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A COMPARISON OF THE SCOPE OF COLLECTIVE NEGOTIATIONS IN THE NEW JERSEY PUBLIC SECTOR AND OTHER JURISDICTIONS

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ABSTRACT

This article compares the scope of collective negotiations that has evolved in the New Jersey public sector and that of other jurisdictions. The article shows that the New Jersey courts have created a relatively narrow range of topics that can be negotiated. The author argues that the protection that the courts have given to managerial prerogatives has been excessive and it may have lessened the commitment of the public employees in the state to their work and to their organizations. She suggests that an expanded scope of bargaining is in the interests of the employees, the public employers, and the public itself.

In the United States, more than nineteen million people are employed by government and over seven million of these workers are covered by collective bargaining agreements [1]. On a percentage basis, unionization within the public sector far exceeds the private sector, where the unionization rate is approximately 10 percent [2]. Today, the vast majority of federal government employees are covered by collective bargaining agreements, as are almost half of state and local government employees [1].

Determining the scope of negotiations is the key to any collective bargaining relationship. Scope of negotiations refers to the subjects that must be negotiated once they are raised, may be negotiated, and may not be negotiated [2]. This topic, seemingly simple, has become one of the most litigated and controversial areas of public sector labor relations [3 at 10]. Unions typically argue that the subjects of bargaining should be defined broadly because a broad scope preserves

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negotiations on the issues of greatest concern to employees, without unduly constraining the employer's ability to manage. Employers, however, usually contend that a broad scope of bargaining unduly reduces their freedom to make necessary decisions on workplace-related issues [4].

While a very broad scope of bargaining has developed in the private sector, in most jurisdictions the range of negotiable subjects in the public sector is usually much narrower [3]. Courts and legislatures usually focus on the government's unique responsibilities as the instrument entrusted with making public policy in the interest of all the people [5]. As a consequence, they have often limited the scope of public sector negotiations in the belief that broadened scope alters the balance of political power and may lead to an unfair allocation of public resources to public employee unions [4]. Thus, to balance competing interests, many state courts and legislatures have limited the topics that may be brought to the bargaining table [6]. These limitations protect the government's authority to make unilateral decisions on matters of public employment.

New Jersey's courts and the legislature have created a fairly narrow scope of bargaining [3]. Other jurisdictions, legislatures, and courts seem to have defined the scope of bargaining more broadly [7]. This paper compares the scope of negotiations in New Jersey with other states and examines the implications of the New Jersey approach. The first part deals with the historical development of the New Jersey doctrine. The second part compares New Jersey's limitations on scope with other jurisdictions, while the third part considers the impact of these limitations on public sector negotiation in this state.

I. THE SCOPE OF NEGOTIATIONS IN NEW JERSEY

After a long political and legislative struggle, the New Jersey State Legislature passed the New Jersey Employer-Employee Relations Act in 1968 [8]. This statute, commonly referred as Chapter 303, granted bargaining rights to virtually all of New Jersey's state and local government employees [5]. Chapter 303 also created an administrative agency known as the Public Employment Relations Commission (PERC) to oversee the implementation of the new law [6]. Section 5.3 of the act required the parties to meet and negotiate in good faith with respect to grievances and terms and conditions of employment [9]. The statute did not clarify "which terms and conditions must be negotiated and "which could still be unilaterally prescribed by the employer" [10]. As a result of this omission, PERC adopted the private sector's approach, holding that there were three kinds of issues—mandatory, permissive, and illegal [7]. Mandatory subjects must be bargained once raised; permissive subjects may or may not be bargained, but they cannot be insisted upon to impasse; and unlawful or prohibited subjects are relatively few.

