

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ENGLEWOOD BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-97-85

ENGLEWOOD TEACHERS' ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of several provisions in an expired contract between the Englewood Board of Education and the Englewood Teachers Association which the Association has proposed for inclusion in a successor contract. The Commission finds not mandatorily negotiable provisions or portions of provisions concerning: academic freedom; qualifications for summer school positions; standards for Board decision-making concerning teacher transfers; voluntary transfers and assignments which would establish a substantive limit on the Board's right to deny a transfer request; maintenance of an attendance register; employment of non-tenured teaching staff; teacher observations and evaluations, to the extent they restrict the Board's right to select its evaluators; evaluation procedures, to the extent it requires that an evaluation be in narrative form; and, an Addendum which would incorporate certain non-negotiable subjects into the contract in the event a change in the case law or a statute makes them mandatorily negotiable.

The Commission finds mandatorily negotiable provisions or portions of provisions concerning: procedural issues related to increment withholdings; notice of involuntary transfers; requirement that qualified teachers who have applied for positions to be interviewed; consideration for summer school positions; written salary notices or contracts by April 30th; transporting students; duration of classroom observation; contents of performance reports; supporting data in performance reports; and, discussion, input or consultation over the school calendar.

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. 98-75

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Petitioner,

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Docket No. SN-97-85

ENGLEWOOD TEACHERS' ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Weiner Lesniak, attorneys
(Eric Martin Bernstein, of counsel)

For the Respondent, Springstead & Maurice, attorneys
(Alfred F. Maurice, of counsel)

DECISION

On February 24, 1997, the Englewood Board of Education petitioned for a scope of negotiations determination. The Board seeks a determination that several provisions in the expired contract between it and the Englewood Teachers Association are not mandatorily negotiable and may not be included in a successor contract.

The parties have filed briefs and exhibits. These facts appear.

The Association represents teachers and certain other employees. The parties entered into a collective negotiations agreement effective from July 1, 1993 through June 30, 1996.

The Association maintains that the Board's petition is a premature request for an advisory opinion because no grievances

have been filed under the disputed contract articles. It also asserts that the petition has had a "chilling effect" on mediation. It concedes that several provisions are not mandatorily negotiable, but argues that they would be negotiable with hypothetical language changes.

The Commission's authority under N.J.S.A. 34:13A-5.4d does not extend to issuing advisory opinions in scope of negotiations matters. However, a controversy may exist even though no grievance has been filed. The Board disputes the negotiability of several clauses in the expired contract which the Association seeks to retain in a successor contract. With respect to these clauses, there is a dispute under N.J.A.C. 19:13-2.2(a)(4)(i).

We accept without further analysis the Association's concessions that several contract provisions are not mandatorily negotiable. Given our lack of jurisdiction to issue advisory opinions in scope of negotiations matters, we do not consider whether these contract provisions would be mandatorily negotiable if hypothetically modified.^{1/}

^{1/} The contract provisions that the Association concedes are not mandatorily negotiable without hypothetical language changes are: Article VIII, Compensation, Section B(2)(c); Article VIII, B(2)(e); Article IX, Sick Leave, Section D; Article XVI, Section B; and Article XXII, Section C. The Board also agrees with the Association's suggestion that Article XVII, Section B should be amended to include the words "whenever possible" after the requirement to make teacher class and subject assignments by June 1. Given the parties' agreement on how this section should read, we do not issue a scope of negotiations determination.

Our jurisdiction is narrow. We consider only the abstract negotiability of the disputed clauses. 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]

Article VII, is entitled Academic Freedom. Section C states:

Teachers shall be guaranteed full freedom in classroom presentation and discussion and may introduce controversial material and express personal opinions relevant to the course content and the maturity of the students as long as those opinions comply with the Laws and Constitution of New Jersey and the United States.

Section C is not mandatorily negotiable. Contract clauses concerning the introduction of "controversial" material relate to curriculum and course content and are matters of non-negotiable educational policy. New Milford Bd. of Ed.,

P.E.R.C. No. 81-36, 6 NJPER 451 (11231 1980), aff'd NJPER Supp.2d

101 (¶84 App. Div. 1981); see also Milltown Bd. of Ed., P.E.R.C. No. 97-66, 22 NJPER 28, 29 (¶28020 1996); South Orange-Maplewood Bd. of Ed., P.E.R.C. No. 97-54, 22 NJPER 411, 412 (¶27225 1996); Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 95-15, 20 NJPER 334, 339 (¶25175 1994), recon. den. P.E.R.C. No. 95-16, 20 NJPER 378 (¶25190 1994); Rutgers, the State Univ., P.E.R.C. No. 91-81, 17 NJPER 212 (¶22091 1991).

