P.E.R.C. NO. 2005-9

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-2004-052

PATERSON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of several contract articles in an expired collective negotiations agreement between the State-Operated School District of the City of Paterson and the Paterson Education Association.

The Commission finds mandatorily negotiable: a portion of an article which provides that grievance documents shall not be kept in the personnel files of any participants, but instead shall be kept in a separate file; the portion of an article entitled evaluation of students which provides that the administration consult with a teacher before changing a grade and that the grade change be initialed by the administrator; an article that prohibits public criticism, except in emergency situations; an article requiring that certain information be provided to the union (if the District deems a future request unreasonable, it can decline to provide the information and the Association can seek to prove the reasonableness of its demand); a clause providing that the school calendar be set by the District after consultation with the Association; an article that limits the processing of class size and assignments grievances to level two; an article requiring that job descriptions be included in the contract; an article concerning salary guide placement; an article concerning job security for instructional assistants; a clause that prohibits disciplinary transfers except to the extent it requires the Commission to resolve claims that a transfer within a work site is disciplinary; a clause concerning observations except to the extent it would allow for shorter observations of non-tenured teachers than required by N.J.A.C.

6:3-4.1; a portion of a clause that allows teachers to request an evaluation by a relevant observer, such as a department chairperson; a portion of a clause providing that procedural defects of non-tenured non-renewals may be submitted to the grievance procedure; an article concerning NJEA convention leave; articles dealing with paid injury leaves except to the extent they would allow for paid leave beyond year without charge to annual or accumulated sick leave; an article concerning procedures for reporting injuries, and a non-discrimination clause.

The Commission finds not mandatorily negotiable: a portion of a clause concerning evaluation of students that would give a teachers the exclusive right to determine grades; check-in procedures which requires that employees sign in and out; a portion of an article in instructional planning to the extent it allows a teacher to decide how best to prepare lesson plans; an article that bases class size on certain considerations; an article concerning non-instructional duties; an article dealing with teacher certification requirements; a clause concerning observations to the extent it would allow for a shorter observation of non-tenured teachers than required by N.J.A.C. 6:3-4.1; a clause which provides that due weight be given to background, experience and attainment of all applicants for positions; a portion of a clause which sets forth the qualifications for evaluators; a clause providing that the District may ask for a physician's certificate; and a portion of a representation fee article concerning the percentage used to calculate the agency fee.

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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Respondent.

Appearances:

For the Petitioner, The Murray Law Firm, LLC, attorneys
(Robert E. Murray, on the brief)

For the Respondent, Bucceri & Pincus, attorneys
(Louis P. Bucceri, on the brief)

DECISION

On March 10, 2004, the State-Operated School District of the City of Paterson petitioned for a scope of negotiations determination. The District seeks a negotiability determination concerning numerous contract articles that the Paterson Education Association seeks to retain in a successor contract with the District.

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

The Association represents all instructional certificated staff and certain other staff. The parties' collective

negotiations agreement expired on June 30, 2004. 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 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]

We have a body of case law that applies this negotiability balancing test to provisions very similar to many of the clauses

at issue, and the parties often cite those decisions in support of their positions. When that is the case, we apply our case law to a given provision without detailing the parties' arguments.

Separate Grievance File

Article 3:5-3 is entitled Separate Grievance File. It provides:

> All documents, communications and records dealing with the processing of a grievance shall be filed in a separate grievance file in the office of the Superintendent and shall not be kept in the personnel file of any of the participants.

The District argues that the underlined language infringes on its managerial prerogative to determine the content of personnel files. The Association responds that this provision deals solely with documents related to the "processing of a grievance" and does not bar the inclusion in personnel files of disciplinary memos or evaluations that might result in a grievance filing. It states that Article 3:5-3 is intended to prevent retribution against an employee for engaging in the grievance process and, further, to guard against unfounded discipline being included in a personnel file by the indirect means of including grievance records.

The Association has a legitimate interest in ensuring that an employee is not adversely affected by having references to participation in the grievance process included in his or her personnel file. We have found similar clauses to be mandatorily

negotiable. See South Brunswick Tp., P.E.R.C. No. 86-115, 12 NJPER 363 (¶17138 1986) (proposal to remove unfounded complaints from personnel file mandatorily negotiable; additional contract language allowed department to maintain a separate record of such complaints). While the District asserts that it seeks to retain grievance material in personnel files for informational purposes only, it does not explain its interest in having the material included in such files, as opposed to the separate grievance file contemplated by the article. Therefore, a balancing of the parties' interests weighs in the Association's favor.

