P.E.R.C. NO. 77-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LOCAL 195, IFPTE and LOCAL 518,
SEIU,

Petitioners,

-and- Docket No. SN-76-18

STATE OF NEW JERSEY,

Respondent.

SYNOPSIS

In a scope of negotiations proceeding initiated by the Locals, the Commission rules on whether the question of seniority as it affects layoffs, recall, bumping and reemployment rights of State employees is outside the scope of mandatorily negotiable terms and conditions of employment, as it relates to the merit and fitness concept as embodied in State statutes and regulations. The Locals, citing federal and state cases, contend that seniority as it relates to layoffs, recall, bumping and reemployment rights is a term and condition of employment. The State does not really dispute this argument but instead asserts that other factors, i.e. constitutional proscriptions, the claim that the intent of N.J.S.A. 34:13A-5.3 regarding individual employee rights immunized these matters from the duty to negotiate, and the argument that the specific provisions of Title 11 regarding the matters in dispute render said matters non-mandatorily negotiable notwithstanding the amendments to N.J.S.A. 34:13A-8.1, render seniority not mandatorily negotiable.

The Commission first concludes that seniority as it relates to layoffs, recall, bumping and reemployment rights is a term and condition of employment which, as such, is a required subject for collective negotiations, barring the existence of factors which render the subject non-negotiable. The Commission then concludes, however, that specific provisions of Title 11 that deal with the matters in dispute, specifically N.J.S.A. 11:13-2 and 11:15-9, cannot be breached as a result of negotiations between the parties. The Commission rejects the claim of the Locals that the amendment to N.J.S.A. 34:13A-8.1 constituted an implied repealer of statutes dealing specifically with terms and conditions of employment. The Commission has analyzed the amendments to N.J.S.A. 34:13A-8.1 and concludes that their purpose was to ensure that the state judiciary would no longer restrict the scope of negotiations by relying upon the language in N.J.S.A. 34:13A-8.1 of Chapter 303 to say that N.J.S.A. 34:13A-8.1 protected existing statutes that gave employers broad grants of authority in certain areas to unilaterally determine terms and conditions of employment without negotiations. The Commission believes that by amending

N.J.S.A. 34:13A-8.1, the Legislature has, in response to the court's invitation, specifically amended the section relied upon by the New Jersey Supreme Court in its Dunellen trilogy, thereby compelling negotiations concerning terms and conditions of employment in those areas within the authority of the employer.

More specifically, the Commission finds that parties can negotiate concerning terms and conditions, but only to the extent that such negotiations do not lead to results which are inconsistent with the provisions of specific statutes regarding such terms and conditions of employment. Applying this rationale to the instant situation, the Commission rules that the instant parties are not prohibited from negotiating seniority. The parties however are required to negotiate seniority consistent with the specific guidelines set forth within N.J.S.A. 11:13-2 and N.J.S.A. 11:15-9. The State was thereby ordered to negotiate in good faith, consistent with the appropriate statutory framework regarding seniority as it relates to the instant case, upon the demand of the Locals.

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STATE OF NEW JERSEY,

Respondent.

Appearances:
For the Petitioner, Rothbard, Harris & Oxfeld, Esqs.
(Mr. Sanford R. Oxfeld, of Counsel)

For the Respondent, William F. Hyland, Attorney General
(Messrs. Guy S. Michael and Melvin E. Mounts, Deputy Attorneys General, of Counsel)

DECISION AND ORDER

A Petition for Scope of Negotiations Determination (the "Petition") has been filed with the Public Employment Relations Commission (the "Commission") by Local 195, IFPTE and Local 518, SEIU (the "Locals") seeking a determination as to whether certain matters in dispute between the Locals and the State of New Jersey (the "State") are within the scope of collective negotiations. 1/

1/ The Commission's authority to determine whether a matter in dispute is within the scope of collective negotiations appears at N.J.S.A. 34:13A-5.4(d): "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." The Commission's rules of practice and procedure governing scope of negotiations proceedings are set forth in N.J.A.C. 19:13-1.1 et seq.

