P.E.R.C. NO. 2009-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CARTERET BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2009-026

CARTERET EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of several provisions in an expired collective negotiations agreement between the Carteret Board of Education and the Carteret Education Association. The Commission finds mandatorily negotiable provisions concerning the dress code and derogatory material. The Commission finds not mandatorily negotiable a provision regarding sick leave verification; a provision requiring employees to submit verification of their relationship to the deceased when requesting bereavement leave; a provision that limits the number of confidential employees in the unit; a Board proposal regarding evaluation criteria; a portion of the provision regarding extended sick leave; a portion of a provision regarding sick leave for family member's illness; and portions of the provisions regarding temporary employees and substitutes.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Wilentz, Goldman & Spitzer, P.A., attorneys (Viola S. Lordi, of counsel and on the briefs; Mary H. Smith, on the briefs)

For the Respondent, Stephen E. Klausner, Esq., LLC, attorney (Stephen E. Klausner, on the brief)

DECISION

On November 12, 2008, the Carteret Board of Education petitioned for a scope of negotiations determination. The Board challenges the negotiability of several contract provisions that the Carteret Education Association seeks to include in a successor collective negotiations agreement.

The parties have filed briefs and exhibits.[1/] The Board has filed a certification from its superintendent. The Association has submitted a certification from a maintenance employee. These facts appear.

1/ We grant the Association's motion to accept its brief as timely filed.

The Association represents a negotiations unit of professional and non-professional employees. The parties entered into a collective negotiations agreement that expired on June 30, 2008. During the course of negotiations for a successor agreement, the Association sought to negotiate with respect to a number of issues that the Board maintains are not mandatorily negotiable. In addition, the Board seeks to add language clarifying Board policy on subjects that it maintains are not mandatorily negotiable. We will discuss specific facts associated with particular proposals in the course of our decision.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states: "The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations." We do not consider the wisdom of the clauses in question, only their negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [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 preempted 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 interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's 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]

DRESS CODE

The Board seeks to alter contractual language to conform to the Board's current dress code policy. The relevant portion of Article XIII of the expired contract provides:

> The Board shall establish a four hundred dollar ($400.00) account with a designated provider, for each Custodian/Maintenance employee. These monies shall be used to purchase shoes and pants/blue jeans, and two (2) short sleeve and two (2) long sleeve shirts. The Board shall also make rain weather gear available when and if needed.

The Association seeks to negotiate over the Board's proposal to remove the words "blue jeans" from the list of clothing that can be purchased under this provision.

The Board argues that it has a managerial prerogative to adopt a dress code. The superintendent states that "blue jeans are not an acceptable form of dress for Board employees." The Association argues that we have never addressed the negotiability of dress codes for laborers who work with chemicals as a core portion of their responsibilities. It asserts that jeans are

thicker and more likely to protect an employee than the thinner pants proposed by the Board. The maintenance employee states that he and all other maintenance, custodial and groundskeeper employees come in contact with oil; grease; gasoline; concrete; hot tar; paint; glue; cleaning solvents; wood stains; muck from sewers, sink and waste lines; hot roofing material; grass; fertilizers; salt for snow removal; and demolition materials from old walls. He further states that the uniforms are thinner than jeans, stain more readily, and are harder to clean and maintain. They also tear more easily requiring more frequent replacement. Jeans are thicker and stronger and provide greater protection from injuries caused by splattering of chemical agents.

In State of New Jersey Judiciary, P.E.R.C. No. 2007-50, 33 NJPER 30 (¶12 2007), we provided a brief review of the relevant case law on dress codes. In 1982, the Appellate Division upheld the power of a school board to adopt a dress code for teachers under standards established by the State Board of Education. Carlstadt Teachers Ass'n v. Carlstadt Bd. of Ed., 1982 S.L.D. 1448 (App. Div. 1982). Those standards were:

> 1. The dress code must be substantially clear and concrete: otherwise it will not be enforceable.
>
> 2. The code should impose no undue financial burden on any individual teacher.
>
> 3. The code should not unduly limit an individual's right of selection and freedom of expression; several options as to styles

> and modes of dress should be available to both men and women.
>
> 4. The code should be reviewed periodically so it will conform from time to time with changing community attitudes.
>
> 5. The code should be consistently interpreted and enforced.