Evaluation of Students

Article 4:5 is entitled Evaluation of Students. It provides:

> The teacher shall maintain the exclusive right and responsibility to determine the grades and other evaluations of students within the grading policies of the Paterson School District based upon his/her given professional judgment of available criteria pertinent to any given subject area or activity to which s/he is responsible. Any change in grade shall be initialed by the administrator making or authorizing the change on the permanent record form of the student.

The District maintains that the establishment of a student grading system is an educational policy decision and a managerial prerogative and that Article 4:5 is therefore not mandatorily negotiable. Middletown Tp. Bd. of Ed., P.E.R.C. No. 98-74, 24 NJPER 19 (¶29013 1997). The Association concedes both that the

first sentence of the article is not mandatorily negotiable and that the District has a prerogative to change a grade assigned by a teacher. However it contends that the last sentence of the article is mandatorily negotiable because it ensures that any grade change cannot later be attributed to the teacher and, further, guards against fraudulent changes by third parties.

Student grading policies predominantly concern educational policy and are usually not mandatorily negotiable. See, e.g., Passaic Bd. of Ed., P.E.R.C. No. 2003-66, 29 NJPER 117 (¶36 2003). However, we have upheld the negotiability of a requirement that an administrator consult with a teacher before changing a grade, reasoning both that it did not interfere with a Board's authority to set final grades and gave teachers an opportunity to consult on matters within their expertise and affecting their employment conditions. Passaic.

Article 4:5's requirement that a grade change be initialed by an administrator preserves the Board's authority to determine final grades. The Board does not offer any particularized arguments as to how the requirement significantly interferes with its grading policy and, further, we believe it affects terms and conditions of employment by ensuring that a grade change cannot later be attributed to the teacher. In this posture, the last sentence of the clause is mandatorily negotiable.

Public Criticisms

Article 4:7 is entitled Criticisms - Public. It provides:

> Any questions or criticisms by a supervisor, administrator or Board member of any employee or his/her instructional methodology shall be made in confidence and not in any public gathering nor in the presence of students, parents, or other employees, with the exception of Association representatives acting in that capacity. District orders made to staff members by administration in emergency situations (i.e., fire drills, etc.) may be excluded from the provisions of the Section.

The District argues that the first sentence is not mandatorily negotiable because it interferes with its managerial prerogative to initiate discipline. The Association counters that the article was expressly drafted with a second sentence that provides an exception permitting public criticism "when required by necessity" (Association's Brief at 13). The District does not address the exception or challenge the Association's claim.

Provisions prohibiting all public criticism of teachers are not mandatorily negotiable. See, e.g., Flemington-Raritan Reg. Bd. of Ed., P.E.R.C. No. 90-58, 16 NJPER 40 (¶21018 1989). However, we have upheld the negotiability of clauses that barred public criticism "except in an emergency" or that prohibited public criticism "without justifiable, substantive reasons." See Egg Harbor Tp. Bd. of Ed., P.E.R.C. No. 2000-39, 26 NJPER 18 (¶31004 1999); Monroe Tp. Bd. of Ed., P.E.R.C. No. 93-9, 18 NJPER

428 (¶23194 1992). We reasoned that these provisions accommodated employees' interest in not being unjustifiably humiliated with the Board's interest in criticizing a teacher publicly when necessary. These cases govern here.

While the first sentence of Article 4:7 bars all public criticism, it must be read together with the second sentence, which limits the reach of the article. So long as the article is understood to permit public criticism when justified or needed, it is mandatorily negotiable.

Information

Article 5:1 is entitled Information and provides:

> The District agrees to furnish to the Association in response to reasonable requests from time to time all available information concerning the financial resources of the District, including, but not limited to: annual financial reports and audits, register of certificated personnel, agendas and minutes of all Advisory Board meetings, census data, individual and group employee health premiums and experience figures, names of all employees, and such other information concerning terms and conditions of employment, together with information which may be necessary for the Association to process any grievance complaint.