The Locals' brief was filed with the Petition, the State submitted a brief,[2/] and the Locals filed a letter in lieu of a reply brief.

The instant dispute arose during the course of collective negotiations between the Locals as the majority representatives of certain public employees and the State as the public employer. The negotiations actually involved three negotiating units: the Operations, Maintenance and Services Unit and the Crafts Unit, both represented by Local 195, IFPTE, and the Inspection and Security Unit, represented jointly by the Locals. Negotiations for the three units were conducted at joint meetings. The State supports the request of the Locals for a determination regarding the disputed matters.

The statement of the dispute, as set forth in the Locals' petition, follows:

> "Whether the State is legally required to negotiate with the employee representative as to the matters concerning seniority where said negotiations may be at variance with seniority as defined by the Civil Service."

In its brief, the Locals framed the issue in the following

2/ The State attached affidavits from Barry Steiner, Deputy Director, Office of Employee Relations and William Druz, Chief Examiner and Secretary, Department of Civil Service to its brief. The Locals, objecting to the inclusion of these affidavits, point out that the State had not requested an evidentiary hearing in this matter pursuant to the Commission's Rules. We would reach the same conclusion whether or not the affidavits are considered.

language:

> "...whether the State must negotiate the question of seniority of unit members; specific reference is made to seniority as it affects lay-offs, recall, bumping and reemployment rights."

In its brief, the State specified the issue as follows:

> "Is seniority outside the scope of mandatorily negotiable terms and conditions of employment under the Employer-Employee Relations Act as it relates to the merit and fitness concept as embodied in State Civil Service statutes and regulations?"

For purposes of the instant determination, we shall focus on the elements of seniority identified by the petitioning Locals: layoffs, recall, bumping and reemployment rights.

In accordance with the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq., (the "Act"), the Commission has been empowered to make a determination as to whether a matter in dispute is within the scope of collective negotiations.[3/] The Commission's Rules provide for a determination "...as to whether the disputed matter is a required, permissive, or illegal subject for collective negotiations..."[4/] The Act mandates negotiations "...with respect to grievances and terms and conditions of employment."[5/]

The initial question to be answered is whether seniority as it relates to layoffs, recall, bumping and reemployment rights is a term and condition of employment. If it is found to

3/ N.J.S.A. 34:13A-5.4(d), supra, note 1.
4/ N.J.A.C. 19:13-3.7. See also In re City of Jersey City, P.E.R.C. No. 77-33, 3 NJPER ____ (1977), at p. 12 of slip opinion for a discussion of these categories.
5/ N.J.S.A. 34:13A-5.3.

be a term or condition of employment, then it must be determined whether there is anything which prohibits negotiations regarding seniority in those cited areas.

The Locals, citing federal and state cases, contend that seniority as it relates to layoffs, recall, bumping and reemployment rights is a term or condition of employment. The State does not really dispute this argument but instead asserts that other factors render seniority not mandatorily negotiable. In fact, the State, citing Rogers v. Dept. of Civil Service, 17 N.J. 533 (1955), concedes that seniority is one factor (others cited include the employee's knowledge, experience, and previous job performance) which is considered regarding, inter alia, layoffs and reemployment.

We agree that seniority as it relates to layoffs, recall, bumping and reemployment rights is a term or condition of employment. This conclusion is consistent with the decisions of courts and agencies in other jurisdictions, federal and state, involving both the public and private sectors. It is also consistent with our earlier decisions.

In In re Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO, P.E.R.C. No. 76-33, 2 NJPER 147 (1976), Motion for Reconsideration denied, P.E.R.C. No. 77-30, 3 NJPER ____ (1977) we found that the procedure for the selection of teachers to be eliminated in any future reduction in employment but not the decision regarding the level of employment to be mandatorily negotiable. Similarly, in the instant matter, the Locals are seeking

to negotiate regarding seniority as it relates to layoffs, recall, bumping and reemployment rights. We note, however, that the Locals are not seeking to negotiate regarding the decision of the State to determine the level of employment. The Locals, in effect, are seeking to negotiate regarding the effect that such decisions have upon the terms and conditions of employment of the unit members which they represent for purposes of collective negotiations.