In 1985, we issued our first decision on dress codes for non-uniformed employees and concluded that a school board had a managerial prerogative to adopt a dress code for teachers that was almost identical to the code in Carlstadt. Egg Harbor Tp. Bd. of Ed., P.E.R.C. No. 86-84, 12 NJPER 99 (¶17038 1985). However, our inquiry was limited to dress codes for teachers and specifically excluded non-faculty. We first found that a dress code intimately and directly affects employee work and welfare. It affects employee comfort, convenience and self-expression and may require employees to incur expenses buying and maintaining required articles of clothing. A dress code may also require employees to spend a greater amount of non-working time in meeting appearance requirements. We then found that a school board's interests in adopting a dress code are substantial. As the Appellate Division had observed in Carlstadt, a teacher dress code may help "create an atmosphere of respect for [teachers] within a dignified environment conducive of discipline and learning" and may bear "a relationship to the furtherance of educational goals in that teachers are undeniably role models to

their pupils." Id. at 101. Balancing the interests of school boards and teachers, we held that requiring collective negotiations over the challenged dress code would significantly interfere with the board's ability to regulate the educational climate. However, since a dress code has such a direct effect upon employee welfare, permitting collective negotiations over aspects of implementing a code severable from the decision to adopt the code would not significantly interfere with the determination of educational policy. Notice and application issues such as inconsistent, selective or unreasonable enforcement were identified as possible negotiable subjects.[2/]

In New Jersey State Judiciary, a grievance challenged an unwritten dress code that prohibited the wearing of jeans, sneakers, baseball caps or sports jerseys while working in the office. Based on the limited record, we declined to restrain arbitration over the uniformity, notice and selective enforcement challenges to the unwritten dress code. However, we did not

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2/ In 2002, a Commission Hearing Examiner recommended that the Commission find that the New Jersey Department of Corrections had a managerial prerogative to enact a dress code prohibiting jeans. State of New Jersey (Dept. of Corrections), H.E. No. 2002-11, 28 NJPER 181 (¶33067 2002). She concluded that a prerogative was justified by the special circumstances associated with the needs to maintain safety, security and order in a correctional facility; facilitate the identification of inmates; provide a behavioral model for inmates; and present a professional atmosphere to the public. The case was withdrawn before final Commission action.

determine whether the employer had a managerial prerogative to prohibit the wearing of jeans, sneakers, baseball caps or sports jerseys while working because the record was insufficient to allow a weighing of the employer and employee interests under the Local 195 negotiability balancing test.

On this record, we will require the Board to negotiate with the Association over the Board's proposal to remove the words "blue jeans" from the list of clothing that can be purchased under this provision. The Association has presented a detailed certification that identifies employee safety interests in being permitted to negotiate over being able to wear jeans. See Essex Cty. Sheriff's Dept., P.E.R.C. No. 2000-79, 26 NJPER 202 (¶31082 2000) (determination of daily police uniforms not mandatorily negotiable unless related to the health or safety of police officers); City of Perth Amboy, P.E.R.C. No. 98-146, 24 NJPER 311 (¶29148 1998) (contract clauses that promote or protect employee safety and well-being are mandatorily negotiable). The superintendent states only that jeans are not an acceptable form of clothing. On balance, the employee interests in this case prevail. We express no opinion on whether blue jeans meet any occupational safety requirements.

DEROGATORY MATERIAL

Article XI.C provides, in part:

> 2. Derogatory Material
>
> No material derogatory to a teacher's conduct, service, character or personality shall be placed in the teacher's personnel file unless the teacher has had an opportunity to review the material. Teachers shall acknowledge that they have had the opportunity to review such material by affixing their signature to the copy to be filed with the express understanding that such signature in no way indicates agreement with the contents thereof. Teachers shall also have the right to submit a written answer to such material and the teacher's answer shall be reviewed by the Superintendent or Superintendent's designee and attached to the file copy.
>
> 4. Termination of Employment
>
> Final evaluation of a teacher upon termination of employment shall be concluded prior to severance and no documents and/or materials shall be placed in the personnel file of such teacher after severance or otherwise than in accordance with the procedure set forth in this ARTICLE.

The Board has proposed deletion of the underlined language. It argues that our case law has found restrictions on what can be placed in a personnel file to be non-negotiable. The Association responds that, read together, the contract provisions do not restrict the right to place materials in a personnel file, but simply require notice and an opportunity to review and respond to the material, even after severance from employment.

Article XI.C.4 permits the Board to place materials in the personnel file of a teacher after severance so long as the Board complies with the notice and procedural requirements of Article XI.C.2. It therefore does not significantly interfere with the exercise of any managerial prerogative and is mandatorily negotiable. See Princeton Reg. Bd. of Ed., P.E.R.C. No. 2003-15, 28 NJPER 399 (¶33143 2002); contrast East Brunswick Bd. of Ed., P.E.R.C. No. 81-123, 7 NJPER 242 (¶12109 1981), aff'd in pt., rev'd in pt., NJPER Supp.2d 115 (¶97 App. Div. 1982) (prohibition on placement of post-employment materials in personnel file found not mandatorily negotiable).

