

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE-OPERATED SCHOOL DISTRICT  
OF THE CITY OF PATERSON,

Petitioner,

-and-

Docket No. SN-2009-006

PATERSON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of several provisions of an expired collective negotiations agreement between the State Operated School District of the City of Paterson and the Paterson Education Association that the District contends are not mandatorily negotiable and may not be included in a successor agreement. The Commission finds several provisions to be not mandatorily negotiable. Those provisions involve the use of inter-school mail facilities without any limitations on whether the use would be related to the District's business; the use of class time; a requirement that the Board refrain from assigning nonteaching duties incidental to a teacher's primary tasks; restriction of the Board's right to assign staff to perform lunchroom supervision duties and related clerical duties as well as to complete attendance registers; the mileage reimbursement rate for the Child Study team; the determination of performance goals, observations, evaluation forms or Professional Improvement Plans (PIP); the removal of obsolete or inappropriate material from a teacher's personnel file; the provision of teacher editions of all texts; the provision of supplies; the criteria to become a mentor teacher; the right to request certain information about assaults; the employ of school nurses in each building; and three provisions relating to the terms and conditions of employment for employees not in the negotiations unit. The Commission also finds several of the disputed provisions to be partially negotiable. Those provisions involve the direct placement of communications in school mail boxes; a general statement of purpose as to a teacher's primary responsibilities; the assignment of clerical duties to teachers that are not incidental to the teacher's normal assignment; and two provisions that set forth that teachers will be informed about performance goals, observations, evaluations and PIP plans.

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.

P.E.R.C. NO. 2009-58

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Respondent.

Appearances:

For the Petitioner, Mark S. Tabenkin, General Counsel,  
on the brief

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum  
& Friedman, attorneys (Kathleen Naprstek Cerisano, on  
the brief)

DECISION

On July 31, 2008, the State-Operated School District of the City of Paterson petitioned for a scope of negotiations determination. The District seeks a determination that several clauses in the expired collective negotiations agreement between the District and the Paterson Education Association are not mandatorily negotiable and may not be included in a successor agreement. Five of the disputed provisions are partially negotiable. The remainder of the disputed provisions are not mandatorily negotiable.

The parties have filed briefs and exhibits.<sup>1/</sup> These facts appear.

The Association represents all instructional certificated staff and certain other staff. The parties' collective negotiations agreement expired on June 30, 2008. The parties are currently in negotiations for a successor agreement.

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

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<sup>1/</sup> Neither party filed a certification. N.J.A.C. 19:13-3.5(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

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].

Article 5 is entitled Association Rights and Privileges.

Article 5.5, entitled Mail Facilities and Mail Boxes, provides:

The Association shall have the right to use the inter school mail facilities and school mail boxes. All such materials shall be in professional taste.

The direct placement of communications in school mail boxes is a mandatorily negotiable issue. Old Bridge Bd. of Ed., P.E.R.C. No. 87-51, 12 NJPER 844 (¶17324 1986); Elizabeth Bd. of Ed., P.E.R.C. No. 83-66, 9 NJPER 21 (¶14010 1982). However, this provision goes beyond the ability to directly place communications in school mail boxes by also permitting the use of inter-school mail facilities without any limitations on whether the use would be related to the District's business. To that extent, this clause is not mandatorily negotiable under our case law interpreting the federal Private Express statutes, 18 U.S.C. §§1693-1699 and U.S.C. §§ 601-606.<sup>2/</sup> Ramapo-Indian Hills Req.

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<sup>2/</sup> The Private Express statutes establish the postal monopoly and, with narrow exceptions, bar the private carriage of letters over postal routes without paying postage to the United States Postal Service. Under our case law, materials that concern the Board's business, including the setting and enforcing of employment conditions through negotiations and  
(continued...)

Sch. Dist., P.E.R.C. No. 90-104, 16 NJPER 313 (¶21129 1990);  
Rockaway Tp. Bd. of Ed., P.E.R.C. No. 90-107, 16 NJPER 321  
(¶21132 1990), aff'd NJPER Supp. 2d (¶209 App. Div. 1991).<sup>3/</sup>

Article 7 is entitled Employee Work Hours and Work Load.  
Article 7:2-2 is entitled Work Day. Article 7:2-2.2-1,  
Elementary, Primary, and Other Staff Traditional Program,  
provides:

The in-school workday for elementary school,  
primary school, and all other staff  
represented by this Association other than  
those assigned to the high schools, or those  
whose workday is established in other  
sections of this agreement, shall begin at  
8:15 a.m. and end at 3:00 p.m. The parties  
agree that the first ten minutes of class  
time following the home room period shall be  
set aside as a silent reading period for all  
students and staff members. Effective  
September, 2005 the school day shall end at  
3:10 p.m., five (5) minutes of teaching time  
and five (5) minutes of non-instructional  
time being added to the end of the school  
day. The non-instructional time shall be  
used for self-directed professional  
activities, e.g., meeting time, preparation  
time and the like. The District shall not  
assign duties during this non-instructional  
time.

