STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RAHWAY BOARD OF EDUCATION

- and -

Docket No. SN-85-79
L-85-17

RAHWAY EDUCATION ASSOCIATION

DECISION

On March 21, 1985 the Rahway Board of Education (hereinafter "Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission (hereinafter "Commission"). The Petition seeks to restrain arbitration of a grievance filed by the Rahway Education Association (hereinafter "Association"). The grievance concerns the Board's decision to prohibit physical education teachers from wearing shorts in the school building beyond the immediate gymnasium area.

On April 1, 1985, the Board, and on April 4, 1985, the Association indicated their willingness to have the instant dispute resolved through the Commission's Litigation Alternative Program (hereinafter "L.A.P."). A L.A.P. hearing was conducted on June 19, 1985, whereby each party was provided with the opportunity to set forth its position, present any witnesses and documentary evidence, and make oral argument. During the hearing, the parties agreed that the decision rendered in this matter would be final and binding upon the parties with respect to all issues presented. In the event that I find that the issue in this matter does not constitute a mandatory

subject of negotiation, the Association has agreed to immediately withdraw the pending arbitration relating to Rahway School District Grievance Report No. 229 filed on September 18, 1984. However, in the event that I find that the issue raised in the proceeding does constitute a mandatory subject of negotiations, the Board has agreed to proceed with the arbitration of Grievance No. 229 in accordance with the parties collective agreement covering the period July 1, 1983 to June 30, 1985.

The mutually agreed upon issue submitted by the parties for resolution is the following:

> Whether the Board's administrative decision to prohibit physical education teachers from leaving the gymnasium area attired in shorts, except in emergent situations, is a mandatory subject of negotiations.

The Association is the majority representative of the Board's non-supervisory professional, clerical and custodial employees. The parties have entered into a collective agreement effective from July 1, 1983 to June 30, 1985. That agreement contains a grievance procedure ending and binding arbitration.

Commencing in school year 1984-1985, the Board adopted a student dress code which, among other things, prohibited students from wearing shorts in school other than during the physical education class. On September 4, 1984, during the course of a faculty meeting for the Physical Education Department, teachers were advised by the Department Chairperson that they were not to wear shorts in the school building, except in the gymnasium and its

immediately adjacent hallway areas. The Association filed a group grievance on behalf of the physical education teachers contending that the Board's policy regarding the wearing of shorts by the physical education faculty was arbitrary, capricious, unreasonable and contrary to past practice. The Association contends that the Board's action in this matter violates Article 30-D of the collective agreement. Having proceded through the various steps of the grievance procedure, the Board ultimately denied the grievance. The Association filed for binding arbitration. The instant proceeding ensued.

The Board contends that its directive requiring that physical education teachers refrain from wearing shorts in the school building outside of the gymnasium and the adjacent area, involves a matter of major educational policy and, consequently, does not constitute a mandatory subject of negotiations. The Board argues that the recent adoption of the student dress code represents a rule relating to pupil discipline and/or pupil achievement. The Board argues that the Commission has held that pupil discipline is "an area intimately related to educational policy and an inherent management prerogative." In In re Jersey City Bd/Ed, P.E.R.C. No. 82-52, 7 NJPER 682 (¶ 12308 1982). The Board contends that in order for it to effectively administer the student dress code, it must have managerial authority to implement rules concerning employee dress code. Thus, the Board concludes that it has the managerial prerogative to unilaterally implement reasonable rules relating to an employee dress code as a derivative of its authority to establish rules relating to pupil discipline and/or pupil achievement.

The Association contends that the Board's directive restricting physical education teachers to wearing shorts in the gymnasium area only does not represent a matter of major educational policy. The Association argued that the Board has not shown any real correlation between its ability to enforce student dress code and its directive concerning the dress code for physical education teachers. The Association asserts that a clear past practice has been established permitting physical education teachers to wear shorts in school buildings. The Association concludes that the Board's decision to prohibit physical education teachers from leaving the gymnasium area attired in shorts represents a negotiable, and, consequently, arbitrable matter.

