



SCOPE OF NEGOTIATIONS

Since the enactment of the Employer-Employee Relations Act in 1968, the definition of the scope of negotiations for New Jersey's public sector has been marked by an active and continuous interaction among the Legislature, the Public Employment Relations Commission (PERC), and the courts. Much to the frustration of the practitioner and layman alike, the scope of negotiations has been, and is expected to continue to be, in a constant state of flux as legislative action, as well as PERC and court decisions, define and redefine what may be negotiated. This dynamic process was structured by the Act's provisions that authorize PERC to determine negotiability disputes and permit appeals of the Commission's decisions to the courts. However, since agency and judicial decisions must be based on interpretations of statutory language, the source of negotiability definitions can be found in the specific provisions of the Act.

The PERC Law and Its Amendments

In 1968, the Act simply defined negotiability to include grievance procedures and other terms and conditions of employment. Legislative definition of negotiable topics has been subsequently modified by several amendments. In 1980, the Act was amended to permit negotiations over agency shop.¹ In 1982, another amendment authorized negotiations over disciplinary review procedures; and, in 1990, the Act was amended to specifically authorize school districts' negotiations over assignments to extracurricular activities and over boards' authority to impose new forms of minor discipline. The 1990 amendment further modified the scope of negotiations by mandating binding arbitration of school employees' grievances over minor discipline, as defined in the Act, thus precluding local negotiations over that issue.

Legislative amendments, however, have not offered further definition of the Act's broad authorization of negotiations over "terms and conditions" of employment. That responsibility falls, in accordance with the provisions of the 1968 Act, to PERC and the courts.

Judicial Clarification

While the primary jurisdiction to resolve negotiability disputes belongs to PERC, the Commission's decisions may be appealed to the Appellate Division. The Commission's subsequent decisions must then be guided by judicial interpretation of the Act. The courts, therefore, have had a profound impact in defining New Jersey's scope of negotiations.

Test of Negotiability

In three landmark decisions,² the Supreme Court held that the scope of negotiations in the public sector must be more limited than that in the private sector because the public employer is the government, which has special responsibility to the public. The Court maintained that the foundation of our democratic system would be endangered if matters of governmental policy were left to the process of collective negotiations, where citizen participation is precluded. Thus, the Court concluded that matters of public policy are properly decided, not by negotiation and arbitration, but by the political process.

Consequently, the Supreme Court in *Ridgefield Park* interpreted the Act as providing only two categories of negotiations for most public employees: mandatorily negotiable terms and conditions of employment and illegal, nonnegotiable matters of governmental policy.³ A three-prong test of negotiability, enunciated in *Local 195*, has provided guidance to PERC and the courts in making scope determinations. To be negotiable, a subject

- must intimately and directly affect the work and welfare of public employees;
- must not be preempted by a statute or regulation which speaks in the imperative and leaves nothing to the discretion of the public employer; and
- must not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.

¹This amendment was modified by a 2002 amendment to the PERC Law. The latest amendment authorizes unions that do not obtain agreements to agency shop provisions to petition PERC to order the employer to institute a representation fee deduction. The 2002 law directs PERC to issue such orders, if after conducting a hearing, the Commission finds that the union meets the criteria set by statute. For more information on this topic, see *The Negotiations Advisor* article "An Analysis of an Agency Shop Provision."

²In *the Matter of Local 195, IFPTE, AFL-CIO v. State of New Jersey*, 88 N.J. 393 (1982); *Paterson Police P.B.A. Local No. 1 v. Paterson*, 87 N.J. 78 (1981); *Ridgefield Park Education Association v. Ridgefield Park Board of Education*, 78 N.J. 144 (1978).

³Negotiations involving police and firefighters are controlled by a specific statute which specifically provides for a third category of negotiable topics, termed "permissive subjects." The Court in *Paterson, supra.*, restricted the permissive category to preclude negotiations on matters which would place "substantial limitations" on a public employer's policy-making authority.