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2/ (...continued)  
grievance processing, likely fall within a statutory  
exception. Materials sent from the Association to its  
members concerning Association organizing and business  
likely does not.

3/ Both Ramapo and Rockaway are addressed in the single  
appellate decision cited.

The underlined language is in dispute. How students should spend their class time is an educational policy determination. This language would restrict the Board in its determination of how that time should be used and would significantly interfere with that policy determination. Princeton Bd. of Ed., P.E.R.C. No. 2003-15, 28 NJPER 399 (¶33143 2002). The Association's argument that the language was added as part of an agreement over an uncompensated increase in the teachers' work day is not supported by a certification so we have no basis to treat this as duty-free time. On its face, the clause specifies what students will be doing during class time. Accordingly, it is not mandatorily negotiable.

Article 10 is entitled Non-Instructional (Teaching) Duties. The District disputes four provisions in this article. The first, Section 10:1, Intent, provides:

The District and the Association acknowledge that an employee's primary responsibility is to teach and that his/her energies should, to the extent possible, be utilized to this end. . . .

This clause is mandatorily negotiable as a general statement of purpose. Mahwah Bd. of Ed., P.E.R.C. No. 83-96, 9 NJPER 94 (¶14051 1983). However, to the extent it could be interpreted to require the Board to refrain from assigning non-teaching duties incidental to a teacher's primary tasks, it is not mandatorily negotiable. Ibid.

The second disputed provision is Article 10:4-1.2. It provides:

The District agrees personnel other than staff represented by the Association shall perform non-teaching duties including but not limited to milk distribution, supervision of cafeterias or lunch rooms, the collection and processing of lunch applications and money, and the completion of attendance registers and, to the extent possible, other non-instructional clerical duties.

This provision is not mandatorily negotiable to the extent it restricts the Board's right to assign staff to perform duties incidental to the teacher's primary tasks, such as lunchroom supervision and related clerical duties as well completing attendance registers. Paterson State-Operated School Dist., P.E.R.C. No. 98-29, 23 NJPER 514 (¶28250 1997). However, it is mandatorily negotiable to the extent it prohibits the assignment of clerical duties to teachers that are not incidental to the teachers primary tasks. Ibid.

The third disputed provision is Article 10:4-2.1. It provides:

The District will hire lunchroom monitors for each school prior to the opening of the 1992-1993 school year. Every consideration will be given to Paterson residents. The number of aides assigned to each school will depend on the school population, lunchroom size and number of students to be served per shift. Lunchroom aides will be responsible for monitoring students during breakfast and lunch, at schools where programs exists, for collecting weekly lunchroom money, and for collecting, compiling and reviewing lunchroom

applications and other clerical duties associated with lunchroom operation.

It is well-settled that a District's decision to employ or not employ aides is a managerial prerogative and not mandatorily negotiable. See, e.g., North Bergen Bd. of Ed., P.E.R.C. No. 82-126, 8 NJPER 397 (¶13181 1982). The Association acknowledges that the District's decision whether or not to employ aides is not mandatorily negotiable, but asserts that the provision could be negotiable if reworded to make clear that the Board's expresses an intent to hire aides. As written, however, the provision is not mandatorily negotiable.

The fourth provision is Article 10:4-2.2. It provides:

Lunchroom aides will be given notice and opportunity to apply for other employment positions as they become available in the school or District.

Article 10:4-2.2 is not mandatorily negotiable as it pertains to lunchroom aides, who are not in the Association's negotiations unit. The Association may not negotiate terms and conditions of employment for employees not in its unit. Newark State-Operated School Dist., P.E.R.C. No. 2000-51, 26 NJPER 66 (¶31024 1999) and P.E.R.C. No. 2001-10, 26 NJPER 368 (¶31149 2000), *aff'd in pt., rev'd in pt.* 28 NJPER 154 (¶33054 App. Div. 2001).

Article 12 is entitled Salaries. The District disputes two provisions in this article. Section 12:6, Promotions, provides:



When a professional employee is promoted to a supervisory or administrative position, said employee shall, at the time of assuming said position, be placed on the appropriate step of the new salary guide which will result in an increase for the employee.

A professional employee who is promoted to a supervisory or administrative position would not be in the Association's negotiations unit. The Association may not negotiate terms and conditions of employment for employees not in its unit. Newark State-Operated School Dist.