Article VIII is entitled "Teachers' Compensation."

Section B(2) provides:

Employment increments may be withheld only in accordance with the following [procedures.]

The Board contends that Section B(2) is not mandatorily negotiable because this introductory sentence does not recognize the Board's right, specified in N.J.S.A. 18A:29-14, to withhold an adjustment increment, an employment increment, or both. The Association responds that Section B(2) does not limit the Board's power to withhold an adjustment increment.

Procedural issues concerning increment withholdings are mandatorily negotiable if they are not preempted by statute and do not significantly interfere with educational policy determinations. Greater Egg Harbor Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 88-37, 13 NJPER 813 (¶18312 1987). Section B(2) does not purport to limit a board's authority to withhold an adjustment increment. It simply sets out procedures that pertain only to the withholding of employment increments. To the extent those

procedures are otherwise negotiable, this sentence is mandatorily negotiable.^{2/}

Article XVI is entitled Promotions. Section A(3) provides:

All qualified teachers who have submitted an application for the positions shall be interviewed and applicants not being hired for the position shall be notified as soon as possible after the position is filled.

The Board contends that the requirement to interview all qualified candidates would significantly interfere with its right to fill vacancies with a qualified individual. It posits a situation where the superintendent would be required to interview numerous minimally qualified applicants for a new teaching position. The Association counters that the interview requirement does not interfere with the Board's right to decide whom to hire.

As a rule, an employer has a prerogative to determine promotional qualifications and criteria, but must negotiate over promotional procedures. See, e.g., State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90 (1978); Rutgers, the State Univ. and Rutgers Council of AAUP Chapters, 256 N.J. Super. 104, 118-19

^{2/} As noted, the Association concedes the non-negotiability of Section B(2)(e), requiring that, in the year following a withholding, a teacher must be placed on the salary guide step which he or she would have attained absent the withholding, unless the Board again withholds the teacher's increment. It also urges that "the requirement that the Board confirm its intention not to restore the withheld increment" does not violate N.J.S.A. 18A:29-14. We do not read Section B(2)(e) as requiring such notification and do not determine the negotiability of such a provision.

App. Div. 1992), aff'd 131 N.J. 118 (1993); State v. State Troopers NCO Ass'n, 179 N.J. Super. 80, 90-91 (App. Div. 1981). Included among negotiable procedures are guarantees that employees meeting all of the employer's promotional criteria will be considered for promotion. State Troopers, 179 N.J. Super. at 93; South Orange-Maplewood Bd. of Ed.; Camden Cty., P.E.R.C. No. 88-115, 14 NJPER 350 (¶19135 1988). We recognize that the requirement to interview qualified applicants may be more burdensome than a requirement to "consider" such applicants. However, we find that Section A(3) is mandatorily negotiable because it does not impair the Board's right to select the individual it deems best suited for a position or limit its right to set the qualifications for a position.

The Board also challenges the negotiability of Article XVI, Section C(3). That section provides:

Priority for summer school positions shall be given to teachers currently employed by the Englewood Board of Education. In filling such a position, consideration shall be given to a teacher's area of competence, major or minor field of study, quality of teaching performance, attendance record and length of service in the Englewood Public School District.

The Association suggests that if the word "consideration" is substituted for "priority" in the first sentence, the section is mandatorily negotiable. The Board responds that, even with such a change, the section would infringe on its right to set criteria for filling summer school positions. Since there is a dispute over the Association's proposal, we consider its negotiability.

A provision that employees be given consideration for summer school positions is procedural and negotiable. See Camden Cty. College, P.E.R.C. No. 97-22, 22 NJPER 357 (¶27186 1996) (finding mandatorily negotiable provision that qualified unit members be given consideration for "overload" summer teaching assignments). Therefore, the first sentence of Section C(3), as proposed by the Association, is mandatorily negotiable.