The District acknowledges that it must provide information to the union in order for it to fulfill its duties. However, it contends that this provision could be construed to require the production of confidential documents or items unrelated to terms

and conditions of employment. The Association counters that the District cites no precedents or problems.

An employer has an obligation to provide pertinent information in connection with grievance processing and collective negotiations; a refusal to supply relevant information violates N.J.S.A. 34:13A-5.4(a)(5). State of New Jersey, P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), recon. den. P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987), aff'd NJPER Supp.2d 198 (¶177 App. Div. 1988); Shrewsbury Borough Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981). As the Association notes, this clause is triggered by "reasonable requests" and does not impose a blanket obligation to supply any documents. Moreover, the District has not cited any problems caused by the provision. We decline to hold either that the clause is not mandatorily negotiable or that certain of the listed items could never be relevant. Should the District deem a future request to be unreasonable, it can decline to provide the information and the Association can then seek to prove the reasonableness of its demand.

School Calendar

Article 6:2-1 is entitled School Calendar. It provides:

> The school calendar shall be set by the Paterson School District after consultation with the Association, and shall be made a part of this Agreement.

The District argues that the establishment of the school calendar is not mandatorily negotiable. The Association maintains that provisions like Article 6:2-1 have been found to be mandatorily negotiable.

Establishing the school calendar and changing the calendar are generally not mandatorily negotiable matters. 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 are mandatorily negotiable as are clauses including the calendar in an agreement for notice purposes. Englewood Bd. of Ed., P.E.R.C. No. 98-75, 24 NJPER 21, 26 (¶29014 1997); Willingboro Bd. of Ed., P.E.R.C. No. 92-48, 17 NJPER 497 (¶22243 1991). More importantly, the Supreme Court has encouraged effective communication between labor and management representatives, even on issues that are not mandatorily negotiable. Hunterdon Cty. and CWA, 116 N.J. 322, 338-339 (1989); Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17, 32 (1973). Accordingly, Article 6:2-1 is mandatorily negotiable because it is a consultation and notice clause.

Check-In Procedure

Article 7:1-1 is entitled Check-in Procedure. It provides:

> As professionals, employees are expected to devote to their assignments the time necessary to meet their responsibilities. Each employee shall indicate his/her presence for duty by signing his/her initials to insure the safety of personnel and property. All employees shall sign out in the same manner. The parties agree that the final sentence of this section shall not apply for elementary and primary staff members.

The District argues that this provision interferes with its right to verify attendance through any procedure it deems fit without negotiations.

We have long held that management has a prerogative to establish timekeeping procedures to verify that employees are at work when they are required to be. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 135 N.J. Super. 269 (Ch. Div. 1975), aff'd 142 N.J. Super. 44 (App. Div. 1976); see also South Hackensack Bd. of Ed., P.E.R.C. No. 98-70, 24 NJPER 14 (¶29009 1997), and cases cited therein. Indeed, based on this case law, we restrained arbitration of a grievance protesting that an alleged change in reporting procedures violated this provision. Paterson State-Operated School Dist., P.E.R.C. No. 97-107, 23 NJPER 202 (¶28097 1997). While the Association contends that the clause does not prevent the District from implementing new timekeeping strategies, the clause also does not explicitly afford the District the right to make such changes and sets forth

specific check-in procedures. Based on our longstanding case law, we hold that the clause is not mandatorily negotiable.

Instructional Planning

Article 7:2-8 is entitled Instructional Planning. Section 7:2-8.1 provides:

> The parties agree that the plan book is for the use and information of the teacher who prepares it. As such, every teacher shall plan lessons and teach course content in a manner s/he considers most practical.

The District argues that the underlined sentence of this article is not mandatorily negotiable, contending that the preparation of lesson plans concerns educational policy decisions. The Association counters that this provision does not bind the District to any planning method; does not bar it from setting standards for plan books; and does not infringe on any prerogatives.

The development, substance, and format of teacher lesson plans and the method of their preparation and submission, are not mandatorily negotiable matters. See Paterson Bd. of Ed., P.E.R.C. No. 92-118, 18 NJPER 303 (¶23130 1992) and cases cited therein. Thus, in Paterson, we held to be not mandatorily negotiable a clause stating that teachers "shall be required to have written lesson plans in a form they consider most practical and useful for their own tastes. . . ." Paterson also held to be

not mandatorily negotiable a clause prohibiting standardized lesson plans.