LEAVE VERIFICATION

Article XIV.A.4 currently requires a doctor's note for personal illness exceeding four consecutive days. The Board seeks to eliminate the four-day waiting period before a note can be required. In addition, the Board proposes language that would require employees to verify eligibility for sick days when an employee is absent due to illness or injury immediately before or after a scheduled school closing. The Association responds that giving the Board an unfettered right to require a doctor's note will violate Title VII of the Civil Rights Act, the New Jersey Law Against Discrimination, and the federal Family Medical Leave Act. The Association argues that it will adversely affect female

employees who occasionally have pre-menstrual syndrome or menstrual cramps or flow that cause them to take a sick day.

We have long held that a public employer has a managerial prerogative to use reasonable means to verify employee illness or disability. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982); Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022 1983), aff'd 198 N.J. Super. 382 (App. Div. 1985). However, the cost of obtaining verification is mandatorily negotiable and the application of a sick leave verification policy may be challenged through contractual grievance procedures. Elizabeth; Piscataway. Even if the Board's new policy violates some other statutory scheme, that fact would not render the policy mandatorily negotiable. Thus, we hold that the contract language requiring a doctor's note only after four days is not mandatorily negotiable and that the Board does not need to negotiate over its continued inclusion in the contract. However, although the Board has a managerial prerogative to establish a sick leave verification policy governing when doctor's notes are required, it does not have a right to require inclusion of contract language reflecting that policy.

The Board also proposes that employees submit verification of relationship to the deceased when requesting bereavement leave. The contract's Funeral Leave provision permits an

allowance of five work days in case of death in the immediate family and the provision specifies which relatives constitute immediate family. The Association responds by citing circumstances under which providing documentation of the relationship to the deceased would be difficult and time consuming.

We have previously held that once parties have agreed that funeral leave can be used only for specific purposes, the employer has a managerial prerogative to verify that a leave was in fact used for those purposes. Newark Bd. of Ed., P.E.R.C. No. 85-26, 10 NJPER 551 (¶15256 1984); Barnegat Tp. Bd. of Ed., P.E.R.C. No. 84-123, 10 NJPER 269 (¶15133 1984). As for the Association's concerns, our past rulings do not preclude claims that any particular employee was improperly denied bereavement leave; that the verification requirement is being used inconsistently in a particular case to harass an individual employee; or that verification is being sought in an unreasonable manner that unduly interferes with the employee's welfare and privacy. Barnegat. As for the Board's proposal, there is no requirement that a union agree to include language about bereavement leave verification in the contract. The parties can agree to place language reflecting the Board's policy in the contract, but the Board does not have a prerogative to change the contract to include that language.

RECOGNITION

Article I.A.18 limits the number of confidential employees to four, including the superintendent's secretary and the assistant superintendent's secretary. The Board proposes that the restriction be removed. The Association responds that the proposal is an attempt to usurp our jurisdiction to resolve representation disputes through clarification of unit or representation petitions.

Although parties may agree on the scope of a recognition clause, any dispute over an employee's confidential status that cannot be resolved between the parties can be resolved through clarification of unit proceedings before this agency. Passaic Cty. Reg. H.S. Dist. No. 1 Bd. of Ed., P.E.R.C. No. 77-19, 3 NJPER 34 (1976).[3/] The Board cannot be required to continue a limitation on the number of confidential employees in a successor agreement.

TEACHER EVAULATIONS

The Board seeks to add the following language to Article XI.B.2: "The observation/evaluation tool must comply with Department of Education standards." The Board argues that the issue of teacher evaluations is preempted by statute and non-negotiable. It seeks to add contractual language to clarify

3/ N.J.S.A. 34:13A-5.3 provides that the Commission shall not intervene in matters of recognition and unit definition except in the event of a dispute.

Board policy on what it believes is a non-negotiable subject. The Association responds that the Supreme Court has held that statutes and regulations are effectively incorporated by reference as terms of any collective agreement.

Evaluation criteria are not mandatorily negotiable. Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982). Evaluation procedures are negotiable, unless preempted by statute or regulation. However, there is no requirement that a union agree to include language about evaluation criteria or procedures in the contract. The parties can agree to place that language in the contract, but the Board does not have a prerogative to change the contract to include that language.