Also, in our decision In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 145 (1976), appeal pending, App. Div. Docket No. A-3402-75, (See also In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976) we found the procedures to be followed in filling certain positions to be mandatorily negotiable but the qualifications for the positions not to be mandatorily negotiable. We cited field of study, attendance record, regular service in the grade or subject area (i.e., seniority) and service within the district as among the factors which are mandatorily negotiable.

Thus, consistent with our previous decisions, we determine that seniority as it relates to layoffs, recall, bumping and reemployment rights is a term or condition of employment which, as such, is a required subject for collective negotiations barring the existence of factors which render the subject non-negotiable. We turn now to a consideration of that issue.

The Locals argue that there is nothing which precludes negotiations regarding seniority. Citing a Pennsylvania Supreme

Court decision,[6/] it is claimed that the only non-negotiable terms and conditions of employment are those concerning which an employer has been explicitly and definitively prohibited from making an agreement.

The Locals also contend that the 1974 amendments to the Act, P.L. 1974, c. 123, reflect a clear legislative intent to preclude negotiations only regarding matters covered by pension statutes.

P.L. 1968, c. 303 contained the following language (N.J.S.A. 34:13A-8.1):

> "...nor shall any provision hereof annul or modify any statute or statutes of this state."

It was this provision that the Supreme Court and the lower courts cited in a number of cases as support for a restrictive interpretation of the scope of negotiations.[7/] That section has now been amended to read as follows:

> "...nor shall any provision hereof annul or modify any pension statute or statutes of this state." (Emphasis added)

This, it is claimed, was the Legislative response to Dunellen, supra, and subsequent cases.

The Locals also cite an addition to N.J.S.A. 34:13A-5.3 which provides as follows:

6/ Pennsylvania Labor Relations Board v. State College, 337 A. 2d 262 (1976).

7/ See, e.g., Dunellen Bd. of Ed. v. Dunellen Ed. Assn., 64 N.J. 17 at 24, 25 (1973) and Burlington County College Faculty Association v. Board of Trustees, 64 N.J. 10 at 13-14, 16 (1973).

> "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."

It is argued that this language supports the Locals' claims that, absent a specific statutory prohibition, terms or conditions of employment are mandatorily negotiable.

The State takes the position that those aspects of seniority which relate to the merit and fitness system are not mandatory subjects of negotiations and may be barred from negotiations by reason of constitutional and statutory interpretation.

The State, citing Dunellen, supra, argues that just as the courts in Dunellen and its progeny found that subjects which are predominantly matters of educational policy are not mandatory subjects of negotiations, it is reasonable to extend that doctrine and to hold that matters relating to the fundamental policy of the employer are not mandatorily negotiable, especially when the policy in question is constitutionally based.[8/]

The pertinent constitutional provision follows:

> "Appointments and promotions in the Civil Service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit

8/ We have previously accepted this argument conceptually. See In re Board of Education of the Borough of Tenafly, P.E.R.C. No. 76-24, 2 NJPER 75 (1976) and In re Byram Township Board of Education, supra; In re Piscataway Township Board of Education, P.E.R.C. No. 77-37, 3 NJPER ___ (1977); and In re Parsippany-Troy Hills Board of Education, P.E.R.C. No. 77-27, 3 NJPER ___ (1977).

> and fitness to be ascertained, as far as practicable by examination, which, as far as practicable, shall be competitive;..." 9/

Thus, it is argued, based upon the above constitutional directive, the Legislature has enacted an extensive body of Civil Service statutes which delegate to the Civil Service Commission the authority to implement the merit and fitness sytem. See N.J.S.A. 11:1.1 et seq.

The State cites cases from New York State to the effect that negotiations regarding terms and conditions of employment are mandatory unless there is a clear and plain statutory or decisional prohibition and urges, based upon the similarity of language in the constitutions of the two States regarding merit and fitness as well as the implementing statutes in both states, that negotiations regarding seniority be found to be prohibited.