The second sentence of Section C(3) is not mandatorily negotiable. The Board has a managerial prerogative to set qualifications for summer school positions. Old Bridge Tp. Bd. of Ed.; Edison Tp. Bd. of Ed., P.E.R.C. No. 83-100, 9 NJPER 100 (¶14055 1983).

The Board maintains that several provisions of three contract articles are not mandatorily negotiable because they infringe on its managerial prerogative to transfer teaching staff members. The Association counters that the disputed articles involve procedural matters.

Article XVII, Teacher Assignment, Section A, states:

All teachers shall have the opportunity to request a change in teaching assignment at any time. When advisable and feasible, as determined by the Board of Education, the request will be honored.

The substantive decision to transfer or reassign an employee is not mandatorily negotiable, nor are the criteria for selecting employees for transfer or reassignment. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156 (1978); Local 195,

88 N.J. at 418; see also N.J.S.A. 34:13A-25. However, related procedures are mandatorily negotiable. Local 195; Ridgefield Park. We agree that the second sentence of Section A is not mandatorily negotiable because it establishes a standard for Board decision-making concerning teacher transfers. See Fairview Bd. of Ed., P.E.R.C. No. 80-18, 5 NJPER 378 (¶10193 1979) (clause requiring Board to continue practice of not transferring teachers in an arbitrary and capricious manner not mandatorily negotiable because it addresses Board's decisions concerning teacher transfers).^{3/}

Article XVIII is entitled Voluntary Transfer and Assignments. Section D provides:

In the determination of requests for voluntary reassignment and/or transfer, the wishes of the individual teacher shall be honored to the extent that the transfer does not conflict with the instructional requirements and best interests of the school system. No such request shall be denied arbitrarily.

This provision is not mandatorily negotiable. It establishes a substantive limit on a board's right to deny a transfer request as opposed to a procedural right to have a request considered.

Ridgefield Park; Piscataway Bd. of Ed., P.E.R.C. No. 87-151, 13 NJPER 508 (¶18189 1987); National Park Bd. of Ed., P.E.R.C. No. 87-102, 13 NJPER 194 (¶18082 1987); Edison Tp. Bd. of Ed.

^{3/} The Board's challenge to Article XVII, Section B is considered together with its challenge to Article XXIII, Section A.

Article XIX is entitled Involuntary Transfer and Reassignments. Section A provides:

Notice of an involuntary transfer or reassignment shall be given to teachers as soon as practicable, and in cases of involuntary transfer or reassignment effective in the following school year not later than May 30th except in cases of unforeseen circumstances beyond the control of the Board.

The Board contests the negotiability of the underlined portion of Section A, contending that it impairs its right to make transfers or reassignments. We disagree. Provisions requiring notice of involuntary transfers are procedural and negotiable. See Old Bridge Bd. of Ed. (clause requiring notice of involuntary transfer by April or as soon as practicable is mandatorily negotiable) and Fairview (clause requiring notice of involuntary transfers by June, except in emergencies, is mandatorily negotiable). Like the clauses in Fairview and Old Bridge, Section A preserves the Board's right, in certain circumstances, to make transfers after the notice date. The clause does not limit the Board's ability to make mid-year transfers: the May 30 deadline applies only to transfers to take effect at the beginning of the next school year. Notice of mid-year transfers need only be given "as soon as practicable."

Article XXII is entitled "Non-Teaching Duties." The Board disputes the negotiability of Sections A(2) and A(4),

stating, respectively, that teachers shall not be required to keep an attendance register or transport students.

Non-teaching duties that are either incidental to teaching or related to student safety, security and control are not mandatorily negotiable. Byram Tp. Bd. of Ed., P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd 152 N.J. Super. 12 (App. Div. 1977); Bayonne Bd. of Ed., P.E.R.C. No. 87-109, 13 NJPER 268 (¶18110 1987). Maintaining an attendance register is incidental to the duty of providing individual and class instruction. Garfield Bd. of Ed. P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989). Therefore, Section A(2) is not mandatorily negotiable.