Dunellen: **Limiting the Scope of Bargaining**

However, in 1973, a series of cases known as the Dunellen trilogy set forth the parameters for distinguishing subjects of bargaining [8, 11]. In its *Dunellen* decision, the New Jersey Supreme Court limited mandatory subjects to those matters that "intimately and directly" affected work and welfare of public employees, without interfering with the public employer's determination of public policy, rendering, all other subjects nonnegotiable [9]. The court established a test for *Dunellen's* negotiability formula in *Board of Education v. Woodstown-Pilesgrove Regional Education Association* [10]. The court stated that a "proposal's effect on the employees' work and welfare must be balanced against a proposal's interference with the employer's prerogatives." If the managerial policy is more important, management has no duty to negotiate, but if the managerial policy would not be unduly hampered, negotiation is required. Moreover, the court said that "a viable bargaining process" should "produce stability and further the public interest in efficiency," and that negotiability differences are to be made on a case-by-case basis instead of a categorical determination [11].

The 1974 Amendments and Ridgefield Park

After *Dunellen* eliminated the permissive category of negotiations, there were two categories of issues. A given issue was either a mandatorily negotiable term or condition of employment or an unlawful matter of managerial prerogative. In 1974, however, the collective negotiations law was amended to give PERC the sole authority to determine whether a matter was within the scope of negotiations [12]. PERC interpreted the amendments as expanding the range for collective bargaining, thereby restoring the permissive category removed by the *Dunellen* court [13].

In 1978, the New Jersey Supreme Court dealt with PERC's interpretation. In *Ridgefield Park Educational Association v. Ridgefield Park Board of Education* [14], the state's Supreme Court reaffirmed the *Dunellen* holding on scope: only two subjects of bargaining existed—mandatory and unlawful [15]. Bargaining on permissive subjects was restricted to police officers and firefighters, where another statute specifically created such a category [16].

The elimination of the permissive category was affirmed in two later New Jersey cases. In *Teaneck Bd. v. Teaneck Teachers Ass'n.* [17], the court concisely articulated that "New Jersey has only two categories of subjects of public employment negotiations: `mandatory negotiable terms and conditions of employment' and `non-negotiable matters of governmental policy'" [18]. In *Local 195, IFPTE v. State,* the court set forth a three-part test to determine issues of negotiability. 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;
3. And a negotiated agreement would not significantly interfere with the determination of governmental policy [19].

SCOPE OF NEGOTIATIONS: NEW JERSEY AND OTHER STATES

Two fundamental ideas provide the basis for placing limits on the scope of negotiations in government. As has been noted above, the first comes from the idea that the government is to make policy for the welfare of all the citizens. A broad scope of negotiations could lead to bargaining agreements that disproportionately advantage public employee unions with public resources.

The second basis for limiting negotiations comes from a concern over protecting managerial prerogatives or management rights [12]. Many courts have embraced the concept that management can make more efficient decisions about its organization when free from the pressures of collective bargaining [20]. In some states, specific, clearly stated managerial prerogatives are incorporated into public sector law [12]. These two ideas are usually expressed in one or more of the five forms examined below [7].

The Nondelegatory Doctrine

The nondelegatory theory "stresses that the legislature has delegated certain powers and authorities to the public employer which cannot be `bargained away'" [7]. Only the public employer can make decisions pertaining to certain governmental functions, and issues of governmental policy cannot be negotiated. This thinking certainly underlies the judicial reasoning in both *Dunellen* and *Woodstown,* discussed above. Those decisions clearly prohibited the employer from placing policy items on the bargaining agenda because of the potential impact on the public interest or organizational efficiency [21].

Several states have adopted this model [12]. A New York court, for example, observed that in determining mandatory subjects for negotiating, the courts within the state have distinguished between decisions, which affect hours and wages, and those that deal with basic policies [22]. Basic policy decisions both in New York and New Jersey are beyond the scope of negotiations. The Nebraska Supreme Court has similarly held that boards of education were not required to enter into negotiations on matters which are predominantly educational policy because a managerial prerogative existed [22]. But Pennsylvania marches to a different drummer. In that state, when a disputed matter pertains to a fundamental

concern of public employees, such as wages, hours or terms, the item is not removed from bargaining simply because it may touch on managerial policy [24].