To implement the Constitutional merit and fitness system, the Legislature has enacted several statutes pertinent herein. Layoff procedures are discussed at N.J.S.A. 11:13-2 which provides that,

> When service ratings are used as a basis for determining the order of layoff, seniority credits, not to exceed ten points, may be added to the ratings of employees affected, based upon their length of service in accordance with regulations prescribed by the chief examiner and secretary and approved by the commission.

Such regulations have been adopted and are found at N.J.A.C. 4:1-16.3 which in pertinent part at subpart (b), states:

9/ New Jersey State Constitution, Article VII, Sec. 1, par. 2.

> Layoff or demotion for all other employees in that class shall be in the inverse order of performance ratings provided that:
>
> 1. In computing the performance ratings to determine the order of layoff or demotion, seniority credits to the extent of one point for each of the past five years of service and 1/2 point for each additional year of service up to ten years shall be added to the average rating for the year preceding the date of layoff or demotion;
>
> 2. In the absence of an approved system of performance ratings by the Department of Civil Service, layoff or demotions of permanent employees shall be in the order of seniority in the class, the person or persons last appointed being the first laid off or demoted.

Additionally, reemployment rights are discussed at N.J.S.A. 11:15-9 which, in pertinent part, provides that:

> ...such employee shall, whenever possible, be demoted to some lesser office or position, in the same department, in the regular order of demotion and according to service ratings and/or seniority, and placed therein with the salary or pay attached; and his name shall be placed upon a special re-employment list, which list shall take precedence over all other civil service lists. The chief examiner and secretary, with the approval of the president of the Civil Service Commission, shall determine the lesser office or position to which such employee may be demoted.

Again, the Administrative Code at N.J.A.C. 4:1-16.5(a) provides that:

> The Chief Examiner and Secretary shall, after receipt of the notice, determine the demotional and reemployment rights of the employee to be laid off or demoted and within a reasonable time not to exceed 45 days notify the employee and the appoint authority of such rights.

While accepting the legitimacy of seniority as a factor in determining merit and fitness as provided above, the State maintains that seniority is only one factor of many and that, consistent with the overall obligation of the Civil Service Commission to provide a system based upon merit and fitness, to mandate negotiations regarding seniority would disturb the balance among the various factors and, as such, would be inconsistent with the merit and fitness sytem.

The State contends that the amendment of N.J.S.A. 34:13A-8.1 does not, as the Locals suggest, make everything negotiable regardless of existing statutory provisions. To interpret the amendment as an implied repealer of statutes dealing with terms and conditions of employment would run counter to normal statutory construction and thus should be rejected. The State points out that the Legislature did not modify the phrase "terms and conditions of employment", thereby indicating no intention of altering that term as it had theretofore been interpreted by the courts.

The State also argues that if the Legislature had intended everything to be mandatorily negotiable, it would not have established a procedure for the resolution of disputes regarding negotiability such as that contained in N.J.S.A. 34:13A-5.4(d).

The State further contends that the argument that the amendment to N.J.S.A. 34:13A-8.1 authorized the reaching of agreements without regard to statutory provisions does not deserve

serious consideration, stating that -- assuming the Legislature had the power to do so -- there is nothing to indicate that the Legislature intended this result.

The State suggests that the purpose of the amendment to that section was to make clear that a number of items including salaries would be negotiable and that terms and conditions of employment, excluding pensions, would be negotiable and unfettered by statutory prescriptions dealing generally with terms and conditions of employment. This would leave broad policy matters within the province of the responsible agency and, presumably, unobstructed by any negotiations obligation.

The statutory provision calling for the utilization of negotiated grievance procedures is asserted by the State to have no bearing on the scope of negotiations, dealing instead with procedural as opposed to substantive matters.

Additionally, the provision in N.J.S.A. 34:13A-5.3 which provides that "Nothing herein shall be construed to deny any individual employee his rights under Civil Service laws or regulations" was not changed by P.L. 1974, c. 123, thereby indicating, according to the State, a legislative intent to exempt matters such as those at issue herein from the duty to negotiate.