Section 12:7-6.3 provides:

All members of the CST who are required to travel and who are not assigned more than one school per day, shall be reimbursed, based upon the submission of a form to be developed, at the prevailing IRS rate per mile and for all other reasonable expenses such as parking fees, tolls, etc.

A recently issued Department of Education regulation addresses the mileage reimbursement issue. N.J.A.C. 6A:23A-7.9(4)(c)(i) and (1), entitled "Travel Methods," became effective December 18, 2008. It provides, in pertinent part:

i. Mileage allowance . . . shall be allowed at the rate authorized by the annual State Appropriations Act, or a lesser rate at the board's discretion for an employee or board member traveling by his personally owned vehicle on business.

(1) In accordance with the OMB Circulars, if any condition in an existing negotiated contract is in conflict with the Circulars,

such as the mileage reimbursement rate, the provision of the contract will prevail.<sup>4/</sup>

Thus, negotiations over a mileage reimbursement rate greater than that provided in the State Appropriations Act ("SAA"), currently 31 cents, is preempted by the express terms of N.J.A.C. 6A:23A-7.9(4)(c)(i) and (1). Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982). The Association argues that the SAA applies only to State employees. However, by the clear terms of the Department of Education regulation, the SAA's mileage reimbursement rate limitation has been extended to local public school employees.

Article 14 is entitled Employee Evaluation. Section 14:1 is entitled Staff Observation and Professional Improvement. It provides for an Association-District Committee on Employee Evaluation. Article 14:1-2 is entitled Committee Responsibilities and has four subsections, three of which are in dispute.

Subsection 14:1-2.1 provides that the joint committee will:

Review the Professional Improvement Plan ("PIP") form, develop and explicitly communicate clear expectations about

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<sup>4/</sup> Department of Treasury Circular 08-19-OMB(VIII) (H) (3) provides that mileage reimbursement shall be made at the rate authorized by the State Appropriations Act. Section (I)(B)(6) provides that "[i]f any condition in a negotiated contract, in any administrative regulation or in any statute is in conflict with these regulations, the provisions of the contract, regulation or statute would prevail."

performance goals, observations, evaluations and PIP plans to the entire District.

Subsection 14:1-2.2 provides that the joint committee will:

Revise District-wide observations and evaluation forms based on job descriptions for teachers, instructional assistants, security officers, secretaries, and each other category of employees represented by the P.E.A. using those expectations and performance goals developed above as guidelines.

The District argues that these subsections are not mandatorily negotiable because evaluation criteria and the content of evaluations are subjects outside the scope of negotiations. The District also argues that these subsections are preempted by N.J.A.C. 6A:32-4.4, which provides that evaluation policies and procedures will be developed under the direction of the school district's chief school administrator in consultation with tenured teaching staff members.

To the extent these provisions set forth that teachers will be informed about performance goals, observations, evaluations and PIP plans, they are mandatorily negotiable. To the extent they would allow the joint committee to determine performance goals, observations, evaluation forms or PIP plans, they are not mandatorily negotiable as they intrude upon the District's managerial prerogative to develop evaluation criteria. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 161 N.J. Super. 75 (App. Div. 1978). N.J.A.C. 6A:32-4.4 provides that evaluation policies

and procedures will be developed under the direction of the chief school administrator, in consultation with tenured teaching staff members. That regulation is not inconsistent with our negotiability determination.

Subsection 14:1-2.3 sets forth that the joint committee will:

[D]evelop and implement training for administrators after the evaluation forms are completed and before the forms are disseminated.

This provision is not mandatorily negotiable as it pertains to non-unit members. Newark State-Operated School Dist.

Article 14:3 is entitled Personnel Records. The disputed part of this provision permits an arbitrator to require the removal of obsolete or otherwise inappropriate material from a teacher's personnel file. We considered an identical provision in Moorestown Bd. of Ed., P.E.R.C. No. 94-21, 19 NJPER 455 (¶24215 1993). There, we found that such language was not mandatorily negotiable since it swept too broadly and granted a third party the power to expunge any personnel documents deemed obsolete or inappropriate. Nothing warrants a different analysis here.<sup>5/</sup>

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<sup>5/</sup> Our holding and the provision do not speak to an arbitrator's right to remove unjust reprimands from a personnel file or to review disciplinary increment withholdings.

Article 16 is entitled Employee Facilities. The District disputes two subsections.

Subsection 16:1-10 sets forth that the school will supply:

Teacher editions, exclusively for each employee's use, of all texts used in each of the courses taught by the teacher.