Political Process Theory

Political process considerations also seek to limit the scope of public sector negotiations because of the fear that unions will secure more than their fair share of public resources from their direct access to the policy makers [12]. The New Jersey Supreme Court held "that representative government would be endangered if governmental policy decisions were left to collective negotiation where citizen participation was excluded" [25]. The court further emphasized that "matters of public policy are best determined through public debate, lobbying, voting, and legislation" [26].

But the California Supreme Court took a different path. Under the state's Public Employment Relations Act, the public is provided the opportunity to be fully informed and to express its views on decisions that would affect the education process. School district business is to be conducted at public meetings, after notice is given to the community [27]. In *San Mateo City School District v. Public Employment Relations Board,* the issue concerned whether the allocation of a teacher's work day between instructional duty time and preparation time was a proper subject of negotiation. The court held that bargaining on this topic was proper and that presenting a contract at a public meeting was sufficient to satisfy the requirement for participation and notification [28].

Tests to Determine Negotiability

New Jersey appears to be in the mainstream in developing tests to determine whether a given issue is bargainable or is a matter of managerial prerogative. Most of the tests in other states are balancing tests, weighing the proposal's impact on conditions of employment against its effect on policy. The majority of these use language such as "significant relation," "primary relation," or "material effect" to connote dominance, as did the New Jersey court in its *Teaneck* balancing test:

> In order to determine whether a negotiated agreement between public employer and employees would significantly interfere with determination of governmental policy, it is necessary to balance interests of public employees and public employer; when dominant concern is government's managerial prerogative to determine policy, subject may not be included in collective negotiations even though it may intimately affect employees working conditions [29].

Other states have followed this same general model. For instance, the Oregon courts determine whether a subject is a condition of employment by balancing

the elements of educational policy involved against the effect that the subject has on a teacher's employment [30].

A few jurisdictions, however, simply state which subjects are within the scope of bargaining. For instance, in *West Hartford Education Assoc. v. De Courcy,* the Connecticut court recognized that both the educational policy decisions and the teachers' employment conditions affect each other. The court held that matters of educational policies crucial to the existence, direction, and operation of the enterprise were outside the scope of negotiations [31].

Application of the balancing tests has produced inconsistent results [4, 32]. For instance, while promotion procedures have uniformly been held to be within the scope of bargaining, courts have reached different conclusions concerning the standards and criteria for promotions. In *Detroit Police Officers Ass'n v. City of Detroit,* promotion criteria were considered mandatory. However, the New Jersey Supreme Court in *State v. State Supervisory Employees Ass'n.* found most proposals related to promotions are not mandatory subjects and, under the state's two-part scheme, were illegal subjects of bargaining. Some of the differences in case outcomes may be attributed to the difficulty of balancing the interest of employees against the burden of negotiating on managerial autonomy [4].

Conflict with Pre-Existing Legislation

Courts have also reached differing conclusions on conflicts between bargaining laws and other preexisting statutes. As we have shown, the New Jersey courts have removed subjects from the scope of negotiations when there is a direct conflict between a preexisting statute and a bargaining issue. For example, in *State v. State Supervisory Employees Ass'n,* the court held that where a "civil service statute or regulation expressly sets particular terms and conditions of public employment, it may not be contravened by negotiated agreement" [33]. A year later in *Maywood Bd. v. Maywood Ed. Ass'n,* the appellate court reasoned that preempting negotiation depended on whether the "statute or regulation [speak] in the imperative or permit a public employer to exercise a certain measure of discretion." If the legislation sets a minimum or maximum term, then negotiation may be confined within the parameters established by those limits [34].

New York has a similar preemption concerning preexisting legislation and the scope of collective bargaining. Subjects of collective bargaining are limited by the expressly stated prohibitions in case law, statutory law, and by public policy [35]. Thus, most collective bargaining subjects are removed from negotiations when a conflict arises with a preexisting law [7, 14].

On the other hand, in *Labor Relations Com. v. Natick,* the Massachusetts court concluded that the scope of bargaining was not restricted when the legislature expressly provides that the negotiated agreements should prevail over a conflict with law [36]. Similarly, the Oregon courts will not limit the scope of bargaining

if the collective bargaining agreement is consistent with the statute [37]. In summary, it appears that the resolution of conflicts pertaining to differences between a contractual provision and preexisting law depends on the wording of the statute and varies from venue to venue.

