P.E.R.C. NO. 77-31

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (STOCKTON STATE COLLEGE),
Petitioner,

- and -

COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,
Respondent.

Docket No. SN-16

STATE OF NEW JERSEY (STOCKTON STATE COLLEGE),
Petitioner,

- and -

COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,
Charging Party.

Docket No. CO-76-11

SYNOPSIS

In a decision in a combined unfair practice and scope of negotiations proceeding, the Commission finds the exceptions filed by the Council relating to the findings of fact and conclusions of law of the Hearing Examiner to be without merit. The Commission, in agreement with the Hearing Examiner, finds that the decision of the State to increase the minimum number of minutes of "contact time" -- the number of minutes of classroom instruction per course per week -- at Stockton State College for the academic year 1975-76, consisting of the fall, winter and spring semesters, was a permissive, not a required subject for collective negotiations. The impact of that decision on the terms and conditions of employment of the employees represented by the Council was determined to be a required subject for collective negotiations.

The Commission also finds that the Council was not the majority representative of summer session employees in 1975, as those job positions were not part of the certified or recognized collective negotiations unit represented by the Council. The Commission therefore concludes that negotiations on the effect of the increase in minimum contact time on summer session employees was not within the scope of required collective negotiations with the Council.

The Commission, again in agreement with the Hearing Examiner, concludes that it should defer to the findings of fact,

conclusions of law and award of arbitrator Daniel House relating to the issue of the State's negotiating responsibilities with regard to the impact on terms and conditions of employment of unit members at Stockton of the decision to increase contact time, insofar as that identical matter was incorporated within the Charge before the Commission. The Commission reviewed the standards that it had developed for determining whether the Commission would reassert jurisdiction over a charge that had been administratively deferred after the relevant arbitral award had been issued and concluded that deferral to the arbitrator's opinion and award under the circumstances in this case was appropriate. The Commission therefore dismisses the complaint in the unfair practice proceeding in its entirety.

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- and - Docket No. CO-76-11

COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

Appearances:

For the State of New Jersey, Hon. William F. Hyland, Attorney General (Melvin E. Mounts, Deputy Attorney General, of Counsel).

For the Council of New Jersey State College Locals, Sauer, Boyle, Dwyer & Canellis, Esqs. (Mr. William A. Cambria, of Counsel).

DECISION AND ORDER

On June 17, 1975 the State of New Jersey[1/] (the "State") filed a Petition for Scope of Negotiations Determination (the "Scope Petition") with the Public Employment Relations Commission

1/ This matter involves only Stockton State College; however the State of New Jersey is the public employer, and has been so stipulated by the parties.

(the "Commission") seeking a determination as to whether a matter in dispute between the State and the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO (the "Council") was within the scope of collective negotiations.[2/] Thereafter on July 14, 1975, the Council filed an Unfair Practice Charge (the "Charge") with the Commission alleging that the State had violated the New Jersey Employer-Employee Relations Act, as amended (the "Act"), N.J.S.A. 34:13A-1 et seq and in particular subsections (a)(1) and (5) of N.J.S.A. 34:13A-5.4.[3/]

Both proceedings relate to the same set of facts, namely a decision by the State to increase the "contact time" -- the number of minutes of classroom instruction per course per week -- at Stockton State College, and the subsequent implementation of that decision beginning with the summer term in 1975 and continuing through the 1975-76 academic year. While this dispute does not seem complicated, it has precipitated numerous proceedings.

2/ The Commission's authority to render such determinations is set forth in N.J.S.A. 34:13A-5.4(d), which states: "The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court." See also, N.J.A.C. 19:13-1.1.

3/ Those subsections prohibit public employers from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

The Executive Director[4/] has heard several applications for interim relief, an arbitrator has issued two Opinions and Awards, and Commission Hearing Examiner, Stephen B. Hunter, has issued a comprehensive Recommended Report and Decision. The Hearing Examiner filed his Recommended Report and Decision with the Commission and served it upon the parties on August 17, 1976.[5/] Exceptions to it were filed by the Council on August 30, 1976. The State, after requesting and receiving an extension of time in which to file cross-exceptions, chose to submit a brief letter dated September 19, 1976 in which it indicated it would rely on the arguments made in the record and the briefs previously submitted.[6/] The Hearing Examiner's Recommended Report, along with the exceptions filed by the Council, has been transferred to this Commission[7/] and that is the aspect of the proceedings currently before us.

The Hearing Examiner's Recommended Report and Decision (H.E. No. 77-5, 2 NJPER 297), a copy of which is attached hereto and made a part hereof, sets forth the factual background and the positions of the parties on the numerous legal issues fully and we need not reiterate that information.

4/ Now Chairman, Jeffrey B. Tener.
5/ The final piece of correspondence in this instant matter that was submitted to the Hearing Examiner was received by him on August 5, 1976.
6/ N.J.A.C. 19:14-7.2 sets forth the material that will be included in the record and transferred to the Commission. Briefs submitted to the Hearing Examiner are not automatically included in this transmission but will be included upon request.
7/ N.J.A.C. 19:14-7.1 et seq.

The Hearing Examiner's Recommended Report dealt with three issues which can be summarized in the following manner:

> (1) Was the decision to increase the minimum amount of contact time per course per week a mandatory subject for collective negotiations?
>
> (2) Were summer session employees included within the collective negotiations unit represented by the Council?
>
> (3) Should the Commission defer, in whole or in part, to the findings of fact, conclusions of law and award of arbitrator Daniel House relating to the issue of the State's negotiating responsibilities with regard to the impact on terms and conditions of employment of unit members at Stockton of the decision to increase contact time, insofar as that identical matter was incorporated within the Charge before the Commission.

We will first discuss the Hearing Examiner's Recommended Report and Decision on the issues of negotiability of the decision to increase contact time and the summer school employees, and then we will consider his determination of the deferral issue with respect to the arbitrator's Opinion and Award on the impact of that increase in contact time on the faculty.

In his Recommended Report and Decision the Hearing Examiner carefully set forth the position of both parties in the scope of negotiations dispute and concluded that the decision to increase minimum contact time was a major educational and managerial judgment that relates primarily to matters that are not terms and conditions of employment. The decision itself, he found, is directed predominantly at the students, involving a determination of the minimum amount of classroom time required to

fulfill course objectives and academic credit requirements of the College. It is thus not a required subject of negotiations. He further found that the decision, while not directed at the faculty, could have a very definite effect or impact upon them and their terms and conditions of employment including, but not limited to, increases in their workload and changes in their hours. To the extent that the implementation of the decision did effect terms and conditions of employment, the State is required to negotiate concerning that effect of the decision.

Based upon our review of the record on this issue we adopt this decision of the Hearing Examiner, as outlined above, including his findings of fact and conclusions of law, substantially for the reasons discussed in his report.[8/] The Council excepted to this determination by the Hearing Examiner, arguing that the decision and impact were too inextricably interrelated to separate them and therefore they should both be negotiable. We reject that argument with respect to these facts. In this case the decision was directed at the students, not the faculty. Negotiations on the impact of that decision on the faculty could lead to numerous alternative approaches which would not effect the increase in students' contact time.[9/] We see no reason to modify the result reached by the Hearing Examiner on the scope issue and we adopt it.

8/ In stating that we adopt his findings of fact and conclusions of law we refer to those relating only to the specific issue being discussed. We will discuss each of the issues separately.

9/ Increased compensation for any additional time worked by faculty is one obvious example that would not relate to the students.

The question of whether the State had an obligation to negotiate with respect to the effect of the increase in contact time on summer term faculty is dependent initially on the resolution of the unit status of those job positions. The Hearing Examiner found that the Council had not proven by a "preponderance of the evidence" that it was the certified or recognized majority representative of the 1975 summer session employees. The Commission has reviewed the record on this issue and adopts this finding of fact of the Hearing Examiner, again substantially for the reasons expressed by him.[10/]

The Council has excepted to this finding as well. It relies primarily on two arguments: one, that almost all summer school employees were full-time faculty and thus the Council's representation of them continues into the summer; and, two, that over the years the Council had represented many of these employees on grievances relating to their summer term employment. Neither of these arguments is persuasive. The fact that the same people teach both in the summer and the rest of the year may be important if the Council attempts to seek recognition of this

10/ The Council made certain arguments at the hearing and in its submissions, including the exceptions, which went to the question of whether or not it would be appropriate for summer session employees to be included in the unit. That is not the issue. The issue is a primarily factual one: were the summer session employees and the job positions they held as summer term employees within the collective negotiations unit represented by the Council in the summer of 1975? We find that they were not. Therefore, there was no obligation on the State to negotiate anything with the Council concerning these positions.

group in the future but it is not relevant herein. A negotiating unit is defined in terms of job titles and descriptions, not individually named employees. The Council's representation of these employees continues throughout the year with respect to their positions as full-time faculty not as summer session employees.

In a similar fashion the fact that the Council has represented many of these people on grievances relating to their summer session employment is not dispositive. N.J.S.A. 34:13A-5.3 states in part:

> "When no majority representative has been selected as the bargaining agent for the unit of which an individual employee is a part, he may present his own grievance either personally or through an appropriate representative or an organization of which he is a member and have that grievance adjusted."

Based upon this language the State was required to permit the Council to represent any summer session employee in processing a grievance even though the Council was not the majority representative of those employees. Therefore no inference need be drawn from the mere fact that the Council assisted the employee in processing the grievance other than the fact that the employee may have been a member of the Council or chose to be represented by the Council.

After making his finding on this issue, the Hearing Examiner further concluded that the impact of the increase in contact time on summer term employees related to a permissive, but not required, subject of bargaining. By this he apparently meant

to imply that the State could, if it wished, agree to negotiate this subject with the Council with repsect to these employees. We specifically do not adopt this aspect of the Hearing Examiner's Recommended Report and Decision. This issue was not litigated and we do not deem it to be necessary to the decision. An employer's obligation to negotiate terms and conditions of employment is owed to the majority representative of its employees in a recognized or certified unit. It is not clear what negotiation rights are permitted an employee organization in the absence of such status, and we do not feel we should reach that question on this record nor do we need to in order to dispose of this issue. We conclude, therefore, that the State could not have violated the Act by refusing to negotiate with the Council concerning the effect of the increase in contact time in the summer session because the Council did not represent employees in those positions.

We now turn to a discussion of the last issue in this case: whether the Commission should adopt the recommendation of the Hearing Examiner to dismiss the Complaint in the Charge matter in its entirety based on the Hearing Examiner's determination that the Opinion and Award of arbitrator Daniel House on the "impact" issue be deferred to as a complete remedy and disposition of the identical issues raised in the unfair practice charge.

In the Opinion and Award, dated December 24, 1975, the arbitrator stated that the parties agreed that the issue before

him was:

> "Does the State violate the Agreement in refusing to negotiate about the impact of its decision announced in President Bjork's letter of April 23, 1975 to Ralph Bean with respect to the academic year 1975-76?"

In this Opinion and Award, the arbitrator concluded that the agreement between the parties did not permit the State to unilaterally implement an increase in the number of minutes of the faculty's contact time. He concluded his Opinion in this way:

> "To sum up: Article XII Section V reflects the results of the negotiation of the parties with regard to, among other things, the amount of the faculty workload in terms partly of time required of the faculty member in performance of his work. It was not proved by the evidence that in it the parties intended to 'freeze' the claimed management right unilaterally to change minimum contact time without negotiation with the Union about the impact of such changes. Unless there were clear evidence to the contrary, it would not be reasonable to find that the Union, either in the statewide or the Stockton Agreement, waived its right to negotiate about this impact on an item so affecting wages and hours; there is no such evidence in the record: neither the plain language of either Agreement, nor the arguments of the State, are convincing in this regard. I conclude, therefore, that the State has the obligation to negotiate with the Union about the impact and, if warranted by the amount of that impact, about a remedy for the extra load."

The Award itself reads in its entirety:

> "AWARD
>
> The undersigned hereby makes the following award:
>
> The State has violated the Agreement in refusing to negotiate with the union about the

impact of its decision announced in President Bjork's letter of April 23, 1975 to Ralph Bean with respect to the academic year 1975-76."

Although no specific reference is made to a remedy in the Award the concluding sentence of the arbitrator's Opinion does state an obligation on the part of the State to negotiate with the Council, including the possibility of some remedy for the extra work, if, in fact, extra work was performed by unit members.[11/] It may be inferred that the Award is intended to include the obligation stated in the last sentence of the arbitrator's Opinion.[12/]

The Hearing Examiner determined that deferral to the arbitrator's award in this instant matter was fully consistent with the Commission's announced deferral to arbitration policy.[13/] He reasoned that the State and the Council chose voluntarily to proceed with the arbitration of the "impact" issue and agreed with the Executive Director to defer the unfair practice charge to resolution through arbitration.[14/] He pointed out that both the State and the Council, in their briefs to the Executive

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11/ This remedy could include, we presume, mandatory compensation.