At the outset of my analysis, the limitation of the Commission's Scope of Negotiations jurisdiction must be set forth.

> The Commission is addressing the abstract issue: is the subject matter in dispute within the Scope of Collective Negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the Courts. Ridgefield Park Bd/Ed v. Ridgefield Park Ed/Assn., 78 N.J. 144, 154 (1978).

Thus, I do not decide in this decision the merits of the Association's contractual claims or the Board's contractual defenses.

In I.F.P.T.E., Local 195 the State of New Jersey, 88 N.J. 383 (1982), the Supreme Court set forth the test determining whether a subject is mandatorily negotiable and arbitrible. The Court stated:

> ...a subject is negotiable between public employers and employees when: (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially pre-empted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfer with the determination of governmental policy, it is necessary to balance the interest of the public employees and the public employer. When the dominate concern is the governments managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. Id. at 404-405.

Elements (1) and (2) of the above test are easily resolved. It does not require extensive analysis in order to determine that the issue of dress code represents an item that intimately and directly affects the work and welfare of public employees.*See the private sector cases cited, supra.* Moreoever, no statute or regulation has been cited, nor has any been discovered, which specifically and directly mandates the establishment of a dress code. Accordingly, the subject has not been fully or partially pre-empted by statute or regulation.

It is clear that pursuant to current school law decisions, a Board of Education has authority to adopt a dress code. Carlstadt Teachers Assn. v. Bd/Ed of the Borough of Carlstadt, 80 SLD 366, aff'd 80 St. Bd. 371, aff'd App. Div., Docket No. A-1469-80-T4, March 26, 1982 (unpublished opinion); Cinnaminson Teachers Assn. v. Bd/Ed of the Township of Cinnaminson, 83 SLD ___, slip op. dated June 27, 1983, aff'd 83 St. Bd. _____ (slip opinion dated December 7, 1983). The Board of Education has such authority pursuant to its general rule making authority granted by N.J.S.A. 18A:11-1 and N.J.S.A. 18A:27-4. However, the issue in the instant matter is whether the establishment of a dress code for teachers constitutes a mandatory subject of negotiations under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (hereinafter "Act"). A finding that a Board of Education has authority to act pursuant to Title 18A does not necessarily mean that such Board has met its obligations under the Act.

It is well established that the Commission may look to the private sector experience for guidance in attempting to resolve public sector labor relations disputes. Lullo v. International Assn. of Fire Fighters, 55 N.J. 409 (1970). It is clear from a review of private sector cases, that the abstract issue of dress code constitutes a mandatory subject of negotiations. See Bay Diner, 250 NLRB No. 29, 104 LRRM 1407 (1980); and Transportation Enterprises, 240 NLRB No. 74, 100 LRRM 1330 (1979). However, the National Labor Relations Board (hereinafter "NLRB") and the courts

have recognized that special considerations may apply which would justify an employer's unilateral imposition of limitations on an employee's appearnce. See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 16 LRRM 620 (1945); NLRB v. Essex Wire Corp., 245 F.2d 589, 39 LRRM 2632 (9th Cir. 1957); NLRB v. Floridan Hotel of Tampa, 318 F.2d 545, 53 LRRM 2420 (5th Cir. 1963); NLRB v. Harrah's Club, 337 F.2d 177, 57 LRRM 2198 (9th Cir. 1964); and Pay'N Save Corp. v. NLRB, __ F.2d___, 106 LRRM 3040 (9th Cir. 1981).