Finally, the State points out that there are differences between the public and the private sectors, including the absence of a constitutionally mandated system of personnel management in the private sector, thereby limiting the precedential value of private sector cases. The State argues that

several cases cited by the Locals in support of their position in fact support the State's position because each case speaks of a holding regarding a mandatory subject of negotiations in the absence of a statute to the contrary. Here the State contends that there are contrary statutory and constitutional provisions which render the issues non-negotiable.

In the reply brief, the Locals dispute the arguments of the State. The Locals claim that P.L. 1974, c. 123 was a reaction to Dunellen, supra, and clearly represents a departure from the Dunellen line of cases. The Locals assert that the State's interpretation of the amendment to N.J.S.A. 34:13A-8.1 would render that amendment meaningless, countering with the argument that this amendment was intended to expand negotiations to include all terms and conditions of employment except pensions.

The Locals claim that there is nothing which prohibits the State from negotiating regarding seniority as it relates to layoffs, recall, bumping and reemployment rights. The State Constitution, which the Locals acknowledge takes precedence over any contrary legislation, refers to promotions and appointments. It is conceded that appointments and promotions must be made in accordance with merit and fitness as required by the State Constitution. However, layoff and recall are not covered by the State Constitution and the Rogers decision, supra, cited by the State, explicitly acknowledges that seniority is appropriately utilized in determining demotional rights pursuant to the statutory as opposed to constitutional purpose of Civil Service. Thus, it

is argued, that because demotional rights are statutorily determined, they can be modified through collective negotiations.

The Locals dispute the relevance of the decisions of the Public Employment Relations Board and the courts in New York State because of the contrasting legislative histories of the public sector labor relations acts in the two States.

Finally, the Locals do not view negotiations regarding seniority as it relates to layoffs, recall, bumping or reemployment rights as interfering with the rights of individual employees under civil service laws or regulations, rights which have been protected at N.J.S.A. 34:13A-5.3 as noted above. The Locals claim that the rights referred to are appeal rights relating to disciplinary matters or to appointments and promotions. Thus, the Locals are not seeking to negotiate "rights" as that term is used in N.J.S.A. 34:13A-5.3.[10/]

10/ To properly appreciate the context of that excerpt, the full paragraph which contains it is set forth: "Representatives designated or selected by public employees for the purpose of collective negotiations by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this act shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit. Nothing herein shall be construed to prevent any official from meeting with an employee organization for the purpose of hearing the views and requests of its members in such unit so long as (a) the majority representative is informed of the meeting; (b) any changes or modifications in terms and conditions of employment are made only through negotiation with the majority representative; and (c) a minority organization shall not present or process grievances. Nothing herein shall be construed to deny to any individual employee his rights (Continued)

In rendering this determination, we must decide whether the issues in dispute which we have found to be terms and conditions of employment are immune from the duty to negotiate by virtue of some factor which renders them non-negotiable. As noted above, the State advanced a number of factors which it contended removed any obligation to negotiate regarding these issues including the constitutional argument, the contention that fundamental managerial policies of public employers are not mandatorily negotiable, the claim that the intent of N.J.S.A. 34:13A-5.3 regarding individual employee rights immunizes these matters from the duty to negotiate, and the argument that the specific provisions of Title 11 regarding the disputed matters render these matters non-mandatorily negotiable notwithstanding the amendment to N.J.S.A. 34:13A-8.1.

Without dealing exhaustively with each of the above arguments, it is our determination that, in spite of the amendment to N.J.S.A. 34:13A-8.1, the specific provisions of Title 11, specifically N.J.S.A. 11:13-2 and 11:15-9, cannot be breached as a result of negotiations between the parties. We reject the claim that the amendment to N.J.S.A. 34:13A-8.1 constituted an implied repealer of statutes dealing specifically with terms and conditions of employment.