12/ Based on exceptions filed to the Hearing Examiner's Recommended Report and Decision filed by the Council, the Council apparently believes that the arbitrator ordered negotiations on the impact. It apparently draws this conclusion from the last sentence of his Opinion. The Council, however, rejects this remedy as inadequate.

13/ See In re Board of Education of East Windsor, E.D. No. 76-6, 1 NJPER 59 (1975); In re City of Camden, E.D. No. 76-13, 1 NJPER 65 (1975); In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975).

14/ On August 25, 1975 the Executive Director, acting on behalf of the Commission, issued an Interlocutory Decision /In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975)/ that denied the Council's request (Continued)

Director on the "interim" proceedings in this matter, had been in agreement with him that the issues in the arbitration and the unfair practice charge were identical and that the arbitrator had the power to remedy the matter in accordance with their agreement. They agreed that it was reasonably probable that the dispute underlying the charge would be resolved in the arbitration forum. The fact that both parties now had certain problems with the ultimate result was not sufficient reason to rescind that deferral.

The Hearing Examiner set forth the three standards that have been developed for determining whether the Commission would reassert jurisdiction over a charge after an arbitral award has been issued. If it could be shown that (a) the dispute has not, with reasonable promptness after the issuance of the determination to defer, either been resolved by amicable settlement or submitted to arbitration, or (b) the grievance or arbitration procedures have not been fair or regular, or (c) the result reached is repugnant to this Act,[15/] then the Commission would not defer and would reassert jurisdiction. He stated, and we agree, that such reassertion of jurisdiction would not be, as the Council suggests in its exceptions, for the purpose of correcting defects

14/ (Continued) for interim relief during the pendency of the unfair practice proceeding /i.e., a temporary injunction staying the implementation of the increased student contact time for the fall (1975) term/. The Executive Director in apposite part recognized that certain aspects of the Council's Charge with reference to the impact issue were before an arbitrator who had the power to fashion an appropriate remedy in accordance with the contract that had been negotiated by the State and the Council.

15/ See In re Board of Education of East Windsor, In re City of Camden and In re City of Trenton, all supra, footnote 13.

in the Award but would be for a de novo review of the issues which were originally deferred to arbitration. If deferral is appropriate, it becomes the forum for resolution of the entire dispute, including remedy. If deferral is not appropriate, or turns out to have been inappropriate, then the entire dispute - the findings of fact, conclusions of law and remedy - will be resolved in the unfair practice forum.[16/]

The Hearing Examiner then reviewed the arbitration process against these three standards and found that they had been met. He found, in fact it was not really contested, that the matter had been promptly submitted to arbitration and that the arbitration procedures had been fair and regular. Also, while he indicated some problem with the remedy, he did not find that these problems amounted to a repugnancy to the Act.[17/] He therefore concluded that deferral to the Award was appropriate.[18/]

Based upon our review of the record on this issue, we

16/ It must be borne in mind that the question before the Commission is always whether the Act has been violated. We do not inspect and review each judgment of the arbitrator. The arbitration process is either deferred to or it is not. If the Award does not meet the criteria, it means that the entire process was inappropriate in that given situation for resolving the statutory issue. That is not to say that the Award is not adequate to resolve the contractual dispute; that question is for the courts, N.J.S.A. 2A:24-1 et seq.

17/ By deferring to the Award, the Hearing Examiner resolved the last issue of the Unfair Practice Charge and therefore recommended dismissal of the Complaint that was issued on the basis of that Charge.

18/ While he noted that the State had rejected the Award as being in violation of the parties' agreement, he pointed out that even the State did not assert that this amounted to repugnancy to the Act. It appears that the State's objections to the arbitrator's Opinion and Award may be, in reality, a disagreement with his finding that it violated the agreement.

adopt the conclusion of the Hearing Examiner, as outlined above, including his findings of fact and conclusions of law, substantially for the reasons discussed in his report. We particularly wish to express our agreement with the Hearing Examiner's comments concerning the State's rejection of the Award, and the Council's determination, to date, not to seek enforcement of said Award.[19/] Just because one party or the other is dissatisfied with an Award does not mean that deferral is inappropriate. Judicial enforcement of the Award is part of the arbitration process to which we have deferred.

We would also emphasize that when the Executive Director directed that deferral to arbitration was appropriate in this case,[20/] it was because he believed (1) that the Unfair Practice Charge involved basically issues of contract interpretation and privilege which were identical to the issues before the arbitrator and (2) that the arbitrator had full authority to address and remedy those issues pursuant to the parties' agreement and their submission to that forum. The existence of those two factors formed the basis for deferring the issues to arbitration initially and they remain a constant and essential requirement for deferral during the entire process. If these preconditions cease to exist, deferral is no longer appropriate.[21/] After careful analysis of

19/ See pgs. 31-32 of the Hearing Examiner's Recommended Report and Decision.

20/ See footnote 14.

21/ In the East Windsor decision, supra, it was stated in this way: "It is clear that the issue of contract interpretation raised by the opposing positions of the parties, is subject to resolution by the grievance procedure which the parties

(Continued)

the entire record in this instant matter, we conclude that no evidence has been proffered that would mandate the conclusion that the above-mentioned preconditions have not been satisfied.

ORDER

Pursuant to N.J.S.A. 34:13A-5.4(c) and (d) the Public Employment Relations Commission makes the following determination.

With regard to the scope of negotiation issues presented:

1. We find that the decision of the State of New Jersey to increase the minimum number of minutes of "contact time" at Stockton State College for the academic year 1975-76, which consists of the fall, winter, and spring semesters, was not a required subject of collective negotiations. It was, however, a permissive subject of negotiations.

2. We find that the impact of that decision on the terms and conditions of employment of the employees represented by the Council of New Jersey State College Locals was a required subject of collective negotiations.

3. We further find that the Council of New Jersey

21/ (Continued) have voluntarily agreed to follow and which, as earlier noted, can result in a binding arbitration...As it is reasonably probable that the instant dispute will be resolved under the parties' grievance and arbitration machinery, they should first seek its resolution in the manner prescribed therein." Pg. 5, 1 NJPER 61.

These two criteria are also essential to deferral in the private sector. Jos. Schlitz Brewing Co., 175 NLRB No. 23, 70 LRRM 1972 (1968); Collyer Insulated Wire, 192 NLRB No. 150, 77 LRRM 1931 (1971).

State College Locals was not the majority representative of the summer employees in 1975, as those job positions were not part of the certified or recognized collective negotiations unit represented by the said Council, and we therefore conclude that negotiations of the effect of the increase in minimum contact time on the said summer session employees was not within the scope of required collective negotiations with the Council of New Jersey State College Locals.

With regard to the Unfair Practice Charge which alleges that the State of New Jersey engaged in a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally implemented the increase in the minimum number of minutes of "contact time" for the academic year 1975-76 (excluding summer session 1975) without negotiating the impact of that increase on the terms and conditions of employment of the employees represented by the Council of New Jersey State College Locals, we hereby adopt the Hearing Examiner's recommended Order and the instant Complaint is hereby dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst, Hartnett and Parcells voted for this decision.
Commissioners Hipp and Hurwitz voted against this decision.
Commissioner Hurwitz filed a separate dissenting opinion.

DATED: Trenton, New Jersey
December 21, 1976
ISSUED: January 4, 1977

STATE OF NEW JERSEY
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Respondent - Charging Party.

Appearances:

For the State of New Jersey
William F. Hyland, Attorney General
(Mr. Melvin Mounts, of Counsel)

For the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO
Sauer, Boyle, Dwyer and Canellis, Esqs.
(Mr. William A. Cambria, of Counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On June 17, 1975 a Petition for Scope of Negotiations Determination [Docket No. SN-16] (the "Scope Petition") was filed with the Public Employment Relations Commission (the "Commission") by the State of New Jersey ("State") seeking a determination as to the negotiability of the decision to increase "contact time" -- the number of minutes of classroom instruction per course per week -- at Stockton State College.

A grievance with respect to this issue had earlier been filed by the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO (the "Council" and an arbitration proceeding with regard to that grievance had been scheduled for July 9, 1975. The State filed a request that the Commission temporarily enjoin the scheduled arbitration proceeding during the pendency of the instant scope of negotiations proceeding. The Commission having delegated to the Executive Director of the Commission, Jeffrey B. Tener, (now the full time Chairman) the authority to act upon such requests, the Executive Director heard the oral arguments of both parties and, on July 8, 1975, signed an Order to Show Cause and Temporary Stay of Arbitration. A return date of July 18, 1975 was set regarding the Order to Show Cause and arbitration was temporarily stayed in the interim to the extent that such arbitration involved matters pending in the instant scope of negotiations proceeding.

On July 14, 1975 the Council filed with the Commission an Unfair Practice Charge [Docket No. CO-76-11] (the "Charge") alleging violations of N.J.S.A. 34:13A-5.4(a)(1) and (5) 1/ on the part of the State.

The Council contended in its charge that announced unilateral increases in "contact time" at Stockton State College, which had already been implemented for the summer session and which were intended to be implemented for the full term beginning in September, 1975, constituted an interference with the rights of employees and a violation of the statutory provision that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." [N.J.S.A. 34:13A-5.3] The Council added that the increase in the number of minutes of college classroom instruction per course per week would result in increasing the unit members' pre-existing weekly teaching hours.

The Council submitted with its charge a proposed Order to Show Cause. That Order, signed by the Executive Director on July 15, 1975, required the State to show cause "why the Commission or its designated agent should not issue an Order staying implementation of the new schedule promulgated by Stockton State College for the fall term, and every term thereafter, pending a decision by the Commission in this matter and in the related Scope of Negotiation matter now pending under Docket No. SN-16." The return date, by agreement of the parties, was set for July 18, 1975 to coincide with the return date of the Order to Show Cause previously issued in the related scope of negotiations proceeding.

Both parties appeared before the Executive Director on July 18, 1975 and presented oral argument. The Executive Director considered the oral arguments, as well as the written arguments and affidavits submitted in connection therewith, and on July 25, 1975 issued an Interlocutory Order Consolidating Cases and Granting Interim Relief. That Order consolidated the scope of negotiations and unfair practice proceedings, and it restrained and enjoined pendente lite the arbitration pending on the increase in "contact time" to the extent that such arbitration involved matters pending in the scope of negotiations proceeding. Finally, the Executive Director reserved decision

1/ These subsections prohibit employers from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act" and from [r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

concerning the requested stay of implementation of the increased "contact time" for the fall term, and ordered that additional briefs and affidavits on the appropriateness of such a stay be filed on or before August 4, 1975.

Additionally it is to be noted that on July 25, 1975 the Executive Director issued a Complaint and Notice of Hearing along with the aforementioned Order Consolidating Cases with regard to the Scope Petition and the Charge.

In accordance with the July 25, 1975 Interlocutory Order of the Executive Director, the State and the Council submitted supplemental letter memoranda and affidavits to the Executive Director in support of their respective contentions for his consideration.

On August 25, 1975 the Executive Director, acting on behalf of the Commission, issued an Interlocutory Decision [In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975)] that denied the Council's request for interim relief during the pendency of the unfair practice proceeding [i.e. a temporary injunction staying the implementation of the increased student contact time for the fall (1975) term].2/ The Executive Director found that although the Council's chances for success were substantial as to the negotiability of the aspects of the College's decision relating to increased teaching hours, a substantial factual dispute existed as to whether the parties had already negotiated this issue. Furthermore the Executive Director recognized that certain aspects of the Council's Charge were then currently before an arbitrator who had the power to fashion an appropriate remedy in accordance with the contract that had been negotiated by the State and the Council.3/ Finally, the Executive Director in his Interlocutory Decision affirmed that he was not convinced that the violation alleged by

2/ The first section of this recommended report and decision is reproduced almost verbatim from the text of the August 25, 1975 Interlocutory Decision of the Executive Director.

3/ The Executive Director in his Interlocutory Decision used the following language in referring to the interrelationships between this arbitration proceeding and the instant Charge matter:

> While the Commission has not yet passed upon the advisability of developing a deferral policy, the undersigned views such a policy as desirable in certain circumstances. Without elaborating on these circumstances at this time, it is observed that such deferral may be appropriate in the instant situation at least to the extent that the dispute involves factual matters relating to contract interpretation. The undersigned understands that the arbitrator intends to render a decision prior to the commencement of the school year. Thus, to the extent that the (continued)

the Council could not be adequately remedied by the Commission at the conclusion of the case.

Pursuant to the Complaint and Notice of Hearing and the Order Consolidating Cases, a hearing was held in this consolidated proceeding on October 14, 1975 in Trenton, New Jersey at which time all parties were given an opportunity to examine witnesses, to present evidence and to argue orally. All briefs, letter memoranda, supplemental positional statements and exhibits, and the Opinion and Award of the arbitrator in the related, aforementioned arbitration proceeding were submitted to the undersigned by August 5, 1976. Upon the entire record in this matter, the Hearing Examiner finds:

1. The State of New Jersey is a Public Employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO is an employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. An Unfair Practice Charge having been filed with the Commission alleging that the State has engaged or is engaging in unfair practices within the meaning of the Act, as amended, a question concerning alleged violations of the Act exists and this matter is appropriately before the Commission for determination.

