitration, a court or agency shall be bound by a presumption in favor of arbitration. Doubts as to the scope of an arbitration clause shall be resolved in favor of requiring arbitration."

2006 The Supreme Court acknowledges that the presumption of arbitrability in the public sector has been restored.

Board of Education v. Alpha Educ. Ass'n., 188 N.J. 595 (2006):

“The dissent . . . criticizes our decision for tacitly dismantling the holding reached in *Camden Bd. of Educ. v. Alexander* . . . ‘in which we explained that we have not endorsed a presumption in favor of arbitrability for the public sector . . .’ The dissent, however, fails to note that the Legislature overruled the above conclusion when it amended N.J.S.A. 34:13A-5.3, effective January 12, 2006 . . .”

2007 The Supreme Court ignores the amendment to N.J.S.A. 34:13A-5.3, L. 2005, c.380, §1 in deciding Pascack Valley and Northvale.

Chief Justice Zazzali recused himself from participating in these cases. The Court chose not to bring up a judge from the Appellate Division to be the deciding vote. In inherently inconsistent rulings employing tortured logic, the Supreme Court, 6-0, permitted the Pascack Valley grievance to proceed to binding arbitration but refused, 3-3, to allow the Northvale grievance to be arbitrated. See *Pascack Vall. Bd. of Ed. v. Support Staff*, 192 N.J. 489 (2007); *Northvale Bd. of Ed. v. Educ.Ass’n*, 192 N.J. 501 (2007). In these cases, the Supreme Court ignored two cardinal principles of labor law in the public and private sectors: (1) the presumption of arbitrability established by the history of public sector labor relations in New Jersey and expressly stated in L. 2005, c. 380, §1; and (2) the primacy of collectively negotiated agreements over the terms of individual contracts which is firmly entrenched in labor relations law in the public and private sectors - See *Troy v. Rutgers*, 168 N.J. 187 (2001) (noting collective agreements prevail over individual agreements and, when there is conflict, individual agreements may not be enforced).

2007-2008 The aftermath of Camden, Pascack Valley and Northvale.

The Appellate Division does not know how to interpret these cases:

Lenape Regional H.S. Dist. Bd. of Ed. v. Educ. Ass’n, Dkt. No.A-5095-04T1 (July 12, 2006), *certif. den.* 193 N.J. 223 (2007). The panel allows the case of a non-renewed custodian to proceed to arbitration where contract language states: “Dismissal for job performance shall follow [just cause] procedure. It is specifically understood that the Board has the right and responsibility to take any action deemed

necessary in retention and/or non-retention matters other than job performance.”

Ocean City Bd. of Ed. v. Ocean City Educational Supportive Staff Ass’n and Dean Spencer, App. Div. Dkt.No.A-2838-06T2 (March 27, 2008). Referring to the outcomes in *Pascack Valley and Northvale*, the *Ocean City* panel states that they “are arguably disharmonious, but potentially reconcilable, and may raise further questions of law that ultimately may be resolved by a fully-constituted Supreme Court.” The Appellate Division remands the case to the trial court to consider: “(1) the shared intention of the parties to the CNA and any ambiguities within its provisions; (2) the general practices and customs of the parties to the CNA; and (3) the CNA’s intended relationship to the individual contracts of employees in the school district.”

2009 The Supreme Court reconsiders the 2005 amendment to N.J.S.A. 34:13A-5.3 (“presumption of arbitrability”) and its Pascack Valley and Northfield decisions.

In *Mt. Holly Tp. Bd. of Educ. v. Mt. Holly Tp. Ed. Ass’n and Juan Gonzalez*, 199 N.J. 319, 2009 WL 1766154 (2009), the Supreme Court restored the presumption of arbitrability that the 2005 amendment to N.J.S.A. 34:13A-5.3 was enacted to reestablish. The Court restored meaning to the two cardinal principles of labor law undermined by the *Pascack Valley* and *Northfield* decisions. It held that to the extent provisions in an individual employment contract conflict or are inconsistent with rights provided by a CNA, the language in the individual contract must yield to the CNA. The decision also “reaffirms the principle that ‘[a]rbitration is a favored means of resolving labor disputes.’”

A word of caution

Legal issues are constantly evolving. New laws are passed and new cases are decided which impact on school employees and the collective bargaining process. Always consult with your local UniServ office to obtain the most accurate and up-to-date information on legal matters.