All three of the above criteria must be met before a subject can be negotiated. Thus, if a subject intimately affects employees' working conditions, but does not meet the other two criteria, it is nonnegotiable.

Case-by-Case Application The test of negotiability provides a standard approach to the process of defining terms and conditions of employment. However, the courts also found that the test must be "fine-tuned to the details of each case"⁴ and that the determination that an issue in dispute could present "significant interference" with governmental or educational policy decisions requires a case-by-case consideration.⁵ These judicial directives, emphasizing the inherently changing nature of scope definitions, have guided PERC's approach to resolving disputes over negotiability.

PERC Decisions

PERC's jurisdiction in scope determinations is triggered by the filing of petitions seeking to resolve negotiability disputes that may arise during negotiations or during the administration of a negotiated agreement. PERC's authority in its case-by-case review is limited to an "abstract" determination of whether the provisions of the law and the body of established case law permits negotiations over a particular issue. This process does not always result in decisions that clearly categorize an issue as totally negotiable or not negotiable. Rather, aspects of an issue may contain both negotiable and nonnegotiable elements. Further, whether an issue is negotiable can frequently depend on the context of the dispute.

The "Split" Decision

The test of negotiability is designed to identify whether the issue in dispute predominantly involves a nonnegotiable managerial policy decision or a mandatorily negotiable term and condition of employment. However, some disputed issues may be found to contain elements which involve both managerial and employee interests. In those instances, PERC may issue a "split" decision that severs the nonnegotiable component from the negotiable: managerial rights to determine policy will be insulated from the negotiations process, while the related terms and conditions of employment will be deemed to be mandatorily negotiable.⁶

The Context of the Dispute

Scope determinations can also be influenced by the context in which the dispute arises. For example, a petition filed in the context of negotiations seeks a ruling of whether the parties can, under the law, negotiate over the issue. In that context, the proposal may be found to meet all three prongs of the test of negotiability and thus to be mandatorily negotiable. However, a dispute that arises during the life of a contract generally seeks a ruling of whether an arbitrator can, under the law, enforce the provision in question. The test of negotiability will also be applied to resolve this dispute. However, under the particular circumstances and context of the dispute, the same test may indicate that permitting binding arbitration would result in significant interference with policy decisions. For example, while the number of evening parent-teacher conferences is generally a mandatorily negotiable topic, an arbitration award that would preclude a board from increasing the negotiated number would significantly interfere with the board's policy decision to extend opportunities for informing parents of student progress. As such, the decision to increase the number of evening conferences, under this particular factual pattern and in this context would not be within the legal scope of negotiations and could not be submitted to binding arbitration. Note, however, the issue of compensation for the additional conference would be seen to be a severable, legally negotiable and arbitrable issue.⁷

Interaction Among Agencies

The continuous interaction among the legislative, judicial and administrative branches of government is a significant factor in the fluctuating definition of the scope of negotiations. For example, the 1990 amendments to the PERC Law which required binding arbitration of certain disciplinary determinations affecting school employees resulted in PERC's active involvement in resolving disputes over what constituted arbitrable discipline. PERC's decisions included a holding that, except in situations involving RIFs, all nonrenewals of noncertificated employees constituted arbitrable discipline.⁸ However, in the late 1990s, the courts held that, when a contract did not include a guarantee of continued employment, the

⁴ *Township of Mount Laurel*, 215 N.J. Super. 108 (1987).

⁵ *Piscataway Township Board of Education*, App. Div. Docket No. A-7215-95T2, January 14, 1998, cert. den. 156 N.J. 385 (1998).

⁶ See, for example, *Monroe Township Board of Education*, PERC No. 93-9, 19 *NJPER* 23194, in which PERC held that the number of parent-teacher conferences was a mandatorily negotiable term and condition of employment. However, also see discussion on "The Context of the Dispute."