4. A Petition for Scope of Negotiations Determination having been filed with the Commission seeking a determination as to whether a certain matter in dispute is within the scope of collective negotiations this particular matter is appropriately before the Commission for determination.

BACKGROUND 4/

The Council was first certified on February 23, 1973 as the exclusive representative for the purpose of collective negotiations for all terms and conditions of employment of specified employees in a unit embracing eight State Colleges [including Stockton State College], the composition

3/ (Continued)

> action of the State constitutes a violation of the agreement, apart from the question of whether the decision is a required subject of negotiations, this matter can be and will be addressed and remedied by the arbitrator in accordance with the agreement of the parties.

4/ All of the facts referred to in this section are uncontroverted and are not in dispute.

of which has been described as follows:

Included:

1. Full time teaching and/or research faculty
2. Department Chairpersons
3. Administrative staff (non-managerial)
4. Librarians
5. Student Personnel Staff
6. Demonstration Teachers
7. Teacher - A. Harry Moore School
8. Professional Academic Support Personnel (holding faculty rank)

Excluded:

1. College President and Vice President
2. Deans, Associate and Assistant Deans and other Managerial Executives
3. Secretarial staff
4. Maintenance staff
5. Bookstore, Food Service etc. staff
6. Adjunct and part-time professional staff
7. Graduate Assistants
8. All others

The Council and the State entered into a collective negotiations agreement on February 22, 1974. This agreement became effective on that date and was to remain effective until June 30, 1976.

Under Article XII (entitled Faculty Responsibilities) of the aforementioned agreement between the State and the Council, the duties and academic year teaching load of certain faculty members in the unit were set forth. Section V of Article XII stated that the responsibilities of faculty set forth therein would not apply to faculty employed at Ramapo College or Stockton State College. Section V of Article XII further stated that "Responsibilities of the faculty at these colleges now in effect, shall remain in effect, unless altered through subsequent negotiations." 5/

Subsequent negotiations at Stockton did take place that resulted in an agreement between the State and the Stockton State Local Chapter of the Council on an Appendix to Article XII of the original agreement between the State and the Council. This appendix was formally ratified and executed in the Summer of 1974. This agreement contained provisions concerning teaching

5/ The parties apparently believed that the "unique nature of educational experiences offered at Stockton and at Ramapo" would not lend themselves to the more traditional definition of faculty responsibilities established within the framework of Article XII.

responsibilities at Stockton, based upon the variety of teaching loads offered at Stockton. This Stockton appendix also referred to the question of overload compensation and credit for modes of instruction other than classroom instruction. A copy of this Appendix to Article XII of the main Agreement is attached hereto and designated as Appendix "A" and made a part hereof.

The President of Stockton State College, Richard E. Bjork, by letter dated April 23, 1975, informed the President of the Stockton Local of the Council, Ralph J. Bean, as follows:

> This is to advise you that the College, as a matter of academic judgment and educational policy, intends to increase the minimum minutes per week for Summer term 1975 to 330 and for Academic year 1975-76 to 225 minutes in the Fall and Spring terms and 330 minutes in the Winter term. We do not view the decision to be mandatorily negotiable under the law, nor do we view that our Agreement in any way circumscribes the implementation of this academic judgment and educational policy.

The Council as set forth hereinbefore processed a grievance on this matter, which grievance was denied by letter from Barry N. Steiner, Special Assistant to the Chancellor, dated May 14, 1975, before being submitted to arbitration.

Subsequent thereto the State filed its Scope Petition and the Council filed its Charge.

On September 29, 1975 arbitrator Daniel House issued his Opinion and Award in the aforementioned related arbitration proceeding. At the outset of a supplemental arbitration hearing conducted on November 6, 1975 the State and the Council agreed that the aforementioned Opinion and Award be withdrawn and negated and that the hearing be reopened for the taking of additional evidence and for further oral argument. At the November 7, 1975 hearing the parties agreed that the only issue to be decided by arbitrator House was "Whether the State had violated the collective negotiations agreement in effect between the parties in refusing to negotiate about the impact of its decision [concerning increased "contact time"] announced in President Bjork's letter of April 23, 1975 to Ralph Bean with respect to the academic year 1975-76?" 6/

6/ As set forth earlier Executive Director Tener in his Interlocutory Decision issued on August 27, 1975 recognized that this particular issue before the arbitrator was also one of the issues subsumed within the Charge filed by the Council. The Executive Director recognized that the Council in its Charge had contended that conduct which constituted a violation of the collectively negotiated agreement also constituted a unilateral change in terms and conditions of employment and thus a refusal to negotiate in good faith in violation of N.J.S.A. 34:13A-5.4(a)(5). The Executive Director concluded that "to the extent that the action of the State [with regard to the "impact issue"] constitutes a violation of the agreement, apart from the question of whether the decision [to increase "contact time"] is a required subject of negotiations, this matter can be and will be addressed and remedied by the arbitrator in accordance with the agreement of the parties." (emphasis added)

In an Opinion and Award, dated December 24, 1975, arbitrator House rejected the State's arguments and determined that the Council had not waived its right to negotiate the impact of the decision to increase the minimum "contact time", either in the statewide agreement between the State and the Local or in the Appendix to Article XII of the original agreement negotiated at the Stockton College level. House further concluded that the State had the obligation to negotiate with the Council about the impact of the decision to increase the number of minutes of college classroom instruction per course per week and, if warranted by the amount of that impact, had the further obligation to negotiate with the Council about a remedy for the extra workload. House specifically made the following award:

> The State has violated the agreement in refusing to negotiate with the Union about the impact of its decision announced in President Bjork's letter of April 23, 1975 to Ralph Bean with respect to the academic year 1975-76.

The State in a letter dated February 2, 1976 from Frank A. Mason, Director of the Office of Employee Relations, to Marcoantonio Lacatena, President of the Council, advised the Council that it was rejecting the arbitrator's award on the grounds that House's award violated the parties' Agreement and did not conform to the applicable State laws governing the enforceability of arbitration awards. Subsequent thereto the parties mutually agreed to extend the time in which either of the parties could move under N.J.S.A. 2A:24-7 to either seek enforcement of the Award or to set that Award aside until after the undersigned had issued his recommended report and decision in the instant consolidated matter.

MAIN ISSUES

1. Whether the issue concerning the State's right to increase the minimum "contact time" — the number of minutes of classroom instruction per course per week — at Stockton State College during the academic year and/or the summer session was a required, permissive or illegal subject for collective negotiations?

2. Whether the Council is the certified or recognized exclusive collective negotiations representative of summer term employees employed by the State within the State College system.

3. An important preliminary issue concerns whether the undersigned should defer, in whole or in part, to the findings of fact, conclusions of law and award of arbitrator Daniel House concerning the issue of the State's negotiating responsibilities with regard to the impact on terms and conditions of employment of unit members at Stockton of the decision to increase "contact time", insofar as that identical matter was incorporated within the Charge before the Commission?

4. If it is determined to consider the "impact" issue de novo and it is further determined that the "impact" issue is a required subject for collective negotiations, did the State fulfill its negotiating responsibilities under the Act with regard to the "impact" issue when it negotiated Article XII, Section V of the original statewide agreement with the Council and when it subsequently negotiated the Appendix to Article XII of that statewide agreement at the Stockton State College level?

POSITION OF THE STATE ON ITS SCOPE PETITION - WHETHER THE DECISION TO INCREASE "CONTACT TIME" IS A REQUIRED, PERMISSIVE OR ILLEGAL SUBJECT FOR COLLECTIVE NEGOTIATIONS

The State maintained that the decision to increase "contact time" at Stockton State College did not concern a required subject for collective negotiations inasmuch as this decision to increase the number of minutes of classroom instruction per course per week was "a matter of employer prerogative in that the matter goes to the mission of the agency and results from an educational and managerial judgment not subject to the obligation to negotiate."

More specifically, the State contended that the decision to increase the minimum number of minutes of classroom instruction per course per week, thus increasing the length of time that a student would spend in a classroom or other instructional setting, went to the very heart of educational policy since "[t]eacher - student contact, usually in the classroom, frequently determine[d] whether educational objectives and curriculum goals [were] met; and the length of time that a student [spent] in a classroom or other instructional setting, [was] perhaps the most important aspect of teacher - student contact." The State concluded that as a public institution of higher education, the College was invested with the responsibility of making managerial decisions regarding fundamental educational policy matters such as the decision to increase minimum "contact time" without first negotiating with the Council.

The State in citing both judicial decisions and Commission decisions asserted that no changes were effected in the New Jersey Employer-Employee Relations Act by the 1974 amendments to that Act (Chapter 123, P.L. 1974) that removed from the College its inherent rights, obligations and duties to increase "contact time" as a matter of major educational policy. The State concluded that the effect of the modification of Section 10 of the Act (N.J.S.A. 34:13A-8.1) by Chapter 123 was not to render mandatorily negotiable any subject which an employee organization chose to raise regardless of whether or not such negotiations would concern a term and condition of employment and irrespective of whether or not such negotiations would contravene existing statutes. 7/

The State did agree that "[t]o the extent that the educational judgment (to increase the minimum "contact time" per course of instruction) impacts upon mandatorily negotiable terms and conditions of employment, the impact, but not the decision itself, can under certain circumstances be a proper subject of negotiations." 8/

With regard to the issue relating to "contact time" as it affected summer session employees, the State contended that even assuming arguendo that the decision as to the time a student spends in the classroom was a required subject for negotiations with regard to the certified unit, any obligation to negotiate concerning the issue would not extend to summer school employees affected by the College's decision inasmuch as summer school employees were not included within the certified negotiating unit represented

7/ Section 10 of P.L. 1968, C. 303 (N.J.S.A. 34:13A-8.1) provided:

> "Nothing in this act shall be construed to annul or modify or to preclude the renewal or continuation of any agreement heretofore entered into between any public employer and any employee organization, nor shall any provision hereof annul or modify any statute or statutes of this State."

Section 6 of P.L. 1974, C. 123 (N.J.S.A. 34:13A-8.1) now reads as follows:

> "Nothing in this act shall be construed to annul or modify, or to preclude the continuation of any agreement during its current term heretofore entered into between any public employer and any employee organization, nor shall any provision hereof annul or modify any pension statute or statutes of this State." (emphasis added)

8/ The State however contended that to the extent that such impact was mandatorily negotiable the Union in this particular case had already negotiated with the State in advance upon such issue and had arrived at an agreement [Appendix "A"] that had not been violated by the College's decision to increase "contact time". The contentions of the State on this "impact" issue will be analyzed in a later section of this recommended report and decision.

by the Council. The State contended that it had never agreed that summer session employees were part of the certified unit nor had the Commission ever included such employees in the unit. The State introduced into evidence a letter from Council President Lacatena to Gilbert Roessner, Chairman of the Board of Higher Education, (Exhibit R-2) that the State maintained established that the Council itself recognized that it did not represent summer school employees.

The State admitted that it had acceded to certain demands of the Council concerning summer school employees who were also full-time faculty members during the course of negotiations e.g. the State had agreed to priority consideration of full-time faculty members for summer school appointments. The State also did not attempt to controvert testimony that it had actively participated in grievances filed by the Council on behalf of certain summer school employees. The State did however assert that these facts were not at all dispositive since it had merely either negotiated certain issues that amounted to fringe benefits accorded to full-time faculty members [priority consideration for summer employment] or had been involved in occasional grievances that impacted on summer school employment that dealt primarily with employees in their full-time employment status.

POSITION OF THE COUNCIL ON THE STATE'S SCOPE PETITION

The Council contended that the decision to unilaterally increase the minimum "contact time" -- the number of minutes of classroom instruction per course per week -- was so heavily involved with the terms and conditions of employment of faculty members at Stockton State College, i.e. their working hours and their salaries, that the College should be required to negotiate concerning the decision itself and its implementation.

The Council stated that it did not question "the managerial prerogative of the State to make a determination that additional classroom time would be educationally desirable." However, the Council maintained that, for example, the question of how much of an increase in a professor's working hours was necessary to effectuate the decision to increase the amount of classroom instructional time, and what changes in compensation would result, must be negotiated prior to the implementation of the decision to increase "contact time."

The Council in its post-hearing supplemental memorandum summarized the difference between the parties' positions on the State's Scope Petition in this fashion:

> Put another way, the State would contend that "the decision" [to increase the minimum "contact time"] involves both the making of the educational determination and the mandating of the changes in the work hours which it feels should result. To the State, "the impact" would involve only changes in compensation and required modifications of other terms and conditions of employment. To the Council, "the decision" means the fixing of working hours pursuant to a previously adopted educational determination. This, as well as "the impact", must be negotiated.