The Commission has analyzed this amendment and we conclude that its purpose was to insure that the Courts would no

10/ (Continued) under Civil Service laws or regulations. 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 such grievance adjusted." (Emphasis added)

longer restrict the scope of negotiations by relying upon the language in N.J.S.A. 34:13A-8.1 of Chapter 303 to say that N.J.S.A. 34:13A-8.1 protected existing statutes that give employers broad grants of authority in certain areas to unilaterally determine terms and conditions of employment without negotiations. The Commission believes that by amending the statute, the Legislature has, in response to the Court's invitation,[11/] specifically amended the section relied upon by the Court (N.J.S.A. 34:13A-8.1) in its decisions, thereby compelling negotiations concerning terms and conditions of employment in those areas within the authority of the employer.[12/]

Having reviewed and analyzed the positions of the parties as they relate to the amendment of N.J.S.A. 34:13A-8.1, the Commission has considered several possible approaches. Under the first but in our view less reasonable approach, any term or condition of employment would, upon request, be mandatorily negotiable and the parties could mutually agree to set that term or condition of employment without regard to the existence of a statute concerning that matter. In the absence of a contrary agreement, however, the provisions of the statute would continue

11/ See Dunellen Board of Education, supra, footnote 11 at p. 24 and Burlington County College Faculty Association, supra, footnote 7 at p. 16.

12/ Moreover, the Commission held in In re Bridgewater-Raritan Regional Board of Education, P.E.R.C. No. 77-21, 3 NJPER ____ (1976), that the amendments in Ch. 123 also enlarged the scope of negotiations area to include permissive as well as required subjects.

to apply. Under the second, and we believe more viable approach, the parties could negotiate concerning terms and conditions of employment but only to the extent that such negotiations did not lead to results which were inconsistent with the provisions of specific statutes regarding such terms and conditions of employment.

Regarding the first approach, we do not believe that the Legislature, by amending N.J.S.A. 34:13A-8.1, could have intended to permit the parties under any circumstances - even by mutual agreement - to annul or modify existing statutes relative to terms and conditions of employment. The courts have held that when the literal reading of a statute such as the amendment to N.J.S.A. 34:13A-8.1 here leads to an absurd result, that a reasonable construction consistent with its underlying purpose is presumed.[13/] Additionally, adoption of this approach would compel us to conclude that the Legislature had by implication repealed a number of statutes which establish minima, maxima, or absolutes regarding terms and conditions of employment. Yet repeals by implication are not favored in the law and to overcome the presumption against such an implication, the Legislative intent must be clear and compelling.[14/] A Legislative desire to enact a statute which drastically alters prior law must be accomplished by deliberate expression and not by implication.[15/]

13/ Schierstead v. Brigantine, 29 N.J. 220, 230-31 (1959); In re Petition of Gardener, 67 N.J. Super. 435, 444 (1961).
14/ Laboda v. Clark Twp., 40 N.J. 424, 435 (1963); Guff v. Hunt 6 N.J. 600, 606 (1951).
15/ Delaware River and Bay Auth. v. International Org., etc., 45 N.J. 138, 148 (1965).

We believe that the second approach was the approach intended by the amendment to N.J.S.A. 34:13A-8.1, that the parties in a bargaining relationship were permitted /and required when concerning mandatory subjects/ to negotiate regarding, inter alia, terms and conditions of employment even if statutory language existed on the subject matter, but only to the extent that the negotiations did not modify or contravene statutes that have specifically limited the authority of the public employer on the subject. The Locals herein are therefore correct in arguing that the change in N.J.S.A. 34:13A-8.1 was designed to expand the scope of negotiations, but it did not expand the scope to the extent urged by the Locals. We believe that the parties in their negotiations cannot, even by mutual agreement, reach a result inconsistent with specific statutory provisions.

The instant parties are thus not prohibited from negotiating seniority based on changes in N.J.S.A. 34:13A-8.1. The effect that this change has on Title 11 is not in the way of a repealer or modifier of those statutes. It does, however, require the parties to negotiate within the fixed minimums or maximums provided for by the statutes.