Conflicts with Constitutional Provisions, Ordinances, Charters, or Regulations

State constitutional provisions almost always supersede statewide collective bargaining statutes [38]. It is also common that local ordinances, charters, or regulations do not restrict the scope of bargaining as defined by a statewide statute. For instance, in *Detroit Police Officers Assoc. v. Detroit,* the court held that the enactment of an ordinance could not remove the duty to bargain under the state's Public Employment Relations Act if the subject of the ordinance concerned the "wages, hours or other terms and conditions of employment" of public employees, which were matters subject to mandatory negotiations under the act [39].

In a similar vein, a Connecticut court confronted a conflict between a provision in the city charter that gave the board of police commissioners the power to remove police officers and a provision of the collective bargaining agreement for arbitration of grievances resulting from such discharges. The court held that the provisions of the collective bargaining statute would take precedence over conflicting provisions in a city charter [40]. And, when a firefighters' union challenged the town representatives' refusal to bargain over certain matters that allegedly fell under the control of the fire chief, a Massachusetts court held that rules and regulations of the police and fire chiefs could be overridden by the bargaining process [41].

EVALUATIONS

In this section, we argue that much of the thinking used to limit the scope of bargaining in the public sector is deficient. Our first point is: the oft-stated claim that managerial prerogatives must be protected to enhance productivity flies in the face of a vast array of contemporary literature on the relationship between employee involvement and performance [18]. Limiting the scope of bargaining may actually decrease work product because public employees may be reluctant to commit themselves to management's goals and programs when they feel they have no voice [19].

Judicially required silence can lead to dissatisfaction and affect job performance and delivery of public services. Broadening the number of topics that can be negotiated may actually enhance productivity by empowering employees. The courts and the legislature need to return to the basic purposes of collective bargaining statutes: the public interests in efficient delivery of public services

and maintaining harmonious labor relations [12]. Focusing alone on protecting managerial rights may interfere with the achievement of these more fundamental objectives [42].

The nondelegation theory uses the concept of governmental autonomy to limit the statutory duty to bargain in good faith. In New Jersey, this theory has been the centerpiece of attempts to remove policy decisions from the scope of bargaining, and take permissive subjects off the bargaining agenda. However, public employees as well as public employers have a significant stake in policy matters. Denying them the right to any voice in the determination of policy surely weakens their commitment to the organization and to their work.

Furthermore, permissive subjects may be opened up for negotiation without requiring management to give away the rights it believes are necessary to run the operation. The obligation to bargain does not carry with it an obligation to agree. When public employers and public employee unions are denied the right to negotiate over policy matters, communications on these issues is shut down, problems and complaints may not surface, and everyone involved may suffer. Bargaining is in itself an aspect of the democratic process. Successful collective bargaining requires participation from both parties. When public employees are denied the right to talk about issues that are important to them, their reaction can be dysfunctional.

Finally, according to the political process theory, some matters should be removed from the scope of bargaining because they allow public employees, through their unions, to enrich themselves at the expense of other interest groups. Once again, we note that the concept that the obligation to bargain does not carry with it an obligation to agree. The fact that public employees are allowed to negotiate over items that may enrich them does not mean their negotiations will be successful.

Furthermore, there is very little empirical data showing that public employees have become unduly enriched because they are able to bargain. Despite the perceived influence of public sector employee unions, most of these organizations have not been able to secure outrageous increases in their wages or vast improvements in other conditions of work. The power public employees receive through collective negotiation is surely limited by the general absence of the right to strike and the ability of the public to make branches of government listen to its pleas for financial relief [12].

SUMMARY AND CONCLUSIONS

This paper has examined the scope of bargaining in New Jersey's public sector, compared the New Jersey approach with other jurisdictions, and has evaluated the situation in this state. Our basic messages have been these.