In support of its contentions the Council referred to judicial and administrative decisions that determined that working hours and compensation were terms and conditions of employment within the intendment of the New Jersey Employer-Employee Relations Act. The Council concluded that it was axiomatic that the issues concerning the increased workloads and working hours for faculty members at Stockton that were an attendant result of the decision to increase minimum "contact time" were required subjects for collective negotiations. The Council contended that the passage of Chapter 123, P.L. 1974 that in part amended the "annul or modify" clause of N.J.S.A. 34:13A-8.1 [9] evidenced the legislative intent to broaden the area of required subjects for collective negotiations in response to the New Jersey Supreme Court's landmark Dunellen decision. [10] The Council did however assert that not even the Dunellen decision, relied upon by the State, permitted the inference that any decision made by college officials and labelled an educational policy or academic judgment was exempt from the requirement of collective negotiations.

With regard to the issue relating to contact time as it affected summer school employees, the Council argued that it was clear that it was the certified negotiating representative for summer session employees. The Council contended that the State had on several occasions processed grievances concerning summer session employees without raising "jurisdictional" objections and had negotiated with the Council on subjects concerning these summer session employees with several provisions referring to these individuals' summer

9/ See footnote 7.

10/ See, Dunellen Board of Education v. Dunellen Education Association, 64 N.J. 17 (1973).

employment being incorporated within the agreement negotiated between the State and the Council. The Council also stated that additional problems and questions concerning summer session employees had been discussed by the Council and the State on numerous occasions. The Council concluded that it was evident that summer session employees had always been considered as members of the unit and that the State was in essence estopped from contending for the first time that they were not. The Council added that summer school employees should not be construed as being "adjunct and part-time professional staff" -- positions that were specifically excluded from the certified State College negotiating unit -- but instead should be categorized as "full-time teaching and/or research faculty" who were subsumed within the unit certified by the Commission.

DISCUSSION AND ANALYSIS - SCOPE PETITION

1. DECISION TO INCREASE MINIMUM "CONTACT TIME" FOR THE FALL, WINTER AND SPRING TERMS DURING THE 1975-76 ACADEMIC YEAR

The Executive Director in his August 25, 1975 Interlocutory Decision in part considered whether the above-referenced issue would be found to be a required subject for collective negotiations in determining whether the Council's request for interim relief should have been granted. The Executive Director stated the following:

> In the instant case, the State argues that it will be sustained on the merits. It frames the issue as follows: Is the decision to increase minimum contact time per week a matter of educational and managerial prerogative not subject to the obligation to negotiate? The Commission may answer that question in the affirmative. See, Dunellen Board of Education v. Dunellen Education Association, 64 N.J. 17 (1973). However, to the extent that the decision contemplates coverage of that increase in contact time by unit members as part of their regular duties and to the extent that this requires an increase in working hours, the Commission may find such aspects of the decision to relate to required subjects for negotiations. See, Board of Education of Englewood v. Englewood Teachers Association, 64 N.J. 1 (1973). In other words, the State could increase student contact time without increasing the contact time of individual unit members and to the extent that the decision was implemented in such a fashion, there may be no obligation to negotiate, at least with respect to the issue of the number of hours.
>
> However, that does not appear to be the case here. Instead, the College intends for each faculty member to increase his/her number of minutes per [course per]

> week from 270 to 330 in the fall and spring terms and from 200 to 225 in the summer and winter terms. (footnote omitted)
>
> Thus, in the opinion of the undersigned, the chances are substantial that the way in which the decision is to be implemented is a required subject for negotiations under the Act...

The undersigned concludes that on the basis of Commission and judicial precedent the decision to increase minimum "contact time" -- the number of minutes of classroom instruction per course per week -- at Stockton relates to matters of inherent managerial authority and/or educational policy that are not themselves terms or conditions of employment.[11/] The Council itself affirmed that it did not question "the managerial prerogative of the State to make a determination that additional classroom time would be educationally desirable." [12/] The undersigned agrees with the position of the State that the minimum length of time that a student must spend in a classroom or other instructional setting per course per week in order to fulfill course objectives and receive academic credit concerns a fundamental managerial and educational decision that is not a required subject for collective negotiations.

However, it is clear to the undersigned that this decision [to increase "contact time"] that was the primary subject of the State's Scope Petition may have an effect or impact upon employees' terms and conditions of employment. To the extent that the resultant impact of this decision affects terms and conditions of employment, the State is required to negotiate regarding that impact as it relates to terms and conditions of employment. In the instant matter the decision to increase "contact time" may impact upon faculty terms and conditions of employment in various ways. The Council may wish to negotiate concerning the following matters, among others: Any attendant increase in workloads of individual faculty

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11/ The Commission has consistently determined that in holding that a particular decision was not mandatorily negotiable, it did not hold that a public employer could not agree to negotiate that issue. The Commission has stated that in the absence of a statutory prohibition [that may render a particular matter an illegal as opposed to a permissive subject for negotiations], negotiations and any ensuing agreement would appear to be permissible and enforceable with regard to that particular issue.

12/ As stated before, the Council however asserted that the unilateral changes effected in the working hours and workloads of Stockton faculty members were subsumed within the decision to increase minimum "contact time".

members; [13] any change in the working hours of individual faculty members [14] and additional compensation for such changes in workloads and hours.[15]

Upon analysis of the submissions of the parties it would appear that there is perhaps a fundamental misunderstanding of the dichotomy established by the Commission between a decision that is found to relate to a permissive, but not required, subject for collective negotiations and the impact of that decision on terms and conditions of employment that is a required subject for collective negotiations. The Council appears to argue that the decisional aspects of the increase in "contact time" concerns the "fixing of working hours" pursuant to a previously adopted educational determination. The Council contends that the State has also taken the position that the decision to increase "contact time" involves both the making of the educational determination and the unilateral mandating of the changes in faculty working hours which the State feels should result from its educational determination.

The undersigned first concludes that the Council has misinterpreted the State's position with regard to its Scope Petition. It is clear that the State is not contending that the increase in the number of minutes of classroom instruction per course per week at Stockton permitted it, in the abstract, as part of its decision, to unilaterally effect changes in faculty members' actual working hours and workloads as well. The State, as set forth before, agreed that to the extent that its educational judgment

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13/ See e.g. In re North Plainfield Education Association, P.E.R.C. No. 76-16, 2 NJPER 49 (1976), In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 143 (1976), In re Newark Firemen's Union of New Jersey, P.E.R.C. No. 76-40, 2 NJPER (1976).

14/ See e.g. Board of Education of the Town of West Orange v. West Orange Education Association, 128 N.J. Super. 281 (Ch. Div. 1974); Board of Education of the City of Englewood v. Englewood Teachers Association, 64 N.J. 1 (1973); In re Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER (1976), In re Byram Township Board of Education, supra, note 13; In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976); In re Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55 (1975).

15/ For a general discussion of the Commission's "decision-impact" theory see In re Rutgers, The State University, supra, note 14. Also see e.g. In re Union County Regional High School Board of Education and Cranford Board of Education, P.E.R.C. No. 76-43, 2 NJPER 221 (1976), In re Byram Township Board of Education, supra, note 13, and other Commission decisions cited therein.

to increase "contact time" impacted upon terms and conditions of employment that impact, but not the decision itself, would be properly a required subject for negotiations. The State however argued that these "impact" considerations had already been negotiated; a contention that will be analyzed in a later section of this recommended report and decision. The State clearly did not argue that the potential changes or increases in teaching hours and workloads that could result from its decision to increase "contact time" were subsumed within the decision itself and thus exempted from the requirements imposed on public employers by the New Jersey Employer-Employee Relations Act.[16/]

The undersigned further concludes that the Council's contention that the fixing of working hours and the restructuring of workloads to accommodate the educational determination to increase "contact time" is not merely an "impact" consideration, but in fact an indivisible part of the decision itself, obscures the distinction established by the Commission between a managerial decision and the impact of that decision as it effects terms and conditions of employment. This distinction was delineated in the following fashion in the aforementioned Rutgers decision:

> Stated simply, the Act precludes a public employer from unilaterally establishing or modifying terms and conditions of employment. Rather, the public employer must notify the majority representative of any such proposed establishment or modification and, upon demand, negotiate the same prior to its implementation.
>
> In this regard a distinction must be drawn between a public employer's activities concerning terms and conditions of employment, and on the other hand a public employer's activities concerning matters other than terms and conditions of employment, but having an effect or impact on terms and conditions of employment. In the first instance, the employer's activities deal with terms and conditions of employment and thus are subject to the negotiations obligations indicated above. An obvious example would be an employer's proposal to increase or decrease salaries. As the proposal concerns a term and condition of employment, it may not be effectuated unilaterally.

16/ N.J.S.A. 34:13A-5.3 in pertinent part provides that, "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representative of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment."

> In the second instance, the employer's activities deal with matters other than terms and conditions of employment and may therefore be undertaken unilaterally, except that the resultant impact on terms and conditions of employment is subject to the negotiations obligations. An example would be a private employer's decision to manufacture an additional product line, creating a need to purchase new manufacturing equipment and to hire new unit employees. The managerial decision may be undertaken unilaterally, but the wages, hours, fringe benefits, etc. of the new unit employees -- terms and conditions of employment -- may not be effectuated unilaterally. (footnote omitted) [See Rutgers, supra, pp. 9-10, 2 NJPER at 15-16]

More specifically, in earlier decisions the Commission has specifically recognized the distinction between decisions to extend the hours that a guidance office would be open, or to increase the amount of class time for special educational students or for students on split sessions that may, in and of themselves, be matters of educational policy or management prerogatives and the impact these decisions may have on the working hours and other terms and conditions of employment of employees in affected negotiating units.[17] The Commission has clearly not taken the position, apparently proposed by the Council, that whenever terms and conditions of employment are actually changed, in the absence of an agreement, pursuant to decisions that have been determined to relate to permissive, but not required, subjects for negotiations, these "impact" matters are then automatically considered to be part of the decision itself, thus mandating negotiations on matters of educational policy or management prerogative before they are established.

In conclusion, terms and conditions of employment that may be affected by a decision to increase minimum "contact time" are required subjects for collective negotiations and in the absence of any countervailing considerations [e.g. the pendency of an arbitrator's award] the State would be required according to Commission mandate to negotiate in good faith [upon demand] with the Council.[18] The State's argument that it had fulfilled its negotiations responsibilities with regard to these "impact" considerations will be analyzed in a later section of this recommended report and decision.

17/ See In re Galloway Township Board of Education, P.E.R.C. No. 76-31, 2 NJPER 182 (1976), In re Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55 (1975).

18/ See footnote 16.

With respect to that matter which has hereinabove been determined to be a permissive subject for collective negotiations, specifically the decision to increase the number of minutes of classroom instruction per course per week at Stockton, the Council may not insist, to the point of impasse, on negotiations with regard to this matter or its inclusion within a collective negotiations agreement with the State.[19/]

DECISION TO INCREASE MINIMUM "CONTACT TIME" FOR SUMMER (OF 1975) TERM

After careful consideration of the transcript and apposite exhibits in this instant matter as well as the parties' submissions on the issue of whether the Council is the certified or recognized collective negotiations representative of summer term employees employed by the State within the State College system,the undersigned concludes that the Council has not proven by a "preponderance of the evidence" [20/] that it is the certified or recognized majority representative of summer session employees. The undersigned therefore further concludes that the issue of the impact on terms and conditions of employment of summer term employees at Stockton of the decision to increase "contact time" relates to a permissive, but not required, subject for negotiations.

The Council never attempted to specifically refute the following statements with regard to summer term employees contained within the State's brief in support of its Scope Petition:

> The State Compensation Plan for the State Colleges recognizes two basic classes of employees for payroll purposes; those employed on a 12-month year basis and those employed on a ten-month academic year basis. In each case where there is a ten-month position available for a job classification, there is also a corresponding twelve-month position classification. The only positions having this ten-month and twelve-month classification situation are the faculty ranks, i.e., Instructor, Assistant Professor, Associate Professor and Professor; the Librarian positions, i.e., Librarian III, Librarian II and Librarian I; certain positions at Jersey City

19/ See e.g. In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976), In re Byram Township Board of Education, supra, note 13.

20/ See N.J.A.C. 19:14-6.8.

> State College A. Harry Moore School; and demonstration teachers. All other positions are on a twelve-month basis only. To the extent that any twelve-month position is included in the negotiating unit, there is a clear obligation to negotiate on terms and conditions of employment regarding those positions for the full twelve-month year. The same obligation exists for ten-month positions included in the negotiating unit but only for the ten-month period of their employment.
>
> At various places in the Agreement distinctions are made between ten and twelve-month employees.
>
> Summer school instruction program as established and operated at the State Colleges are not staffed by twelve-month faculty members. Such programs are staffed by individuals employed on an ad hoc per credit basis by each college under a compensation schedule promulgated by the Board of Higher Education. Such programs are not funded in the State budget, but rather are generally supported by student tuition.
>
> The Agreement in no way seeks to regulate or define Faculty Responsibilities for summer school employment.
>
> The agreement in Article XI E. speaks of certain matters relating to summer school. However, these matters primarily relate to priority consideration for faculty members for summer school appointments. In any event the provision makes clear that summer school assignments are voluntary and that a faculty member should not be compelled to accept an appointment. (footnote omitted)

The Council also never specifically addressed itself to the import of the letter [Exhibit R-2] from Council President Lacatena to Gilbert Roessner, Chairman of the Board of Higher Education, dated April 30, 1974. The State contended that this document established that the Council itself had recognized that it did not represent the generic classification of summer session employees as part of its certified unit. In this letter Lacatena requested that the Board of Higher Education consider the passage of a resolution putting payment for summer school faculty on a teaching credit basis [rather than on a student credit basis that had been in effect for prior years] in order to be consistent with "[t]he practice, as called for in the contract between [the State] and [the Council which] has put payment during the academic year on a teaching credit basis." Lacatena also requested that the faculty salary rates at the state colleges for summer school be increased for the first time since 1968 "to take into account the high rate of inflation which has prevailed in the past 6 years."