Section A(4) is mandatorily negotiable. The Board has not explained how "transporting students" is incidental to teaching or how the clause interferes with its educational mission. Nor does "transporting students" fall within the range of non-classroom assignments that we have found to be related to student safety, security and control. See Clifton Bd. of Ed., P.E.R.C. No. 96-10, 21 NJPER 284 (¶26182 1995); Florham Park Bd. of Ed., P.E.R.C. No. 93-64, 19 NJPER 117 (¶24056 1993) (playground supervision); Long Branch Bd. of Ed., P.E.R.C. No. 93-8, 18 NJPER 403 (¶23182 1992) (coverage of nurse's office); Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78, 81 (¶18036 1986) (hall duty and supervising the loading and unloading of buses). Unlike the above assignments, "transporting students" does not

appear to us to be an integral part of ensuring student safety or supervision during the school day or when arriving at or departing from school.^{4/}

The Board maintains that two contractual notice provisions are not mandatorily negotiable. Article XXIII is entitled Fair Dismissal Procedure. Section A states:

On or before April 30th of each year, the Board shall give to each non-tenured teacher continuously employed since the preceding September 30th either:

1. A written offer of contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary and benefits as may be required by law or agreement between the Board and the ETA.
2. A written notice that such employment will not be offered.

Article XVII, Teacher Assignment, Section B provides in pertinent part:

All teachers shall be given written salary notices or contracts no later than April 30th.

The Board argues that the April 30 notice requirement in these articles conflicts with N.J.S.A. 18A:27-10, which gives

^{4/} The Board notes that Hunterdon held to be not mandatorily negotiable a clause: (1) stating that teachers shall not supervise the loading and unloading of buses, drive students, or perform library duties and (2) requiring that hall duty be shared with administrators. Hunterdon did not discuss the portion of the clause pertaining to "driving students" so we do not find it to be controlling.

boards until May 15 to notify non-tenured teachers of their renewal or non-renewal. The Association does not respond to the Board's challenge to Article XVII, Section B, but contends that Article XXIII, Section A was intended to incorporate the notice requirements in N.J.S.A. 18A:27-10 which, at the time the contract was written, included an April 30 notice date. The Association maintains that "the date should be May 15th." Since the Association does not argue that it has negotiated for an earlier notice date for non-tenured teachers than that contained in N.J.S.A. 18A:27-10, we do not further discuss Article XXIII, Section A or Article XVII, Section B.

Article XXIII, Fair Dismissal Procedure, Section F, provides:

Should the Board fail to give a non-tenured teacher either an offer of contract for employment for the next succeeding year or a notice that such employment shall not be offered and upon request by the teacher to the Superintendent, a statement of reasons and hearing, and in the event of such hearing shall fail to make and serve a copy of determination, all within the time and in the manner provided by this Article, the Board shall be deemed to have offered to that teacher continued employment for the next succeeding school year and upon the terms and conditions of employment as may be required by law or agreement between the Board and the ETA.

The Board maintains that N.J.S.A. 18A:27-11 and N.J.S.A. 18A:27-12 preempt negotiations over this clause. To the extent the clause provides for automatic reemployment in circumstances other than those prescribed by statute, we agree. In Atlantic

Highlands Bd. of Ed., P.E.R.C. No. 93-40, 19 NJPER 7 (¶24005 1992), we accepted the Association's concession that a clause similar to Article XXIII, Section F was not mandatorily negotiable. We also held to be not mandatorily negotiable a clause stating that violations of contract provisions concerning the renewal or termination of non-tenured employees would be considered grounds for reinstatement. The same result obtains here. Title 18A includes a comprehensive framework for the employment of non-tenured teaching staff members and the acquisition of tenure. Long Branch Bd. of Ed., P.E.R.C. No. 92-79, 18 NJPER 91 (¶23041 1992). Title 18A: (1) requires boards to give non-tenured teaching staff members, by May 15, an offer of re-employment or a notice of non-renewal, N.J.S.A. 18A:27-10; (2) states that a board is deemed to have offered an employment contract where it has not provided the required notice, N.J.S.A. 18A:27-11; and (3) provides that the offer created by N.J.S.A. 18A:27-11 expires unless the teaching staff member accepts the contract in writing by June 1. N.J.S.A. 18A:27-12. Title 18A also provides that teaching staff members may obtain tenure only after employment by a board for one of the time periods specified in N.J.S.A. 18A:28-5 and contemplates that non-tenured teachers may be offered up to three one-year contracts. Long Branch. Given this detailed statutory scheme, we conclude that N.J.S.A. 18A:27-10 through -12 expressly, specifically and comprehensively set forth those circumstances where a board's non-adherence to

contractual requirements is deemed to result in an offer of reemployment. Section F is not mandatorily negotiable to the extent it conflicts with N.J.S.A. 18A:27-12 or results in an employment contract where the Board violates procedural requirements other than those in N.J.S.A. 18A:27-10.