⁷ *Monroe Township Board of Education*, *supra*. A detailed discussion of the differences between legal and contractual arbitrability can be found in *PERC: The Public Employment Relations Law*, Vol. 6 of the NJSBA's School Board Library Series; also see the article "Preparing to Arbitrate Disciplinary Grievances" in the Selected Topics section of *The Negotiations Advisor*.

⁸ See, for example, *Dumont Board of Education*, PERC No. 93-17, 19 *NJPER* 23202. For a full discussion of the evolving definition of discipline, see the article "Discipline of School Employees Under the PERC Law" in the Selected Topics section of *The Negotiations Advisor*.

nonrenewal of noncertificated staff employed on a fixed-term contract did not constitute a mandatorily arbitrable disciplinary determination.⁹ These decisions may have a significant impact on the proposals that may be raised in school districts' negotiations.

Interaction With Other Laws

The second prong of the test of negotiability also requires that all statutes must be considered in determining whether an issue is preempted from negotiations. Thus, changes in other statutes, such as school law, can have a significant impact on the scope of negotiations. For example, in 1996 the New Jersey Supreme Court found that a 1987 change in school law required the modification of a long-standing interpretation of boards' obligation to maintain the *status quo* under the PERC Law. In *Neptune Township*,¹⁰ the Court held that the amendment to *N.J.S.A.* 18A:29-4.1 prohibited local boards of education from paying increments to teaching staff members after the expiration of a three-year agreement. Given this holding, PERC concluded that principles of labor law also

precluded boards of education from paying increments to other classifications of employees covered by the same three-year contract as the district's teachers.¹¹ This decision has been appealed and the negotiability of this issue may become a new volatile area in the definition of scope.

Summary

Legislative actions, court decisions and subsequent PERC applications of new legal requirements result in a very active and dynamic definition of the scope of negotiations. While the basic principles governing this definition seem well-established, case-by-case determinations, as well as legislative initiatives, can continue to alter the specifics of negotiability. Given the many factors that influence scope determinations, please use the following list of negotiable subjects as abstract guidelines,¹² but remember to check with your board attorney, professional negotiator, or the NJSBA Labor Relations Department for information concerning the most recent interpretation of your negotiations obligation.

⁹ *Wayne Township Board of Education*, App. Div. Docket No. A-2749-97T5, January 19, 1999, cert. den. 3/31/99. Also see *Marlboro Township Board of Education*, 299 N.J. Super. 283 (1997).

¹⁰ *Neptune Township Board of Education*, 144 N.J. 16 (1996).

¹¹ *East Hanover Board of Education*, PERC No. 99-71, 25 *NJPER* 30052, aff'd App. Div. Docket No. A-4226-98T3, April 10, 2000.

¹² For greater details of the negotiability of specific topics, see "A Guide to Negotiability" in the References section of *The Negotiations Advisor*. Also

OVERVIEW OF TOPICS OF NEGOTIATIONS

The following listing summarizes the current scope of negotiations in New Jersey's public sector. For a more detailed review, including case cites, please consult "A Guide to Negotiability" in the References section of *The Negotiations Advisor*.

MANDATORY TOPICS

The Act, court decisions and PERC determinations have held that the following are *mandatory topics of negotiations*. Remember—you must negotiate these issues but you do not have to concede unless you wish to do so.

Advisory arbitration for the application of management prerogatives to individual employees

Agency shop

Commencement date of negotiations, if earlier than date set by PERC

Committees on nonnegotiable topics that have merely advisory authority

Compensation

Discipline procedures consistent with statutes

Discipline of school employees, not authorized or prohibited by law

Duty-free lunch

Evaluation criteria for merit pay

Evaluation procedures that do not contravene statute or administrative code and do not interfere with the process

Extracurricular assignments of individuals meeting district qualifications

Fair dismissal procedures, that do not interfere with the nonrenewal of nontenured teachers

Fringe benefits, including benefits for RIFed teachers if incorporated into the contract

Grievance procedures¹³

Hiring procedures

Holidays

Holdback of salary

Hours of work

Insurance, including disability income

Job security (for employees not covered by tenure statutes)