The undersigned concurs with the State's contention, referred to in one of its post-hearing memoranda dated November 3, 1975, that the above-mentioned letter "reflects a recognition that the [Council] in fact has no standing to represent summer school employees in collective negotiations, but can only achieve an increase in summer school rates by requesting same from the Board of Higher Education by way of a unilateral act of the Board." This "Lacatena letter" of April 30, 1974 was written approximately two months after the State and the Council had executed a comprehensive collective negotiations agreement that incorporated within it the understanding that "[t]his agreement incorporates the entire understanding ofthe parties on all matters which were the subject of negotiations.[21/] The undersigned concludes that the tenor of the "Lacatena letter", as well as the timing of this letter, certainly supports a strong inference that the Council understood that it was not the certified majority representative for summer term employees and could not seek to negotiate, as a required subject for collective negotiations the important issue of summer term compensation with the State's designated negotiating representative, the Office of Employee Relations. The undersigned further concludes that the State's reply [as reproduced below], dated May 22, 1974, to this "Lacatena letter" also supports this inference.[22/]

21/ See Article XXX, Section A of this agreement which has been designated as Arbitrator's exhibit J-7 which in turn is part of exhibit JT-1 in this instant matter.

22/ Dear Mr. Lacatena:

I have reviewed your request concerning the State College Summer School payment schedule with the Board of Higher Education and am authorized to advise you that while the Board does agree that a review of the rates does appear to be warranted, it would not be appropriate to consider any increase for this coming summer's programs.

The summer programs are scheduled to begin in the near future and planning for these programs has been based upon the existing schedule. However, a review of the schedule would appear to be appropriate this fall with any approved revisions being effective for the 1975 summer programs.

You also requested that the Board revise its summer schedule, this summer, to provide for summer payment on a teaching credit basis. As with the general review issue, it is felt that this would not be appropriate for consideration for this summer. It will be considered as part of any overall review which is undertaken.

Sincerely,
/S/

Ralph A. Dungan
Chancellor

The Council in support of its contentions concerning the "summer term employee" issue first introduced into the record exhibits that indicated that the State in the past had been involved in the processing of certain grievances concerning individuals employed during the Summer term and yet had not asserted during those proceedings that the Council did not have standing to represent these individuals.[23] The Council also referred to the fact that the agreement negotiated with the State covering the period between February 22, 1974 and June 30, 1976 contained within it a section [Article XI Section E] entitled "Summer Session Contracts" that in part established that faculty members employed during the regular academic year would have priority consideration [a right of first refusal] in appointments to teach regular summer session courses. The Council also maintained that there had been negotiations and/or discussions with the State on other matters related to summer session employment.

The Council's witnesses also testified (1) that at least 75% of all the faculty members who taught during summer sessions were full time faculty members at the State Colleges during the regular academic year and (2) that, over the four years of Stockton's existence, apparently only one summer term course had been taught at Stockton by an individual who was not a full time faculty member at Stockton during the rest of the year.[24] The Council therefore concluded that the reference to "full time teaching and/or research faculty" in the list of titles and positions included within the Council's certified unit subsumed within it all full time faculty members who taught during the Summer Term.

The Council asserted that on the basis of the aforementioned evidence the State was estopped from now asserting that the Council did not represent Summer Term employees whom the State deemed to be "adjunct and part-time professional staff" -- positions that were specifically excluded from the certified State College negotiating unit.

On the basis of the entire record the undersigned cannot conclude that the evidence proffered by the Council on this issue establishes by a "preponderance of the evidence" that Summer Term employees were included within the negotiating unit represented by the Council. The undersigned also does not find that the record supports the Council's allegations that in any event the State is estopped from denying that it "recognized" the Council as

23/ Exhibits CH-5, CH-6, CH-7, CH-8, CH-9 and CH-10.

24/ Transcript, pages 42, 59 and 68.

the majority representative for Summer Term employees as a result of the State's failure to raise this representation issue in the past during the course of prior negotiations and during the processing of individual grievances.

The undersigned is persuaded by the State's contentions that it had negotiated with the Council on the very delimited issues of priority consideration for summer school appointments and the timing of notices with reference to these assignments since these issues concerned fringe benefits accorded to full time faculty members. Certain of the Commission's decisions lend support to this argument of the State.25/ It is also evident that the absence of any other specific contractual provisions on summer employment within the agreement between the State and the Council further substantiates the State's assertions on this issue.

The undersigned also fully credits the State's argument that its participation in grievances filed by the Council that impacted on the summer school employment of full time faculty did not estop the State from raising this representation issue in the consolidated matter before this Hearing Examiner. In this regard it should be noted that the agreement reached by representatives of the Council and the State in settlement of a series of grievances filed concerning the summer compensation of department chairpersons [Exhibits CH-6, CH-7, CH-8 and CH-9] constituted the acknowledgment that Summer Term salaries for department chairpersons, in the future, "may be raised as a subject for prospective negotiations during the overall re-opened negotiations which will take place beginning in October, 1974." 26/ Article XXXIII of the agreement executed by the State and the Council covering the period between

25/ The Commission has determined that a proposal of an employee organization concerning the posting of vacancies that in part would encompass openings in summer school teaching positions related to a required subject for negotiations even though the Commission recognized that there was a dispute as to whether the Association represented summer school employees. It is evident that the Commission determined that such a proposal [that would in part help to insure priority consideration for full time staff in the teaching of summer school courses] related to a term and condition of employment of full time teachers. [See In re Byram Township Board of Education, P.E.R.C. No. 76-27, at pages 12-13, 2 NJPER at page 146 (1976)]

In an earlier case the Commission determined that the issue of summer school salaries and fringe benefits related only to permissive, but not required subjects for collective negotiations, where a University disputed the inclusion of summer session teachers within the parties' collective negotiations relationship. In this matter the Commission did not interpret the above issues as relating to terms and conditions of employment [i.e. fringe benefits] of full time faculty members although it was evident that many full time faculty members also taught during the Summer Term. [See In re Rutgers, The State University, P.E.R.C. No. 76-13 at pages 25-26, 2 NJPER at page 19 (1976).

26/ See Exhibit CH-10, dated August 12, 1974.

February 22, 1974 [the date of execution] and June 30, 1976 had however already provided that "[t]he parties agree to open this Agreement only for the negotiation of salaries and fringe benefits [of unit members] to become effective on or after July 1, 1975 unless waived by mutual agreement... [s]uch reopened negotiations shall commence no later than October 1, 1974..." 27/ It would thus appear that the State in settlement of several outstanding grievances had agreed to negotiate on a permissive subject for negotiations [department chairspersons' summer salaries] although both parties agreed that Summer Term employees were not subsumed within the certified unit and were thus not covered by Article XXXIII on re-opening procedures.

In conclusion, the undersigned does not find that Summer Term employees are part of the certified negotiating unit represented by Council. I furthermore do not find that the actions of the State's representatives, subsequent to the certification of the Council as the exclusive representative of the unit embracing all eight State Colleges, established that the State had either formally [pursuant to N.J.A.C. 19:11-1.14] or informally recognized the Council as the exclusive negotiations representative of Summer Session employees as well.

With respect to the issue of the impact on terms and conditions of employment of summer term employees at Stockton of the decision to increase "contact time" - a matter which has hereinbefore been determined to be a permissive subject for collective negotiations - the Council may not insist, to the point of impasse, on negotiations with regard to this matter or its inclusion within a collective negotiations agreement with the State. 28/

POSITION OF THE COUNCIL ON ITS UNFAIR PRACTICE CHARGE - THE "IMPACT" ISSUE

The Council maintained that the undersigned should adopt the findings of fact and conclusions of law of arbitrator Daniel House insofar as the issue that was the subject of the arbitration proceeding was also before the Commission

27/ Exhibit JT-1.

28/ The Council could seek to add summer session employees to its negotiating unit by either seeking voluntary recogniation from the State [see N.J.A.C. 19:11-1.14] or by seeking certification from the Commission to represent summer session employees. [see N.J.A.C. 19:11-1.1 et seq.]

In any event, the State in the future, if it chooses to negotiate concerning particular permissive subjects for collective negotiations, may negotiate with the Council regarding the salaries, fringe benefits and other terms and conditions of employment of the Council's present unit members who teach in the summer session and the parties may also negotiate an expansion of the negotiations unit to include summer session employees if that is desired.

for a decision, i.e. whether the State had violated the Agreement between the parties [as well as violating the Act] by refusing to negotiate about the impact on terms and conditions of employment of its decision to increase minimum "contact time" at Stockton for the 1975-76 academic year. More specifically, the Council argued that the arbitrator's finding that the State violated the agreement between the parties by refusing to negotiate the impact of its decision to increase "contact time", as well as the arbitrator's rejection of the State's argument that it had already negotiated in advance with the Council upon this issue and had arrived at an agreement [Appendix "A"] that had not been violated by the decision to thereafter increase "contact time" unilaterally, should be adopted by the Commission as part of its "deferral doctrine" as enunciated in prior Commission decisions, and should be dispositive in connection with the State's defense against the unfair practice charge filed by the Council.

It is the Council's position, however, that whereas deferral to the findings and conclusions of Arbitrator House are appropriate, the Council is entitled to additional remedies [not proposed by the Arbitrator] which are only available in the present forum before the Commission. The Council in a letter submission dated August 4, 1976 summarized its position in this respect in the following fashion:

> The arbitration Award issued by Arbitrator House finds a violation of the Agreement between the parties and concludes that the State has an obligation to negotiate as to the extra teaching load involved. However, the extra teaching load unilaterally promulgated at Stockton State College has now been in effect for a full academic year. PERC is the appropriate forum for determining the proper compensatory remedy which should be granted. This issue was neither presented to nor decided by the Arbitrator.
>
> We have in this situation an action by the State which is at the same time a violation of the contract and an unfair labor practice. Because both are grounded on the same facts, deferral as to the findings of fact is appropriate. The matter has been litigated once, before the Arbitrator, and the State should not be given the opportunity to seek an inconsistent ruling on the facts from PERC. However, the ramifications of the contract violation and unfair labor practice are different. The contract violation has one remedy; the unfair labor practice has another. It is our position that PERC should defer to the findings of fact by the Arbitrator but award a remedy which will compensate the Council and its members for the State's unfair practice.

In the event that the undersigned chose not to defer to the Arbitrator's award and chose to render instead a de novo determination on the merits of the "impact" issue, the Council summarized its position on the "impact" issue.

The Council first referred to the existence of Section V of Article XII of the statewide Agreement between the State and the Council covering the period between February 22, 1974 and June 30, 1976 and then referred to the Appendix to the statewide agreement (See Appendix "A"), negotiated at the Stockton College level, that related to teaching responsibilities at Stockton in support of its contentions.[29/]

The Council contended that with the signing of the February 22, 1974 agreement with the State the Stockton College administration was then effectively foreclosed from making unilateral changes in the minimum required contact time.[30/] The Council contended that the term "faculty responsibilities" as used in Section V of Article XII referred to the obligation that the faculty owed to management - the faculty's workload or the amount of work required of the faculty - as a result of their employment at the College. The Council stated that it was axiomatic that one factor, perhaps the most important factor, involved in determining the amount of work required of an employee was time, comprised in part of contact time in class and necessary preparation time. The Council concluded that the regulations concerning minimum contact time in effect as of the date of the execution of the Agreement with the State on February 22, 1974 were "frozen" under Section V of Article XII unless this contact time was specifically altered through subsequent negotiations.

The Council maintained that the matter of minimum contact time had simply not been a subject of the negotiations that resulted in the Stockton Workload Agreement (Appendix "A") that was appended to the statewide contract. The Council stated that neither its proposals nor the State's counterproposals nor the actual workload agreement which resulted from those local negotiations

29/ See pages 5 and 6 of this decision and Appendix "A" of this decision for a description of these provisions.