The Board next contends that all of Article XXVII, Teacher Evaluations, is not mandatorily negotiable because this subject is preempted by N.J.A.C. 6:3-4.1 and N.J.A.C 6:3-4.3, governing the evaluation of tenured and non-tenured teaching staff members. In the alternative, it argues that certain sections of the article are not mandatorily negotiable because they interfere with the Board's right to select evaluators, conduct informal observations, determine the length of an observation, and establish evaluation criteria. The Association responds that the article restates statutes and regulations and does not infringe upon evaluation criteria or the selection of evaluators.

Evaluation criteria and the selection of evaluators involve sensitive educational policy decisions and are not mandatorily negotiable regardless of the presence or absence of preempting legislation or regulations. Bethlehem, 91 N.J. at 46-47; Rutgers, 256 N.J. Super. at 118-19. However, the teacher evaluation regulations do not foreclose negotiations on all aspects of procedures for evaluating teachers. Bethlehem, 91 N.J. at 46-47. Therefore, we cannot assume that all the provisions in Article XXVII are not mandatorily negotiable and we will not

independently assess the negotiability of each provision in Article XXVII in the absence of particularized arguments.

We turn to the Board's arguments that the following sections of Article XXVII are not mandatorily negotiable:

Section A(1):

1. Teachers shall be observed through classroom visitations by a certified supervisor to be followed by an evaluation conference between the teacher and evaluator and by a written performance report.

Section A(5):

The duration of the observation should last for a minimum of one class period in the high and middle schools, and for the duration of one complete subject lesson in the elementary school.

Section A(7)

The performance report shall be written in narrative form and shall include, if applicable, but not limited to the following:

- a. Strengths of the teacher
- b. Areas needing improvement
- c. Supporting data for statements and/or comments
- d. Supervisory steps being taken to assist the teacher to improve instruction

Section C(2)

2. Teacher shall be evaluated only by appropriately certified personnel who are designated by the Board of Education to supervise instruction.

Section A(1) and C(2) are not mandatorily negotiable to the extent they restrict the Board's prerogative to select its evaluators. Sussex Cty. Community College, P.E.R.C. No. 96-18, 21 NJPER 350 (¶26216 1995). While the Association maintains that

these sections incorporate the requirements of N.J.A.C. 6:3-4.1(a) and N.J.A.C. 6:3-4.3(a), evaluator qualifications are not a mandatorily negotiable term and condition of employment and are not appropriately included in a negotiated agreement. Rutherford Bd. of Ed., P.E.R.C. No. 85-96, 11 NJPER 223 (¶16086 1985). Cf. Edison (procedural aspects of teacher evaluation regulations may be incorporated in agreement).

Section A(1) is mandatorily negotiable to the extent it requires a written performance report following formal observations but is not mandatorily negotiable to the extent, as the Board contends, it requires a written report after every informal classroom visit. See Fair Lawn Bd. of Ed., P.E.R.C. No. 84-39, 9 NJPER 648 (¶14281 1983)

Section A(5) is basically procedural: it does not affect evaluation criteria and is designed to ensure that formal observations are long enough to enable a supervisor to assess a teacher's performance in accordance with Board-established criteria. We note that N.J.A.C. 6:3-4.1(a)1 requires that statutorily-mandated observations of non-tenured teachers be conducted for a minimum duration of one class period in the secondary schools and one complete subject lesson in the elementary schools. With respect to non-tenured teachers, Section A(5) incorporates this procedural provision. With respect to tenured teachers, the clause is mandatorily negotiable. However, consistent with Fair Lawn, the clause cannot be construed to set a minimum duration for informal classroom visits.

The Board maintains that Section A(7) is preempted by N.J.A.C. 6:3-4.1(d)(1) and (2) and N.J.A.C. 6:3-4.3(f)(1) and (2), which set forth minimum requirements for annual performance reports. We disagree. Section A(7) appears to govern performance reports following classroom visits, while Section B of Article XXVII concerns the annual evaluation. In any case, the parties may negotiate procedural provisions concerning evaluations so long as the provisions do not conflict with N.J.A.C. 6:3-4.1 and N.J.A.C. 6:3-4.3.