Leaves of absence, in excess of statutory guarantees

Leaves of absence: stacking of statutory and contractual benefits

Length of the collective bargaining agreement

Management rights clause

Merit pay (including evaluation criteria)

No-strike provision

Payment for unused accumulated sick leave

Past practice

Personal leave

Personnel file, access to

Physical facilities and working conditions

Posting procedures

Preparation periods

Promotion procedures

Reduction in force, notice provisions and compensation for remaining staff if there is a significant increase in work load

Release time

Representation for teacher conferences, other meetings

Rules, change of

Sabbatical leaves

Safety issues

Salary guide, initial placement, credit for experience

Shifting unit work from unit employees to employees outside the unit (specifically distinguishable from the nonnegotiable topic of subcontracting)

Sick leave, above the statutory minimum

Sick leave, payment for verification

Summer session, procedures for filling positions

Teacher-pupil contact time

Teacher rights clause

Teaching periods, number of

Transfer and assignment procedures

Union business, time off for, use of prep period for

Tuition reimbursement

Vacations

Work load

Workday, length of

Work year, length of¹⁴

Zipper clause

¹³Note, however, binding arbitration of school employees' grievances over minor discipline, as defined in the Act, is statutorily mandated and is, therefore, *not* negotiable.

¹⁴This is generally mandatory for public employees; however, for teachers it is mandatory only to those days in excess of the 180 minimum required for state aid.

ILLEGAL TOPICS

The following items have been determined to be *illegal topics of bargaining* because they involve matters of *educational policy or inherent management prerogatives*:

<ul style="list-style-type: none"> Absenteeism and tardiness policies Academic calendar Affirmative action plans Application of evaluation criteria Assignment (other than extracurricular) Audio-visual equipment, use of Budget formulation Class size Curriculum Decision to assign bus, cafeteria, corridor and playground supervision Decision to reschedule snow days in teacher vacation period Decision to go to split sessions Design of students' school day Dress code, adoption of Evaluation, selection of evaluator; advance notice of observation Facilities relating to the education process Impact¹⁵ of nonnegotiable decisions, when such negotiations would present significant interference with determination of policy 	<ul style="list-style-type: none"> Instructional materials Lesson plans, format of and scheduling of submission Number of employees and deployment of personnel Parent-teacher conference, decision to schedule and changes in number of evening conferences for policy reasons Productivity studies Qualifications for employment Qualifications for increment Qualifications for promotion Sick leave, verification of Staffing, number of employees Student-related issues: discipline, grading, grievance procedure, safety, testing Subcontract, decision to Supervision of employees by department chairperson Transfer, decisions and criteria (other than disciplinary transfers of school employees)¹⁶ Use of teacher aides
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The following items have been held to be *illegal topics of bargaining* because they *contravene specific statutes or regulations*:

<ul style="list-style-type: none"> Composition of the bargaining team Decision to RIF Discipline, procedures ending in binding arbitration for non-school employees with other statutory appeals procedures Early retirement incentives Evaluation criteria Extended sick leave "If/then" clause Impact of RIF on remaining teachers, and on RIFed teachers when there is no significant increase in work load Maintenance of membership clauses Nonrenewal of nontenured teachers, decision to Parity 	<ul style="list-style-type: none"> Pensions RIF procedures (such as seniority, recall, and bumping rights) covered in statutes Religious leave (paid), if not charged to general personal leave or vacation Seniority provisions inconsistent with Title 18A Sick leave, unlimited blanket Sick leave, use of for other than statutory purposes Smoking in school buildings Student grievance procedures Sunshine bargaining as a precondition to negotiations Withhold increments, decision to
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¹⁵ *Woodstown-Pilesgrove, supra.*, and *Piscataway Township Board of Education, supra.*

¹⁶ In-between work-site transfers of school employees for predominantly disciplinary reasons are prohibited by *N.J.S.A. 34:13A-25*.