30/ The Council conceded that, prior to the execution of this agreement, the Stockton administration had upon occasion unilaterally implemented its decision to increase the minimum number of minutes per academic year of student contact time required of the faculty and that neither the Council nor the prior majority representative had filed a grievance or any other type of complaint concerning these earlier actions of the College. The Council stated that only with the signing of this Agreement did it think it could effectively pursue such a grievance.

related to the issue of normal contact time for class courses.[31] The Council affirmed that it had not therefore waived its right to negotiate the impact of the decision to increase minimum contact time by executing either the original statewide agreement or the local workload agreement. The Council concluded that the actions of the College in unilaterally increasing the workloads and hours of its faculty members [pursuant to its decision to increase "contact time"] in contravention of the section of N.J.S.A. 34:13A-5.3 that provides in part that "proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established" violated N.J.S.A. 34:13A-5.4(a)(1) and (5).

POSITION OF THE STATE ON THE COUNCIL'S UNFAIR PRACTICE CHARGE - THE "IMPACT" ISSUE

The State in a letter dated February 2, 1976 advised the Council that it was rejecting the arbitrator's award on the grounds that the award violated the parties' agreement and did not conform to the applicable state statutes governing the enforceability of arbitration awards. In a letter dated March 16, 1976 the undersigned was informed that since the State had rejected said award and since the Council had not as of that date moved for judicial enforcement pursuant to N.J.S.A. 2A:24-7 the Commission could only view this case as a matter for a de novo determination "in the context of there not being an enforceable arbitration award in existence [that could be deferred to]."

Subsequent thereto the State and the Council mutually agreed to extend the time in which either of the parties could move under N.J.S.A. 2A:24-7 to either confirm or vacate the arbitrator's award until after the undersigned had issued his recommended report and decision in this matter. Thereafter in a letter dated July 14, 1976[32] the State clarified its

31/ The Council added that the issue of contact time for normal courses was not even discussed during these local negotiations that occurred pursuant to Section V, Article XII of the statewide agreement.

32/ In a letter dated August 4, 1976 the Attorney for the Council objected to the receipt of the State's letter submission of July 14, 1976 on the basis that it was submitted four months after the undersigned had informed the parties by letter that the State would have three days in which to submit additional memoranda on any of the issues involved in the instant matter.

The undersigned has however considered the State's July 14, 1976 letter as well as the Council's letter of August 4, 1976 as letters that only served to clarify positions taken much earlier by the parties.

position concerning the "deferral to arbitration award" issue.

The State first submitted that the Council's argument that the Commission could legally adopt the findings and conclusions of arbitrator House, but could then reassert its jurisdiction to confirm the award and then apply the Commission's remedial powers with referenne to the outstanding unfair practice, would distort the concept of "deferral to the arbitration process" as it had been applied by administrative agencies (including PERC) as well as the courts and would violate the State's right to due process under the Commission's Rules and the State Administrative Procedures Act. The State contended that if the Commission chose to reassert its jurisdiction with regard to an issue that was previously considered in the arbitration setting it would then have to make a de novo determination on all aspects of that issue pursuant to its exclusive jurisdiction to pass upon unfair practice allegations. The State maintained that if the Commission chose to defer to the arbitration process it would have to withhold all of its own processes [including the right to take affirmative action to remedy the commission of an unfair practice] in favor of the total arbitration process, including the remedy fashioned by the arbitrator. The State concluded that if the Commission would adopt the Council's "deferral" approach it would be involved in the legally impermissible commingling of the functions of the Commission with private arbitration.

The State then submitted that for the purpose of expediting the entire matter it would agree that PERC could reassert jurisdiction over the "impact" issue previously submitted to arbitration if a de novo determination would then be made of all aspects of the "impact" issue on the basis of the arbitration record and the exhibits before the arbitrator, but not the arbitrator's awards. It was the State's view that once the Commission acted to reassert de novo jurisdiction the previous arbitrator's award became unenforceable upon the basis that the Commission had then asserted its exclusive jurisdiction to pass upon unfair practice charges [as opposed to deferring to the arbitrator's award] and had thus preempted jurisdiction over the matter in issue.

On the merits of the "impact" issue, the State stated that pursuant to the aforementioned Article XII, Section V of the main agreement negotiations had taken place at the Stockton College level on faculty responsibilities at Stockton and an agreement (Appendix "A" of this decision) was reached and appended to Article XII of the main statewide agreement. The State submitted

that this local agreement defined the classroom academic year teaching responsibilities in terms of 5 "teaching units" and not in terms of hours or minutes, in contrast to the main Agreement wherein there was a teaching load formula (applicable to faculty members at Glassboro, Jersey City, Montclair, Kean, Wm. Paterson and Trenton State Colleges) stated in terms of hours which by calculation could be reduced to minutes. The State submitted that this local Stockton agreement, by utilizing "teaching units" (for which students received four Stockton academic credits) permitted the College to continue, as it had done unchallenged in the past,[33/] to determine how many minutes of instruction ("contact time") were necessary for the fulfillment of a "teaching unit."

The State asserted that the Council had waived its right to negotiate with the State concerning the impact of a decision to increase minimum "contact time" by not seeking to limit, by contract, the parameters within which the College could exercise its academic judgment (concerning "contact time") as it impacted upon faculty responsibilities. The State took the position that the mandate of Article XII, Section V [/"Responsibilities of the faculty at these colleges now in effect shall remain in effect, unless altered through subsequent negotiations."/] was satisfied since the responsibilities of the faculty in effect both before and after the effective date of the Stockton Agreement on Faculty Responsibilities included the performance of "teaching units"; the minutes required for such "teaching units" being set through the exercise of reasonable academic judgment by the College, unfettered by any provision in the Stockton Agreement that measured classroom teaching obligations in terms of hours or minutes as did the main Agreement between the State and the Council.

In summary, the State concluded that the evidence submitted during the arbitration proceeding established that the Council had already negotiated with the State on the "impact" issue and had arrived at a Faculty Responsibilities Agreement covering the faculty at Stockton that permitted the College to fully implement its decision to increase "contact time" without having to negotiate further about the impact this decision had on the terms and conditions of employment of Stockton faculty members.

33/ As set forth before it is uncontroverted that the College had in the past increased classroom minutes without objection from the Council or its predecessor negotiations representative.

DISCUSSION AND ANALYSIS OF THE COUNCIL'S UNFAIR PRACTICE CHARGE

The undersigned, on the basis of the foregoing and the record as a whole, concludes that the arbitration opinion and award of Daniel House, dated December 24, 1975, concerning the "impact" issue as previously defined, should be deferred to and the undersigned hereby adopts this arbitral award in its entirety as a complete remedy for the unfair practice charge filed by the Council that raised the same issue aired and determined in the arbitration proceedings. I therefore recommend that the complaint that was issued with regard to the Charge filed by the Council be dismissed in its entirety.[34/]

Preliminarily, it is important to note that the State and the Council chose voluntarily to proceed with the arbitration process with regard to the "impact" issue and at all times prior to the issuance of the arbitrator's award appeared to concur with the statement of the Executive Director contained within his Interlocutory Decision in this instant case that "this matter [concerning the "impact" issue] can be addressed and remedied by the arbitrator in accordance with the agreement of the parties." [35/] The State, for example, in its brief in support of its Scope Petition affirmed that "since this latter issue [the "impact" issue] is primarily one of contract interpretation, it should be resolved through the agreed upon grievance machinery..." (P. 13 of State's brief) The State and the Council, at the time that they proceeded to voluntarily utilize the arbitration forum, concerning the "impact" issue agreed that it was reasonably probable that the dispute underlying this issue would be resolved under the parties' grievance-

34/ The Council alleged that the decision of the College to unilaterally increase minimum "contact time" also constituted a violation of the Act. The undersigned's earlier determination that the decision to increase the number of minutes of classroom instruction per course per week at Stockton was not a required subject for collective negotiations represented a rejection of the Council's contentions contained in its Charge concerning the decisional aspects of the College's determination to increase "contact time".

35/ The Commission has adopted a policy of deferring the resolution of unfair practice charges to the parties' contractual grievance/binding arbitration mechanism where it is reasonably probable that the dispute underlying the alleged unfair practice will be resolved in the parties' contractual forum. [See, e.g. In re Board of Education of East Windsor, E.D. No. 76-6, 1 NJPER 59 (1975) and In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975)]

arbitration machinery and both parties expressed the willingness to therefore arbitrate this dispute that would result in a final and binding decision.

Both parties now however, for the reasons delineated hereinbefore, question the appropriateness of deferring to the arbitral award now that it has been issued. The Commission has enunciated in the past the standards to be applied in determining whether to reassert jurisdication over a charge after an arbitral award has been issued. The Commission has affirmed that it may entertain an appropriate and timely application for further consideration upon a proper showing that (a) the dispute has not with reasonable promptness after the issuance of the determination to defer, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular, or (c) the grievance or arbitration procedures have reached a result which is repugnant to the Act. If the Commission is satisfied that these three standards have been fulfilled in a particular case it will defer to the arbitral award.[36/]

It is therefore necessary at this time to examine the specific exceptions raised by the parties that question the propriety of deferring to the arbitral opinion and award of Daniel House in its entirety.

It was the Council's essential position that whereas deferral to the findings and conclusions of the arbitrator was appropriate, the Council was entitled to a remedy - most probably a compensatory damages award - from the Commission, pursuant to its unfair practice authorities, in order to rectify the unfair labor practices of the State, in addition to the remedy recommended by the arbitrator for the related contract violation.

The undersigned finds however that the Council misapprehends the concept of deferring to an arbitral award as interpreted by the Commission in accordance with private sector precedent.[37/] The Commission has made it clear that when deferral is appropriate, i.e. when the three requirements referred to earlier are fulfilled, the arbitration award becomes the sole remedy for both contractual and statutory violations. In the absence of procedural irregularities or statutory repugnancy, the Commission is free to adopt the arbitral award as a complete remedy for an unfair practice related

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36/ See e.g. In re Board of Education of East Windsor, supra note 35, and In re City of Trenton, supra note 35.

37/ See e.g. Spielberg Manufacturing Co. 36 LRRM 1152 (1955).

to a contractual dispute, even though the Commission has the exclusive authority to adjudicate unfair practice charges. Contrary to the Council's contentions, the Commission is not obliged to reassert jurisdiction to remedy the unfair practice aspects of a matter after a proper deferral to the arbitration forum.

In considering the Council's arguments with regard to the deferral issue the question must be asked whether the arbitrator's remedy, in any event, was repugnant to the purposes and policies of the Act, inasmuch as the award did not provide for any reinstatement of the status quo concerning the hours and workload of faculty members at Stockton as it existed prior to the beginning of the 1975 Summer Term, nor did the award provide for any compensatory damages. Although the undersigned in a de novo matter may well have fashioned a different remedy than that of arbitrator House, I have reached the conclusion that the arbitrator's award is not repugnant to the purposes and policies of the Act.[38/] It is interesting to note that the Council itself never specifically stated that the award was repugnant to the Act, concluding only that the award was incomplete inasmuch as the Council asserted that the arbitrator had not addressed himself to the unfair practice aspects of this matter -- a contention that has already been analyzed and rejected by the undersigned.

In its July 14, 1976 memorandum of law on the deferral issue the State appeared to concede that it was appropriate under the circumstances of this case to defer completely to the "total arbitration process" (including

38/ The undersigned has examined the relevant arbitration transcripts and exhibits and has taken administrative notice of Article VII (D) (4) of the main agreement between the State and the Council that provides in pertinent part, that an "arbitrator making a binding determination of a grievance has the authority to prescribe a compensatory award to implement the decision", in considering whether the arbitrator's award or any other aspects of his opinion were repugnant to the purposes and policies of the Act.

The undersigned also took notice of the fact that arbitrator House's first Opinion and Award with regard to the "impact" issue [dated September 29, 1975] that was later withdrawn and negated by joint consent by the parties provided, as part of the award, that "if negotiations fail in a reasonable time to result in an agreement as to whether the impact is substantial enough to warrant additional compensation for any of the teachers involved, the dispute may be returned [to the Arbitrator] for further hearing and, if appropriate, further specification of the remedy intended by this Award."

statutory proceedings under N.J.S.A. 2A:24-1 et seq.).[39] The State did not attempt to assert that "deferral" was inappropriate because either the arbitration procedures were not fair or regular or because the arbitrator's award reached a result that was repugnant to the purposes and policies of the Act, although the State had earlier rejected the award on the grounds that it had violated the parties' Agreement and did not conform to the applicable state statutes concerning the enforceability of arbitration awards.

The undersigned however would like to comment on an earlier position taken by the State on the "deferral question" before the parties mutually agreed to extend the time in which they would seek to confirm or vacate the arbitrator's award pursuant to N.J.S.A. 2A:24-7. The State had contended that since it had rejected the arbitrator's award and since the Council had not sought to enforce the award, as of that date, the Commission could only view the case as a matter for a de novo determination since there was no enforceable award in existence.