The introductory language to Section A(7) is not mandatorily negotiable to the extent it requires that an evaluation be in narrative form. Rutgers. However, Section A(7)(a) and (b) are essentially procedural and protect the teachers' mandatorily negotiable interest in being notified of their specific strengths and weaknesses. Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶17323 1986); Union City Bd. of Ed., P.E.R.C. No. 84-79, 10 NJPER 46 (¶15026 1984). Sections (c) and (d) require that an evaluation report include, "if applicable", supporting data for statements and a description of any supervisory steps taken to improve a teacher's instruction. We read the provisions as requiring such information only if available. As such, the provisions are basically procedural and protect the teachers' interest in ensuring that pertinent information available to administrators is included in an evaluation report. The provisions do not infringe on the Board's

right to apply evaluation criteria and make evaluative judgments where supporting data, or information on supervisory assistance, may not exist.

The parties also dispute the negotiability of Sections B and C of Article XXXII (underscored portion). These sections provide:

B. The Board, in determining said school calendar, will consider the recommendations of the ETA and will advise and consult with the ETA concerning any deviations from such recommendations prior to the adoption of or any changes in the official school calendar.

C. The Board shall adopt the school calendar no later than the first regular Board Meeting in April, and said calendar shall be attached hereto and made a part hereof as Appendix III.

Establishing the school calendar in terms of when school begins and ends is not mandatorily negotiable. Woodstown-Pilesgrove Reg. School Dist. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980); cf. Burlington Cty. College Faculty Ass'n v. Burlington Cty. College, 64 N.J. 10 (1973). However, because the school calendar affects teachers' terms and conditions of employment, clauses requiring input, discussion or consultation concerning the school calendar are mandatorily negotiable. Willingboro Bd. of Ed., P.E.R.C. No. 92-48, 17 NJPER 497 (122243 1991). Therefore, Section B is mandatorily negotiable: it requires discussion with the Association but preserves the Board's right to adopt the school calendar. With respect to Section C,

the Association suggests that the words "if possible" could be inserted after the requirement to adopt the calendar in April. We view this an implicit concession that the clause is not mandatorily negotiable as written.

Finally, the Board contends that the "Addendum" to the agreement is not mandatorily negotiable. It provides:

The provisions set forth in this Addendum shall not be enforceable so long as they are held to be illegal subjects of bargaining by PERC and or the Courts. In the event that, by virtue of any subsequent PERC and or Court rulings or legislative enactment, said provisions(s) shall be returned to the main body of the Agreement and shall be in full force and effect for the duration of the Agreement.

Following this paragraph are two provisions: one stating that a vacancy shall not be filled by means of an involuntary transfer or reassignment if there is a qualified volunteer available and one in which the Board agrees to keep class size at an acceptable number and consider Department of Education recommendations on class size. The Association concedes that the addendum is not currently an enforceable part of the agreement, but argues that parties could agree to include the provisions should they become lawful subjects of negotiations. However, clauses which state that non-negotiable subjects will become a part of the contract in the event of a change in the case law or a statute are not mandatorily negotiable. North Bergen Bd.

of Ed., P.E.R.C. No. 90-77, 16 NJPER 173 (¶21072 1990); Ridgefield Park Bd. of Ed., P.E.R.C. No. 84-50, 9 NJPER 670 (¶14292 1983).

ORDER

A. The following provisions are not mandatorily negotiable:

Article VII, Section C

Article XVI, Section C(3) (second sentence)

Article XVII, Section A (second sentence)

Article XVIII, Section D

Article XXII, Section A(2)

Article XXIII, Section F

Article XXVII, Section A(1), to the extent it restricts the Board's right to select its evaluators, and C(2)

Addendum

B. The following provisions are mandatorily negotiable:

Article VIII, Section B(2)

Article XIX, Section A

Article XVI, Section A(3)

Article XVI, Section C(3) (first sentence as proposed by the Association)

Article XXII, Section A(4)

Article XVII, Section B

Article XXVII, Sections A(5) and A(7) (a), (b), (c)
and (d)

Article XXXII, Section B

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioners Boose and Klagholz were not present.

DATED: November 20, 1997
Trenton, New Jersey

ISSUED: November 21, 1997