EXTENDED SICK LEAVE

Article XIV.A.3 governs extended sick leave. It provides:

> In the event an employee has exhausted the annual sick leave, or if in addition to annual sick leave accumulated sick leave has also been exhausted, extended sick leave may be granted. Requests for such extended sick leave shall be considered only when submitted with a physician's certificate documenting the illness or injury. Each request will be decided on an individual basis with said decision on that individual basis to be based on satisfactory attendance and observations.

The Board seeks to remove the language that would base the decision on satisfactory attendance and observations.

The Board argues that N.J.S.A. 18A:30-6 precludes any limitations on its discretion to grant or deny extended sick

leave. The Association argues that since the statute prescribes no legitimate standards to govern the exercise of the Board's discretion, it is unconstitutional. It further argues that the language merely provides the Board with some standards to consider.

The Appellate Division has held that because the grant of extra sick leave days under N.J.S.A. 18A:30-6 is discretionary on a case-by-case basis, a board of education cannot negotiate away that discretion in its collective agreement. Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance and Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977). Thus, the disputed portion of Article XIV.A.3 is not mandatorily negotiable. We note that we have no authority to declare the education statute unconstitutional. Bergenfield Bd. of Ed., P.E.R.C. No. 90, 1 NJPER 44 (1975).

SICK LEAVE

Article XIV.C. provides:

> In case of illness of parent, brother, sister, husband, wife, child or any other relative living at home within the immediate family, paid leave will be permitted up to a maximum of five (5) days in the fiscal year. This time will be charged against sick leave provided in A.1, above.

The Board argues that N.J.S.A. 18A:30-1 limits sick leave to an employee's own illness or injury. See Hackensack Bd. of Ed., P.E.R.C. No. 81-138, 7 NJPER 341 (¶12154 1981), rev'd 184 N.J.

Super. 311 (App. Div. 1982), certif. den. 91 N.J. 217 (1982). The Association argues that under N.J.S.A. 43:21-39.1, effective July 1, 2009, the provision is mandatorily negotiable as to the employee's spouse and minor children. The Association acknowledges that it is not mandatorily negotiable as to other family members. N.J.S.A. 43:21-39.1 provides:

> The employer of an individual may, notwithstanding any other provisions of law, including the provisions of N.J.S.A. 18A:30-1 et seq., permit or require the individual, during a period of temporary family disability leave, to use any paid sick leave, vacation time or other leave at full pay made available by the employer before the individual is eligible for disability benefits for family temporary disability leave pursuant to P.L. 2008, c. 17 (C.43:21-39.1 et al.), except that the employer may not require the individual to use more than two weeks worth of leave at full pay.

While the new paid family leave statute may permit use of sick leave for certain family illness, Article XIV.C as currently written impermissibly permits sick leave to be used for family members not covered by the new statute. The Association may propose contract language that comes within the ambit of the new statute.

TEMPORARY EMPLOYEES AND SUBSTITUTES

The parties dispute the negotiability of this sentence in Article I.B.3 concerning temporary employees. It provides:

> There shall be excluded from the category of temporary employees all persons/students engaged in summer work, work study or CETA programs.

They also dispute the negotiability of Article I.B.4 concerning substitutes. It provides:

> Substitutes hired for a period known in advance to be in excess of sixty (60) calendar days shall be placed on scale from the first day of employment. All other substitutes working on the same assignment shall, after completion of sixty (60) calendar days of employment, be placed on scale on the sixty-first (61st) day.

The parties' recognition clause excludes temporaries and substitutes.

The Board argues that since the Association does not represent temporaries or substitutes, proposals regarding their terms and conditions of employment are not mandatorily negotiable. The Association argues that the provisions are intended to protect the work of negotiations unit employees.

The disputed language in Article I.B.3 addresses which employees are excluded from the definition of temporary employees and consequently the language may affect which employees are included in the Association's unit. Nevertheless, that language is not mandatorily negotiable because, as we said above in our discussion of the Recognition Clause, any unresolved disputes over unit composition must be resolved through clarification of unit proceedings before this agency. Article I.B.4 concerns the

terms and conditions of employment of non-unit employees and is not mandatorily negotiable.

ORDER

The following subjects are mandatorily negotiable consistent with this decision: Dress Code and Derogatory Material.

The following subjects are not mandatorily negotiable consistent with this decision: Sick Leave Verification, Bereavement Leave Verification, Recognition, Teacher Evaluations, Extended Sick Leave, Sick Leave, Temporary Employees and Substitutes.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Colligan, Fuller and Watkins voted in favor of this decision. None opposed. Commissioner Joanis was not present.

ISSUED: June 25, 2009

Trenton, New Jersey