The undersigned concurs with the position taken in the private sector by the National Labor Relations Board [40] and sustained recently by the United States Court of Appeals (District of Columbia Circuit) [41] that a Respondent's unwillingness to comply with an arbitration award, coupled with a Charging Party's reluctance to seek judicial enforcement of that award, does not constitute grounds for refusing to defer to said award. In this regard

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39/ The State argued in the alternative that while it believed that the Council's position (urging PERC to reassert jurisdiction over the "impact" issue previously submitted to arbitration) was contrary to sound labor relations policy, it would consent to a reassertion of the Commission's jurisdiction if the Commission did not do so only for the purpose of confirming the arbitrators' findings and conclusions and then applying the Commission's remedial powers.

Inasmuch as the undersigned finds that the arbitration process has been fair and regular and further finds that the arbitrator has not reached a result that is repugnant to the Act, the undersigned concludes, for the reasons set forth in the East Windsor decision (see footnote 35), that it would not serve to effectuate the purposes of the Act by reasserting jurisdiction over the "impact" issue for the purposes of making a de novo determination.

40/ The Courts of our State have specifically recognized that the New Jersey Employer-Employee Relations Act was patterned after the National Labor Relations Act, as amended, and that the latter may be utilized as a guide in resolving disputes arising under out Act [See Lullo v. Intern. Assoc. of Fire Fighters, 55 N.J. 409 (1970)].

41/ See IBEW Local 715 v. NLRB (Malrite of Wisconsin, Inc.) 85 LRRM 2823 (1974).

the NLRB has stated the following:

> "In its formulation of the Spielberg standards the Board did not contemplate its assumption of the functions of a tribunal for the determination of arbitration appeals and the enforcement of arbitration awards. If the Board's deference to arbitration is to be meaningful it must encompass the entire arbitration process including the enforcement of arbitral awards. It appears that the desirable objective of encouraging the voluntary settlement of labor disputes through the arbitration process will best be served by requiring that the parties to a dispute, after electing to resort to arbitration, proceed to the usual conclusion of that process -- judicial enforcement -- rather that permitting them to invoke the intervention of the Board. 42/

In sustaining the Board's conclusion in this regard a federal appeals court concluded:

> We agree with the Board that the employer's recalcitrance following arbitration does not preclude deferral to the award. The policy established by Spielberg is to withhold Board processes where private methods of settlement are adequate. In this case, the arbitration process has foundered, but it has not proven inadequate. The union may yet obtain compliance with the award by means of a suit for its enforcement. As long as the remedy of judicial enforcement is available the force of the Spielberg doctrine is not diminished by one party's disregard for the arbitral award. (footnote ommitted) 43/

Upon the foregoing findings of fact, conclusions of law and the entire record, I hereby issue the following recommended:

ORDER CONCERNING THE SCOPE PETITIONS

With respect to those matters which the undersigned has hereinabove determined to be permissive subjects for collective negotiations, specifically

42/ Malrite of Wisconsin, Inc. (NLRB decision) 80 LRRM 1593 at 1594 (1972).

43/ IBEW Local 715 v. NLRB (Malrite of Wisconsin, Inc.) 85 LRRM 2823 at 2825. It is interesting to note that in the Malrite case the Charging Party argued that judicial enforcement of the arbitrator's award was precluded by the vagueness of the award and the mootness of the controversy. The Board determined that these contentions could only be tested in a suit for the enforcement of the award.

the decision to increase the number of minutes of classroom instruction per course per week at Stockton and the issue of the impact on terms and conditions of employment of Summer Term employees at Stockton of the decision to increase "contact time", the Council may not insist, to the point of impasse, on negotiations with regard to these matters or their inclusion within a collective negotiations agreement with the State.44/

The undersigned further concludes that terms and conditions of employment of full time faculty employed during the Academic Year that may be affected by a decision to increase "contact time" are required subjects for collective negotiations and in the absence of any countervailing consideration [e.g. the pendency of an arbitrator's award] the State would be required, pursuant to Commission mandate, to negotiate in good faith upon demand with the Council.45/

ORDER CONCERNING THE CHARGE

Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED that the Complaint in this matter be dismissed in its entirety.

Stephen B. Hunter
Hearing Examiner

DATED: Trenton, New Jersey
August 17, 1976

44/ Pursuant to N.J.S.A. 34:13A-5.4(d) and the foregoing discussion, the interlocutory restraint of arbitration previously issued herein by the Executive Director [now the Commission's full time Chairman] with reference to that aspect of the arbitration proceeding that was pending in the Scope of Negotiations matter, specifically the issue of the decision to increase "contact time", is hereby made permanent.

The Appellate Division of the Superior Court has recently held that the Chapter 123 amendments to the Act do not apply to contracts entered into prior to the effective date of the amendments. [Board of Education of the Township of Ocean v. Township of Ocean Teachers Association, Superior Court of New Jersey, Appellate Division, Docket No. A-3334-74, decided May 5, 1976] Thus with respect to contracts in existence on January 20, 1975 (such as the relevant contract in this instant matter) the analysis of the arbitrability of a given subject must be determined within the context of the law established prior to the amendments, including the aforementioned Dunellen decision. It is clear to the undersigned for the reasons previously set forth that the College's decision to increase "contact time" is non-arbitrable under the law established prior to the effective date of the Chapter 123 amendments.

45/ The undersigned concludes that to specifically order the State to negotiate this "impact" issue as part of the Scope Petition could be construed as Commission involvement in the reassertion of its jurisdiction over a matter [the "impact"issue] that had been deferred to the arbitration forum, in contravention of Commission policy as enunciated hereinbefore. [See N.J.S.A. 34:13A-5.4(f)]

APPENDIX "A"

APPENDIX TO ARTICLE XII OF THE AGREEMENT BETWEEN THE STATE OF NEW JERSEY AND THE COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, NJSFT - AFT, AFL-CIO DATED FEBRUARY 22, 1974

AGREEMENT

This Agreement made as of by and between Stockton State College (herein called the College) and the Stockton Federation of College Teachers, AFT Local 2275, AFL-CIO (herein called the Union).

Whereas the parties hereto have entered into collective negotiations and desire to reduce the results thereof to writing NOW THEREFORE, it is mutually agreed as follows:

FACULTY RESPONSIBILITIES: STOCKTON STATE COLLEGE

Institutional responsibilities of the Stockton State College faculty shall include teaching responsibilities and other responsibilities as defined below.

I. TEACHING RESPONSIBILITIES

The basic academic teaching load shall be assigned over thirty-two weeks of instruction and shall occur during the period of payment which commences September 1 and ends on June 30, and may not exceed such thirty-two week period unless otherwise agreed to by the concerned faculty member and the College.

Stockton State College employs a variety of teaching modes: public lecture (1000 series), lecture-discussion (2000 series), seminar (3000 series), special project (4000 series), independent study (5000 series), tutorial (6000 series), student seminar (7000 series), internship/student teaching (8000 series), senior/honors thesis (9000 series). Primary responsibility for determining how best to meet the pedagogical needs of students and academic programs is jointly shared by the individual faculty member, his or her Faculty Dean, and for General Studies the Director of General Studies. In order to maintain this flexibility in teaching, the normal teaching load at Stockton State College shall be as follows:

A. The basic academic year teaching load shall be 1) a combination of five (5) public lecture (1000 series), lecture-discussion (2000 series) and/or seminar (3000 series) courses, taught in either a 2-1-2, 1-2-2, or 2-2-1 term pattern; and (2) fifteen to twenty-four (15-24) students in a non-class teaching mode (series 4000 through 9000). With the prior agreement of the appropriate Faculty Dean, a faculty member may satisfy the basic minimum with fewer than fifteen students in upper division 6000 series courses. A sixth class course (2000 or 3000 series) may, at the option of the faculty member and with the approval of his or her Faculty Dean, however, be substituted for the non-class requirements.

B. All overload shall be voluntary, unless otherwise specified, and subject to prior agreement between the faculty member and the College. Overload compensation shall be at the rate of two hundred fifty dollars ($250) per overload unit. An overload unit is defined as one (1) Stockton student credit hour or its equivalent. In any academic year, voluntary teaching assignments for overload compensation shall not exceed six (6) overload units or two (2) four-hour courses.

C. A deficit in the annual non-class teaching load shall carry over to following academic years. A surplus in the annual non-class teaching load shall be paid at the close of the fiscal year at the overload rate of two hundred fifty dollars ($250) for every block of six (6) enrollments in excess of twenty-four (24), up to an annual maximum of three (3) overload units ($750). For this calculation, a single large enrollment course (4000 and 7000 series) shall count as its actual enrollment or 24, whichever is smaller.

D. Nothing in A through D of this section shall prevent a faculty member, with the consent of the College, from exceeding the stipulated workload in A above, without overload compensation, if in his or her professional pedagogical judgment the load addition is necessary to accomplish desired educational and pedagogical goals.

E. Faculty members assigned duties involving modes of instruction other than classroom, such as, but not limited to independent study, supervision of internships or practice teaching, or assigned to teach regularly scheduled courses for which collegiate credit is not granted, shall receive teaching credit hours for such activities according to the policies and practices currently in force at the College unless specified otherwise in this Agreement.

1. In the event that the College makes an assignment of any activity covered herein for which there is no current practice or policy or intends to change a practice or policy, the College shall notify the local Union in writing of such action and upon written request of the local Union, the president shall designate an official of the college to consult with the local Union concerning the new or changed policy or practice. Such written request must be received by the president within 31 days of the College's written notice to the local Union. The consultation shall be completed within 30 days of the local Union's written request to the president, unless said time limitation is extended by mutual consent of the parties.

2. In the event that after consultation the local Union is of the opinion that the involved policy or practice is unreasonable, the local Union, within seven (7) calendar days, may file written notice with the president of intent to submit the dispute to an advisory panel. Such panel shall consist of two employees

designated by the local Union and two administration representatives designated by the president. The panel shall investigate the facts of the dispute and make recommendations to the president for the resolution of the dispute. In the event that the panel cannot agree upon a recommendation, panel members may submit individual recommendations.

The president will accept, reject or modify the advisory panel's joint or individual recommendations within seven (7) calendar days of receipt thereof.

Nothing contained herein shall limit the authority of the College to direct that workload assignments be implemented during the pendency of consultation or advisory panel procedures.

3. Nothing herein shall be construed to permit the College to alter, vary, or modify the express terms stated above in Paragraph 1.

II. OTHER RESPONSIBILITIES

A. The faculty shall perform their assigned non-credit-bearing duties, such as but not limited to student advising through the preceptorial system, preterm, and program planning and development, in accord with the norms of professional practice and past practice at Stockton State College, during the period September 1 through June 30.

III. IMPLEMENTATION

A. A subsequent increase or decrease in the student credit hour value of the Stockton State College course system shall be cause for either party to reopen negotiations on Paragraph 1 hereof exclusive of subparagraph E.

B. The provisions of the Appendix to Article XII shall take effect on September 1, 1974.

C. The Union and the College agree that certain types of Stockton courses (laboratories, studios, field, performing arts), due to the nature of the instruction, may impose an inequitable burden on instructors who teach in those modes. In the fall and winter terms, 1974 and 1975, the College will make a study of the impact of teaching in these modes.

The parties agree to open this Agreement for the negotiation of a possible adjustment in the basic academic year teaching load for individuals who teach in these modes in academic year 1975-76. Such negotiations shall commence in March 1975. For the academic year 1974-75, the College, through administrative means, will attempt to relieve problems in certain programs.

LETTER OF AGREEMENT #1

The College recognizes that in certain program areas coordinators are performing administrative duties which should be reflected by a reduced load or additional compensation. The College is currently reviewing the situation. As an interim measure for the 1974-75 academic year, the following program will be implemented:

The Coordinator of the Teacher Development program and the Coordinators of degree programs and supporting programs with six or more full-time faculty members with primary program assignments shall, for a full academic year's service, be released from one class course per year, or be paid three overload units ($750) where, in the judgment of the College, a suitable adjunct replacement is not available.

It is understood that this program will expire at the end of the 1974-75 academic year except that if by March 1, 1975 the local Union requests continuation this matter will be subject to negotiations in the reopened negotiations of March 1975. Absent agreement to continue the program set forth above, there shall be no obligation to provide released time or additional compensation for Coordinators.

P.E.R.C. NO. 77-31

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (STOCKTON STATE COLLEGE),

Petitioner,

- and - Docket No. SN-16

COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, NJSFT-AFT/AFL-CIO

Respondent.

STATE OF NEW JERSEY (STOCKTON STATE COLLEGE),

Respondent,

- and - Docket No. CO-76-11

COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

HURWITZ, Commissioner (concurring in part and dissenting in part)

With regard to the Unfair Practice Charge I concur with that part of the Decision and Order which dismisses the Complaint in its entirety.

With regard to the Scope Petition I concur with that part of the Decision and Order which finds that the Council of New Jersey State College Locals was not the majority representative of the summer employees in 1975. I also concur with that part of the Decision and Order which finds that the decision of the State of New Jersey to increase the minimum number of minutes of "contact time" at Stockton State College for the academic year 1975-76 was not a required subject of collective negotiations.

I dissent, however, from that part of the Decision and Order which finds that the State's decision to increase the minimum number of minutes of "contact time" was a permissive subject of negotiations.