1. The New Jersey courts have generally restricted the scope of negotiations to matters that directly affect terms and conditions of employment, removing from the scope of negotiations a wide array of policy issues that have, nevertheless, an impact on terms and conditions of employment.
2. We have examined the leading theories that provide the foundation for restricting the scope of bargaining and, in many respects have found those theories wanting.
3. While agreeing that New Jersey is far from alone in restricting the scope of bargaining, we have also uncovered repeated examples where other jurisdictions have defined the topics of negotiation more broadly.
4. We have argued that the protection the courts have given to managerial prerogatives in this state is excessive. In particular, the New Jersey approach ignores a vast array of management literature which says that people perform better when they have an opportunity to have some measure of participation in determining their terms and conditions of employment.

In their attempt to protect management rights, the New Jersey courts may have helped to create a system that decreases the commitment of public employees to their work, lowers their morale, and limits their efforts to become productive employees. The courts' motives may very well lie in an essential distrust of the ability of state and local operating officials to run their own affairs properly and protect the public interest.

We think the protection given to the prerogatives of management by the New Jersey courts is excessive. We have pointed out repeatedly that, while the opportunity to negotiate over the items that affect them can have positive effects on employees and their performance, the duty to bargain over a given topic does not include the obligation to agree. Requiring management to negotiate does not require that it surrender to the union.

In sum, we have suggested that an expanded scope of bargaining is in the interest of the public and the public employer as well as that of the public employee. By emphasizing the protection of managerial prerogatives, the New Jersey courts may have deprived the parties directly involved in bargaining with the benefits that would come from a more balanced approach. New Jersey needs to strike a new balance between tested practices of participatory management in the field of industrial relations and management's control over policy decisions.

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ENDNOTES

1. Within the public sector, 37.6% of the workers were union members and unions covered 43% of the public sector workforce [1]. The list below describes the four kinds of employee organizations that are active in state and local government. (1) Some labor organizations organize a diverse number of employees and limit membership to the public sector, e.g. AFSCME; (2) Another type organizes a variety of trades and occupations, but operates within the public and private sectors; (3) A third kind restricts membership to a particular occupation or area of the public sector, e.g. AFT or the FOP; and (4) employee associations do not align themselves with traditional unions, yet they lobby, participate in setting salaries and deciding on payroll deduction for dues. They do not have a voice in determining the terms and conditions of employment [2].
2. Scope of bargaining will be used synonymously throughout this comment with subjects of negotiations and subjects of bargaining.
3. See *Abood v. Detroit Bd. of Educ.,* 431 US 209, 227-28 (1977).
4. See *Unified School Dist. No. 1 v. Wisconsin Employment Relations Comm'n.,* 81 Wis.2d 89, 96, 259 N.W.2d 724, 729 (1977).
5. The law provided "public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity." N.J. STAT. ANN. § 34:13A-5.3 (West 1996).
6. Specifically, PERC was entrusted to "make policy and establish 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 elections and related matters and to implement full all the provision of [the] act." N.J. STAT. ANN. § 34:13A-5.2 (West 1996).
7. The delineation between mandatory and permissive subjects under the NLRA was introduced in *NLRB v. Wooster Div. Borg-Warner Corp.,* 342, 348-50 (1958); since then the courts have sharpened the distinction in more recent decisions, *see e.g., First Nat'l Maintenance Corp. v. NLRB,* 452 U.S. 666, 678-79 (1981).
8. *Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n.,* 64 N.J. 17, 311 A.2d 737 (1973) (holding that a local school board's decision to consolidate the chairmanships of the high school humanities and social studies departments was not negotiable as a term or condition of employment); *Burlington County College Faculty Ass'n. v. Board of Trustees,* 64 N.J. 10, 311 A.2d 733 (1973) (approving the trustees' decision to negotiate such items as compensation, hours, sick leave and physical accommodations); *Board of Educ. v. Englewood Teachers Ass'n.,* 64 N.J. 1, 311 A.2d 733 (1973) (holding working hours and compensation are terms and condition of employment).
9. *See Dunellen,* 64 N.J. at 25, 311 A.2d at 741.
10. 81 N.J. 582, 410 A.2d 1131 (1980).
11. *See Id.* at 589-91.
12. *N.J.* STAT. ANN. SEC 34:13a-1 TO 13 (WEST 1965 & SUPP. 1983-1984). The amendments were subsequently called Chapter 123.
13. Thirty-four permissive topics were found, including selection of administrators, qualifications of department heads, evaluation criteria, tenure ratios, and involuntary transfers [11].