With reference to the instant dispute, the parties, if negotiating seniority, may agree on seniority credits from zero to ten points as provided by N.J.S.A. 11:13-2 but may not agree to exceed ten points and may not go to impasse on whether more than ten points should be added. By way of further but hypothetical

illustration, however, had the law provided that ten points was a minimum, the parties could agree on a figure from ten points upwards, but could not agree or go to impasse on any number below ten points.

Thus, the change in N.J.S.A. 34:13A-8.1 means that general statutes giving authority to employers are not to be read as shields to the employer's obligation to negotiate regarding terms and conditions of employment, but specific statutes governing terms and conditions of employment cannot be abrogated by collective negotiations.

The parties herein therefore are required to negotiate seniority as it relates to layoffs, recall, bumping and reemployment but in doing so must not exceed maximums or fall below minimums provided by statute or in any other manner agree to contravene specific statutory requirements as provided for in Title 11 or any other Title.

We do not accept the claim that the Constitution, which requires that appointments and promotions shall be made in accordance with merit and fitness, determined as far as practicable by competitive examination, renders seniority as it relates to layoffs, recall, bumping and reemployment rights non-negotiable. The Constitutional provision relates specifically to appointments and promotions. The suggested reading of the provision that it requires the establishment of a merit and fitness system extending beyond appointments and promotions is overly expansive. The Constitution does not mandate an all-encompassing merit and fitness system but only that appointments and

promotions be made according to merit and fitness. We observe that although reemployment may be similar in certain respects to appointment, which is covered by the Constitution, reemployment necessarily follows an initial appointment and that initial appointment was subject to the Constitutional and statutory requirements regarding appointments. Thus, in the case of reemployment, it has already been determined that the merit and fitness test has been met. Therefore, we do not find that the Constitutional provision prohibits negotiations regarding seniority as it relates to layoffs, recall, bumping and reemployment rights.

However, even if the broad reading of the provision urged by the State were accepted, we would still find seniority as it relates to layoffs, recall, bumping and reemployment rights to be mandatorily negotiable. The Supreme Court in Rogers, supra, did not find seniority as a factor in rendering certain decisions - specifically, in determining demotional rights pursuant to a statutorily prescribed system - to be inconsistent with merit and fitness. Thus, since seniority has been found to be compatible with merit and fitness, the Constitution cannot be read to preclude negotiations regarding this factor.

Similarly, we reject the argument that the language in N.J.S.A. 34:13A-5.3 regarding individual employee rights under Civil Service Laws or regulations, quoted in context in note 9 above, renders seniority as it relates in layoffs, recall, bumping and reemployment rights non-negotiable. We do not believe

that this was the Legislative intent. If it were, all employees covered by Civil Service including State employees, employees in 20 of the 21 counties, and employees in many of our municipalities, would be precluded from negotiating concerning terms and conditions of employment regarding any matters which could be considered "rights" which are or could be covered by Civil Service laws or regulations. We do not believe that the Legislature intended, when it enacted Chapter 303, Laws of 1968 providing for negotiations regarding terms and conditions of employment, to simultaneously take away that right to all Civil Service employees when there existed or were enacted regulations relating to terms and conditions of employment. We believe that this provision, read in context, relates not to any substantive rights but instead protects the procedural "choice of forum" Civil Service appeal rights of individual employees.

ORDER

With respect to the matter in dispute concerning the negotiability of seniority as it relates to layoffs, recall, bumping and reemployment rights, we hereby determine, in accodance with the above discussion and pursuant to N.J.S.A. 34:13A-5.4(d) and N.J.A.C. 19:13-3.7 that seniority within the context of this case is a term and condition of employment.

Having determined that issue, and having determined above that, within the limit of the specific provisions of N.J.S.A. 11:13-2 and N.J.S.A. 11:15-9, there is no basis for prohibiting negotiations on that subject, the State of New Jersey is hereby ordered to negotiate, consistent with the statutory

framework, in good faith regarding seniority as it relates to the instant case upon demand of the Locals.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Hipp and Parcells voted for this decision.
Commissioner Hurwitz voted against this decision.
Commissioner Forst abstained.

DATED: Trenton, New Jersey
April 19, 1977
ISSUED: April 20, 1977