Through its rules the Public Employment Relations Commission (the "Commission") has adopted a tripartite categorization concerning scope of negotiations. Matters in dispute are determined by the Commission to be either "required," "permissive" or "illegal" subjects for negotiations.[1/]

The first case in which the Commission indicated that a major educational policy decision may be a permissive subject for negotiations was Fair Lawn Bd. of Ed. and Fair Lawn Administrative and Supervisory Association, Local 34, SASOC, AFL-CIO, P.E.R.C. No. 76-7, 1 NJPER 47 (1975). In Fair Lawn the Commission held that the decision by the board of education to reduce the work year of elementary school principals from 12 months to 10 months involved a matter of inherent managerial authority and/or educational policy and was not a required subject of negotiations. In a footnote to that decision, however, the Commission said:

> In holding that the decision is not mandatorily negotiable, we do not hold that the Board could not agree to negotiate that decision. In the absence of a statutory prohibition, negotiations and any ensuing agreement would appear to be permissible and enforceable. See N.J.A.C. 19:13-3.7. [Fair Lawn, supra, footnote 9, P.E.R.C. No. 76-7 at p. 9, 1 NJPER at p. 49]

1/ The pertinent rule is N.J.A.C. 19:13-3.7:

> Based upon the parties' submissions and oral argument, if any, or where an evidentiary hearing has been conducted, based upon the record in the case as set forth in subsection (c) of N.J.A.C. 19:13-5.3 (Evidentiary Hearings), the Commission shall issue and cause to be served upon the parties its findings of fact and conclusions of law, including its determination as to whether the disputed matter is a required, permissive, or illegal subject for collective negotiations and, where appropriate, an order for remedial or affirmative action reasonably designed to effectuate the purposes of the Act.

By citing its own rule as authority for the proposition that a major educational policy decision is permissively negotiable the Commission rather obviously "pulled itself up by its own boot straps." In numerous cases subsequent to Fair Lawn the Commission has held similarly that major policy decisions, though not mandatorily negotiable, are permissive subjects for negotiations.[2/]

The Commission in Fair Lawn was forced to rely upon its own rule in support of the proposition that major educational policy decisions are permissively negotiable because there is no other authority in New Jersey

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2/ In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976)
In re North Plainfield Education Association, P.E.R.C. No. 76-16, 2 NJPER 49 (1976)
In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 143 (1976)
In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976)
In re Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO, P.E.R.C. No. 76-33, 2 NJPER 147 (1976)
In re Newark Firemen's Union of New Jersey, P.E.R.C. No. 76-40 2 NJPER 139 (1976)
In re Plainfield Patrolmen's Benevolent Association, Local #19, P.E.R.C. No. 76-42, 2 NJPER 168 (1976)
In re Board of Education of the Borough of Ridgefield, P.E.R.C. No. 77-9, 2 NJPER 284 (1976)
In re Green Brook Education Association, P.E.R.C. No. 77-11, 2 NJPER 288 (1976)
In re Piscataway Township Board of Education, P.E.R.C. No. 77-20, 2 NJPER ____ (1976)
In re Bridgewater-Raritan Regional Board of Education, P.E.R.C. No. 77-21, 2 NJPER ____ (1976)
In re Board of Education of the City of Trenton, P.E.R.C. No. 77-24, 2 NJPER ____ (1976)
In re New Milford Board of Education, P.E.R.C. No. 77-25, 2 NJPER ____ (1976)

law to support this proposition.[3/]

The leading case concerning scope of negotiations under the "New Jersey Employer-Employee Relations Act," (the "Act") N.J.S.A. 34:13A-1 et seq., L. 1968, C. 303 ("Chapter 303") prior to the Act's amendment by L. 1974, C. 123 ("Chapter 123"), is Dunellen Bd. of Ed. v. Dunellen Ed. Assn., 64 N.J. 17 (1973). In Dunellen the issue was whether the board of education could legally have agreed to submit to binding arbitration the soundness or validity of its determination that it would be educationally desirable to consolidate the Chairmanships of the Social Studies Department and the English Department into a newly created Humanities Chairmanship. The Supreme Court of New Jersey held that the decision to consolidate was predominantly a matter of educational policy which had no effect, or at most only remote and incidental effect, on the "terms and conditions of employment" contemplated by Chapter 303, and that the board could not legally have agreed to submit the decision to binding arbitration. The court reasoned that the Legislature, in adopting the terms of Chapter 303, did not contemplate that local boards of education would or could abdicate their management responsibilities

3/ In Burlington Cty. Col. Fac. Assoc. v. Bd. of Trustees, 119 N.J. Super. 276, 281 (Law Div. 1972), the court, citing a private sector case, in dictum, stated that bargaining demands are either mandatory, voluntary or illegal subjects of negotiations. The holding in the case, that the college calendar was a required subject for negotiations, was reversed on appeal by the New Jersey Supreme Court, 64 N.J. 10 (1973).

for determining educational policies.[4/] The court stated that while its holding related only to arbitrability, the consolidation decision was not a proper subject of either arbitration or mandatory negotiation under Chapter 303. 64 N.J. at 31

The language of the court's decision in Dunellen contains no support for an argument that major educational policy decisions, though not mandatorily negotiable, may legally be the subject of voluntary negotiations. The court's analysis involves a determination whether a matter involves a major educational policy decision. If it does, it is not negotiable. If it does not, and is intimately and directly related to the work and welfare of school district employees, it is negotiable.

This reading of Dunellen -- i.e. that major educational policy decisions are not negotiable, rather than permissively negotiable -- is buttressed by the language of the court in a companion case to Dunellen,

4/ This same point was made by the New Jersey Supreme Court in an earlier case, Lullo v. Intern. Assoc. of Fire Fighters, 55 N.J. 409 (1970). Therein, in a discussion of the collective negotiation-collective bargaining dichotomy, the court said:

> It is crystal clear that in using the term "collective negotiations" the Legislature intended to recognize inherent limitations on the bargaining power of public employer and employee. The reservation in section 7 [of Chapter 303] of the Civil Service rights of the individual employee is a specific indication of that fact. The lawmakers were sensitive that Civil Service statutes in many areas provide for competitive employment examinations, eligible lists, fixed salary lists, for promotion, transfer, reinstatement and removal, and require all employees to be dealt with on the same basis. And undoubtedly they were conscious also that public agencies, departments, etc., cannot abdicate or bargain away their continuing legislative or executive obligations or discretion. Consequently, absent some further changes in pertinent statutes public employers may not be able to make binding contractual commitments relating to certain subjects. [Citations]. In our judgment, therefore, the authorization for "collective

Bd. of Ed. of Englewood v. Englewood Teachers Assn., 64 N.J. 1 (1973), wherein the court said:

> As was pointed out in Dunellen, supra, major educational policies which indirectly affect the working conditions of the teachers remain exclusively with the board and are not negotiable whereas items which are not predominantly educational policies and directly affect the financial and personal welfare of the teachers do not remain exclusively with the Board and are negotiable. [at 7; emphasis supplied]

The language of the court could hardly be clearer -- major educational policies are not negotiable.

While holding in Dunellen that the decision to consolidate departments was predominantly a matter of educational policy not mandatorily negotiable, the court did indicate that the board would have been well advised to have voluntarily discussed the decision in timely fashion with the representatives of the teachers. The court concluded Dunellen with these words:

> It would seem evident that, when dealing in fields with which the teachers are significantly concerned though outside the fields of mandatory negotiation, the end of peaceful labor relations will generally be furthered by some measure of timely voluntary discussion between the school administration and the representatives of the teachers even though the ultimate decisions are to be made by the Board in the exercise of its exclusive educational prerogatives. [Dunellen, supra, at 32]

4/ continued
negotiations" in the 1968 Act was designed to make known that there are salient differences between public and private employment relations which necessarily affect the characteristics of collective bargaining in the public sector. Finally, it signified an effort to make public employers and employees realize that the process of collective bargaining as understood in the private employment sector cannot be transplanted into the public service. [55 N.J. at 440].

This can hardly be construed as language in support of the proposition that major educational policy decisions are permissively negotiable. All that this language means is that a public employer is not prohibited from voluntarily discussing a major educational policy decision with its employees, so long as the ultimate decision making authority remains exclusively with the employer. One need not belabor the point that such discussions do not in any way constitute negotiations.

But if authority for the proposition that major educational policies are permissively negotiable cannot be found in Chapter 303 or in the Supreme Court decisions interpreting Chapter 303, is such authority to be found in the amendments to the Act contained in Chapter 123? An analysis of those amendments demonstrates that such authority cannot be found in Chapter 123.

Among other things, Chapter 123 defined unfair practices (Section 1); gave the Commission exclusive power to prevent unfair practices (Section 1); gave the Commission power to determine whether a matter in dispute is within the scope of collective negotiations (Section 1); defined "managerial executives" and "confidential employees" (Section 2); and created the position of full time chairman of the Commission (Section 3). None of these amendments supports an argument that major educational policy decisions are mandatorily or permissively negotiable.

It has been asserted by this Commission, however, that two other amendments contained in Chapter 123 have reversed, in part at least, the holding of the Supreme Court in Dunellen. In Bridgewater-Raritan Reg. Bd. of Ed. v. Bridgewater-Raritan Ed. Assn., P.E.R.C. No. 77-21, ___ NJPER ___ (1976), the Commission said that Chapter 123 made two significant changes in the Act which would appear to reverse that part of the

holding of Dunellen which prohibited the arbitration of contract disputes related to subjects normally within management's discretion.

The first change cited was Section 6 of Chapter 123 which deleted from N.J.S.A. 34:13A-8.1 the language "nor shall any provision hereof annul or modify any statute or statutes of this state" and substituted the language "nor shall any provision hereof annul or modify any pension statute or statutes of this state."

The second change cited in Bridgewater as having reversed in part the holding in Dunellen was the amendment to N.J.S.A. 34:13A-5.3 made by Section 4 of Chapter 123:

> Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.

In commenting on these two changes in Bridgewater the Commission said:

> It would appear that the legislative intention was to enlarge the jurisdiction of the grievance/arbitration process to be co-extensive with the scope of those matters which could be negotiated and incorporated into a collectively negotiated agreement. Therefore, as a general rule, it can be anticipated that a dispute arising under a grievance/arbitration procedure contained within a contract entered into after the effective date of Chapter 123 of the Public Laws of 1974 may be submitted to arbitration for resolution if it involves either a required or a permissive subject of collective negotiations. [Bridgewater, supra, at p. 11]

The problem with this interpretation is not that it finds the scope of the jurisdiction of the grievance/arbitration process to be

co-extensive with the scope of those matters which could be negotiated, but rather that it assumes without foundation that major educational policy decisions are permissively negotiable.

The Chapter 123 amendment to N.J.S.A. 34:13A-5.3 is of no relevance in determining whether major educational policies are permissive subjects of negotiations since the amendment deals with the utilization of grievance procedures established by agreement and not with the scope of negotiations. Nor can one use the Chapter 123 amendment to N.J.S.A. 34:13A-8.1 as the basis for holding that major educational policy decisions are permissive subjects for negotiations. As Judge Allcorn noted in his concurring opinion in the as yet unreported decision in Englewood Teachers Assn. v. Englewood Bd. of Ed., (A-1473-75, Appellate Division, decided December 10, 1976):

> The repeal or modification of virtually all of those powers [of boards of education] and the transfer thereof to an arbitrator or arbitrators, who have neither responsibility, responsiveness, nor accountability to the public, who must make their decision on the isolated issue presented rather than in the context of the whole complex of problems facing the board of education, including budgetary restrictions, and without regard to the public interest, may not be implied from language such as that contained in L. 1974, C. 123, § 10 (N.J.S.A. 34:13A-8.1), the meaning and effect of which is at the very least uncertain. A divestiture and transfer of authority of such magnitude and significance may only be accomplished by the Legislature in language that is plain and unmistakeable. In short, if the Legislature determines upon the administration of local public educational systems by arbitrator (if, indeed, it has the authority to so abdicate its constitutional obligations), the public is entitled to have that determination "legislatively expressed in clear and distinct phraseology." Burlington Co. Col. Fac. Assn. v. Bd. of Trustees, 64 N.J. 10, 16 (1973). [slip sheet, p. 3]

If support for the proposition that major educational policies are permissively negotiable cannot be found in Chapter 303, in the decisions of the New Jersey Supreme Court or in Chapter 123, where then has this Commission found authority for this proposition? The simple answer is that no such authority is to be found in New Jersey law. The fact that there is no authority in New Jersey law for this proposition is manifest in this Commission's inability to identify such authority in its decisions which hold that major educational policy decisions are permissively negotiable.

For the foregoing reasons, I would find that the decision of the State of New Jersey to increase the minimum number of minutes of "contact time" at Stockton State College for the academic year 1975-76 was not a proper subject for collective negotiations.

Mark W. Hurwitz
Commissioner
Public Employment Relations
Commission

DATED: Trenton, New Jersey
January 3, 1977

ISSUED: January 4, 1977