14. *78 N.J. 144, 393 A.2d 278 (1978).*
15. *78 N.J. 162; 393 A.2d 278 (1978).*
16. The court refined this special category of permissive subjects in *In re Paterson Police Benevolent Assoc. v. City of Paterson,* 87 N.J. 78, 432 A.2d 847 (1981). The Paterson court found legislative authorization for the interest arbitration statute (N.J.S.A. 34:13A-14) express creation of a permissive subjects category for police and firefighters. However, the court devised this very narrow test for determining permissive negotiability: "an issue is not permissively negotiable if an agreement would place `substantial limitations' on government's policymaking powers." Very few subjects can meet this standard [3. 10].
17. *94 N.J. 9, 462 A.2d 137 (1983).*
18. *See Teaneck* 94 N.J. 9, 14, 462 A.2d 137, 139 (1982) (quoting *In Re Local 195 IFPTE v. State,* 88 N.J. 393, 402, 443 A.2d 187 (1982)); see also *In Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Educ.,* 91 N.J. 18, 449 A.2d 1244 (1982) (holding only two categories of bargaining exist in public sector bargaining).
19. *See Teaneck supra* note 43; *In Re Local 195 supra* note 42 at 404, 443 A.2d 187 (holding that subcontracting was not a subject of mandatory negotiations) [3].
20. *See Fibreboard Paper Prods. Corp. v. NLRB,* 379 U.S. 203 (1964); *First Nat'l Maintenance Corp. v. NLRB.* 452 U.S. 666 (1981).
21. *See Dunellen*, 64 N.J. at 25, 311 A.2d at 741; *Woodstown,* 81 N.J. at 589-91.
22. *See Skaneateles Teachers Assoc. v. New York State Public Employment Relations Board,* 389 NYS.2d 257 (1976).
23. *See School Dist. of Seward Educ. Ass'n. v. School Dist.* 188 Neb. 772, 199 NW.2d 752 (1972).
24. *See Susquentia Sch. Dist. v. Susquentia Educ. Ass'n.*, 676 A.2d 706 (1996).
25. *See* 78 N.J. at 163, 393 A.2d 287.
26. *See* 88 N.J. 402, 443 A.2d at 191.
27. The district asserted that the collective bargaining process was excluding members of the public at large because the highly stratified governmental decision-making model has been collapsed to a bilateral process of collective bargaining. The public is not permitted to attend negotiations concerning mandatory subjects. As a result, the district charged that the employees were gaining a significant advantage in pressing their own issues and excluding lawfully sanctioned public input. 33 Cal.3d 850, 663 P.2d 523, 191 Cal. Rptr, at 809 (1983) West's Ann. Cal. Gov. Code ss 3540 et. Seq., 3547, 3549.1, 54950 et seq.; West's Ann. Cal. Edu. Code, 35145, 35145.5 See *also* Davis *supra* at note 51 at 118.
28. The court recognized the importance of public participation in decisions affecting the educational process. It suggested that initial contract proposals in both sides be made public. Also, the stated any new subject introduced into the collective bargaining process must be made public within 24 hours and the public must be informed of the votes. *Id.*
29. 94 N.J. 9, 14, 462 A.2d 137, 140 (1983), quoting *Woodstown-Pilesgrove Bd. v. Woodstown-Pilesgrove Educ. Ass'n.,* 81 N.J. 582, 591, 410 A.2d 1131 (1980). *See also Bethlehem Tp. Bd. of Educ. v. Bethlehem Tp. Educ. Ass'n,* 91 N.J. 38, 449 A.2d 1254 (1982); *Council of N.J. State College Locals v. State Bd. of Higher Educ.,* 91 N.J. 18, 449 A.2d 1244 (1982).