We have held that the provision of textbooks is a matter of educational policy. Passaic Bd. of Ed., P.E.R.C. No. 2003-66, 29 NJPER 117 (¶36 2003). We have also held that the decision whether a teacher should have a teacher's edition of a textbook is also predominately one of educational policy. Ibid. The Association asserts that teachers have been forced to expend their own funds for teacher's editions. Absent a factual record that would enable us to balance the parties' respective interests, we will follow our precedent noting only that should a teacher's edition of a textbook be required, the cost of that purchase would be mandatorily negotiable.<sup>6/</sup>

Subsection 16:1-12 sets forth that the school will supply:

Individual books for each student, paper, pencils, chalk, erasers and other such material required in daily teaching responsibility shall be available.

The determination as to what supplies are necessary to fulfill the District's educational mission is a managerial prerogative. Delaware Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER

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<sup>6/</sup> We noted earlier that neither party filed any certifications.

840 (¶17323 1986); Burlington Cty. College, P.E.R.C. No. 90-13, 15 NJPER 513 (¶20213 1989). The Association asserts that teachers have been forced to expend their own funds for student supplies.<sup>7/</sup> While the cost of supplies teachers would be required to purchase may be mandatorily negotiable, this provision would encroach too greatly on the District's managerial prerogative to determine which supplies are necessary to meet its educational objectives. This provision is not mandatorily negotiable.

Article 22 is entitled Staff Development and Educational Improvement. Subsection 22:8-4 is entitled Qualifications of Mentor Teachers. It sets forth four requirements for a mentor teacher. This subsection is preempted by N.J.A.C. 6A:9-8.4(d), which specifically sets forth nine requirements for becoming a mentor teacher. Moreover, absent the regulation, it would be a managerial prerogative to determine the criteria to become a mentor teacher. Passaic Bd. of Ed., P.E.R.C. No. 2006-75, 32 NJPER 98 (¶48 2006).

Article 25 is entitled Protection of Employees, Students and Property. Section 25:5 is entitled Reporting Assaults. Two portions of this section are in dispute. The first is subsection 25:5-2, State District Superintendent of Schools. It provides:

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<sup>7/</sup> We note again that neither party filed any certifications.

Such notification [of cases of assault] shall be immediately forwarded to the immediate Supervisor and School District Counsel who shall comply with reasonable requests from the employee for information in the possession of the State District Superintendent relating to the incident or the persons involved, and shall act in appropriate ways as liaison between the employees, the police, and the courts.

This subsection is not mandatorily negotiable. Employees may negotiate for a right to request information about assaults on them, subject to a district's right to deny requests that are unreasonable given concerns about the confidentiality of ongoing criminal proceedings or student records. Passaic Bd. of Ed., P.E.R.C. 2006-75. However, this provision as written extends beyond a simple procedural right to request information and restricts the District from denying unreasonable requests. Moreover, this provision encroaches too greatly on the District's policy determinations as to who interacts with the police and the courts in assault matters. Ibid.

The second section is 25:8, Nurses. It provides:

A school nurse shall be scheduled to be in each building.

Requiring a school nurse in each building involves minimum staffing levels, a subject that is not mandatorily negotiable. Paterson Bd. of Ed., P.E.R.C. No. 92-118, 18 NJPER 303 (¶23130 1992). While the Association argues that the number of assaults has risen and that the student population cannot be adequately

serviced without having a school nurse scheduled in each building, a provision that intrudes upon the District's managerial prerogative to determine minimum staffing levels is not negotiable.

ORDER

The following provisions are not mandatorily negotiable:

Article 5.5 to the extent it permits the use of inter-school mail facilities without any limitations on whether the use would be related to the District's business.

Article 7:2-2.2-1.

Article 10:1 to the extent it could be interpreted to require the Board to refrain from assigning non-teaching duties incidental to a teacher's primary tasks.

Article 10:4-1.2 to the extent it restricts the Board's right to assign staff to perform lunchroom supervision duties and related clerical duties as well to complete attendance registers.

Article 10:4-2.1.

Article 10:4-2.2.

Article 12:6.

Article 12:7-6.3

Articles 14:1-2.1 and 14:1-2.2 to the extent these provisions would allow the joint committee to determine performance goals, observations, evaluations forms or PIP plans.

Article 14:1-2.3.



Article 14:3.

Article 16:1-10.

Article 16:1-12.

Article 22:8-4.

Article 25:5-2.

Article 25:8.

The following provisions of the contract are mandatorily negotiable.

Article 5.5 to the extent it concerns the direct placement of communications in school mail boxes.

Article 10:1 to the extent it is a general statement of purpose.

Article 10:4-1.2 to the extent it prohibits the assignment of clerical duties to teachers that are not incidental to the teachers normal assignment.

Articles 14:1-2.1 and 14:1-2.2 to the extent these provisions set forth that teachers will be informed about performance goals, observations, evaluations and PIP plans.

BY ORDER OF THE COMMISSION

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

ISSUED: April 30, 2009

Trenton, New Jersey