In Harrah's Club, supra, the employer had "...regulated strictly the dress and appearance of its employees who come in contract with the public." Harrah's Club., 57 LRRM at 2199. Certain employees began wearing union buttons and pins. Harrah's ordered the buttons and pins removed in order for the employees to remain in conformance with the dress code. The employees complied with Harrah's order and the union filed an unfair labor practice charge with the NLRB. The NLRB found Harrah's in violation of the National Labor Management Relations Act. Harrah's appealed and the Circut Court of Appeals reversed. The court concluded that the employer has the right to maintain discipline in its establishment and found the existance of "special circumstances" which justified Harrah's decision to require the removal of the union buttons and pins. Id. at 2200. It is of particular significance that the Court's ruling ratifying the propriety of Harrah's actions was premised on a finding that the employees were not engaged in concerted activity. The court said:

> Most business establishments, particularly those which, like respondent, furnish services rather than goods, try to project a certain type of image to the public. One of the most essential elements in that image is the appearance of its uniformed employees who furnish that service in person to customers. Id. at 2200.
>
> * * *
>
> Respondent should not be required to wait until it receives complaints or suffers a decline in business to prove special circumstances. This is a valid exercise of business judgement, and it is not the province of the Board or of this court to substitute its judgement for that of management so long as the exercise is reasonable and does not interfere with a protected purpose. Id. at 2201.

In this case, the Board, pursuant to the established student dress code, prohibited the physical education teachers from leaving the gymnasium area attired in shorts. The Board asserts that it must take this action in order to maintain student discipline. The Board reasons that students will refuse to adhere to the student dress code prohibition concerning the wearing of shorts if teachers wearing shorts are free to travel throughout the building so dressed. Thus, in applying Harrah's to the instant matter, I conclude that under the particular facts present here, a special circumstance exists which dictates the finding that any requirement upon the Board to negotiate its decision prohibiting teachers from wearing shorts outside the gymnasium area significantly interfers with the determination of governmental policy as it relates to student discipline and achievement.

Like Harrah's, the Board is a provider of services to the public. The "service" it provides is academic instruction and the "public" it serves is the student body. It is well established that the area of student discipline is intimately related to educational policy and, consequently, represents a matter of inherent managerial prerogative. See, In re Bloomfield Bd/Ed, P.E.R.C. No. 84-37, 9 NJPER 645 (¶ 14279 1983); In re Edison Twp. Bd/Ed, P.E.R.C. No. 83-100, 9 NJPER 100 (¶ 14055 1983); and In re Jersey City Bd/Ed, supra. Therefore, in the instant matter, since the Board's action is focused upon the maintenance of student discipline, the Board's decision represents an exercise of its inherent managerial prerogative and is neither negotiable nor arbitrable. As the court instructed in Harrah's, the Board should not be required to wait until it actually receives complaints from students or parents or both regarding disparate application of the dress code between students and teachers in order to prove that special circumstances exists. The Board's decision is a valid exercise of its managerial judgement, and, as the Harrah's court pointed out, it is not within my province to substitute my judgement for that of the Board's, so long as the exercise is reasonable. Clearly, the Board's, decision to prohibit physical education teachers from wearing shorts outside the gymnasium area is reasonable in light of the student dress code and its legitimate objective to maintain student discipline.

The Commission has addressed a related area to the issue of dress code -- the determination of daily uniform for police employees. In In re City of Trenton, P.E.R.C. No. 79-56, 5 NJPER 112 (¶ 10065 1979), the Commission stated:

> By their very appearance, police officers may act as a deterent to criminal activity. A police officer's uniform thus must be considered to relate to the "manner or means" of rendering police services and, as such, it is not a mandatory subject of negotiations. Id. at 112.

In the instant matter, the Board insists that physical education teachers refrain from wearing shorts outside the gymnasium area in order to enforce the student dress code and maintain student discipline. It is undeniable that students often view teachers as role models. Consequently, just as the Commission reasons that the mere identification of a uniformed individual as a police officer may act to deter crime, the mere identification of a teacher away from the gymnasium area in shorts may act to undermine the established student dress code and the desired level of student discipline and control.

Accordingly, on the basis of all of the factual circumstances presented in this matter only, I find that the Board's administrative decision to prohibit physical eduation teachers from leaving the gymnasium area attired in shorts, except in emergent

situation, represents an exercise of inherent managerial prerogative. Consequently, pursuant to the agreement reached during the hearing in this matter, the Association will immediately withdraw the pending arbitration relating to Grievance Report No. 229 dated September 18, 1984.

Stuart Reichman, Assistant
to the Director

DATED: July 23, 1985
Trenton, New Jersey