30. *See Sutherlin Education's Assoc. v. Sutherlin School Dist.,* 25 Or. App. 85, 548 P.2d 204 (1976).
31. 162 Conn. 566, 295 A.2d 526 (1972).
32. Compare the following cases on the issue of classroom size. In *San Mateo City School Dist v. Public Employment Relations Bd.,* 33 Cal.3d 850, 663 P.2d 523, 191 Cal. Rptr. 800 (1983), the court held that class size is a mandatory subject of bargaining. In *Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ.,* 88 S.D. 127, 215 N.W. 2d 837 (1974), however, classroom size becomes a non-mandatory subject. On the issue of transfer procedures, the New Jersey courts have held that transfer and assignment procedures are negotiable but that substantive criteria are not [In *re Local 195, Int'l Fed'n of Professional & Technical Eng'rs,* 88 N.J. 393, 443 A.2d 187 (1982)] but the New Hampshire courts have concluded that subcontracting, promotion, transfer, and layoff policies are nonnegotiable subjects [*State Employees' Ass'n v. New Hampshire Pub. Employee Labor Relations Bd.,* 118 N.H. 885, 397 A.2d 1035 (1978)].
33. 78 N.J. 54, 393 A.2d 233.
34. 168 N.J. Super. 45, 401 A.2d 711 (1979), cert denied 81 N.J. 292, 405 A.2d 836.
35. *See In Union Free School Dist. v. Nyquist,* 38 NY.2d 137, 379 NYS.2d 10, 341 NE.2d 532 (1975).
36. 369 Mass 431, 441; 339 N.E.2d 900, 905 (1976). The issue in this case was whether subjects within the authority of "strong" police and fire chiefs of town are proper subjects for collective bargaining. The court concluded they were proper subjects. With respect to the court not restricting the scope of bargaining when the legislature expressly states that negotiations succeed if a conflict of law arises, the court stated that:

    > The fact that the Legislature has provided expressly that the negotiated agreement prevails over conflicting by laws, regulations, and statutes indicates that the statutory goal of achieving entirely open, conclusive negotiations between the chief executive officer and employees representative is preeminent.

37. *In Sutherlin Education Assoc. v. Sutherlin School Dist.,* 25 Or. App. 407, 549 P.2d 1141 (1976) (holding a school board would not be prohibited from negotiating the disciplinary rules as long as the ones eventually promulgated were consistent with the statewide rules.)
38. Any bargaining provision, which conflicts with the state constitution of New Jersey, is an illegal and, therefore, unenforceable subject of bargaining. Similar standards are commonly found in other jurisdictions. *See supra* note 17; see also *International Assoc. of Firefighters v. Warren,* 89 Mich. App. 135; 129 NW.2d 566 (1979); *State, Dept. of Administration v. Wisconsin Employment Relations Commission,* 90 Wis. 2d 426, 280 BW.2d 150 (1979).
39. 391 Mich. 44, 214 NW2d 803 (1974). The court reasoned if an ordinance establishing a residency requirement for policeman was read as eliminating a mandatory subject of bargaining from the scope of negotiations, then the ordinance would be in direct conflict with state law thus rendering it invalid.
40. *See Board of Police Comrs. v. White,* 171 Conn. 553, 370 A.2d 1070 (1976); see also *Los Angeles County Civil Service Com. v. Superior Court of Los Angeles,* 23 Cal.3d 55, 151 Cal. Rptr. 547, 588 P.2d 249 (finding that charter cities are subject to and con-

trolled by applicable general state law if the legislature has manifested an intent to occupy the field to the exclusion of local regulation).

41. *Natick., supra,* note 36.
42. "By defending management prerogatives so vigorously, the [New Jersey] courts have denied to public employees negotiating rights that have long been granted in the private sector, and which in many jurisdictions today are found in the public sector as well" [11 at 828].