Against this backdrop, the underlined sentence is not mandatorily negotiable: to the extent it allows a teacher to decide how best to prepare lesson plans, it significantly interferes with the District's prerogative to set standards on this subject. Paterson. Similarly, a contract provision affording each teacher the right to teach course content in the manner she or he deems "most practical" would significantly interfere with the District's ability to provide guidance and direction on instructional methods and techniques. Thus, the clause goes to the core of educational policy decisions and is not mandatorily negotiable.

Dental Assistants

Article 7:7 is entitled Dental Assistants. Section 7:7-9.1 provides:

> 7:7-9.1. The District agrees that Dental Assistants employed prior to July 1, 1992 shall not be required to hold New Jersey State Dental Assistant Certification unless required by law.

The District argues that 7:7-9.1 is not mandatorily negotiable because it sets hiring criteria and requires Association input into the selection process. The Association responds that this is not a hiring provision because it applies only to dental assistants who have been employed for at least 12

years. The District has not responded to this argument. We agree that this clause does not implicate the District's prerogative to establish hiring criteria. The District has not offered any other reason for challenging the clause so we do not consider its negotiability further or address the clause in our order.

Class Size

Article 8 is entitled Class Size and provides:

> 8:1 Objectives
>
> The District and Association agree that desirable class sizes be established and adhered to wherever possible. The objectives are:
>
> 8:1-1 To overcome crowded conditions in the schools.
>
> 8:1-2 To effect maximum utilization of classrooms in presently existing schools.
>
> 8:1-3 To protect the health, safety, and welfare of all students.

The District argues that this provision is not mandatorily negotiable because it interferes with its managerial prerogative to establish class size based on whatever factors it deems most appropriate. The Association stresses that Article 8:1 consists in part of non-binding statements of purpose and allows "optimum" class size to be ignored if necessary.

The subject of class size centers on educational policy and is not mandatorily negotiable. Winslow Bd. of Ed., P.E.R.C. No.

2000-95, 26 NJPER 280 (¶31111 2000); Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 95-15, 20 NJPER 334 (¶25175 1994). Accordingly, we have held to be not mandatorily negotiable clauses that did not set specific numeric levels, but required a board to limit or maintain class size consistent with fiscal, facility, personnel or other considerations. Old Bridge. This clause falls within the ambit of these cases because it sets forth objectives and standards to guide the District's decision-making concerning class size. It is also more intrusive than the clause found to be mandatorily negotiable in Delaware Tp., where the contract stated the administration's right to determine class size, but gave teachers an opportunity to provide non-binding input.

Grievances

Article 8:4 is entitled Grievances and provides:

> "Grievances on class size and assignments will terminate at Level Two."

The District argues that class size and the assignment of personnel are matters of educational policy and as such are not mandatorily negotiable. The Association responds that the article addresses only the processing of grievances on such issues.

Article 8:4 does not set substantive constraints on class size and assignments and provides that such grievances shall end at the State District Superintendent level. Even where a dispute over an employment condition may not be submitted to binding

arbitration, the parties may agree to submit it to a negotiated grievance procedure or to advisory arbitration. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983); Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979). Accordingly, Article 8:4 is mandatorily negotiable.

Inclusion of Job Descriptions

Article 9:2 is entitled Inclusion of Job Descriptions and states:

> The job descriptions included in the Rules and Regulations of the District shall be made part of the written contract.

The District argues that it is not required to negotiate over job descriptions because assignments and the ability to change job descriptions are managerial prerogatives. The Association concedes that the article cannot preclude the District from revising job descriptions.

In Borough of Rutherford, P.E.R.C. No. 89-31, 14 NJPER 642 (¶19268 1988), we held that a clause incorporating existing job descriptions in an agreement merely notified employees of their duties and, therefore, was mandatorily negotiable. We reach the same result here.

Non-Instructional (Teaching) Duties

Article 10 is entitled Non-Instructional (Teaching) Duties. It provides:

> 10:1 Intent
>
> 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. Therefore, they agree as follows:
>
> 10:2 Non-Educational Activities
>
> Activities which have no education objectives shall be barred from the classroom.

The District argues that this article is not mandatorily negotiable because the determination of educational objectives and related activities is a managerial prerogative. The Association contends that the provision does not bind the District to act in any particular way and is mandatorily negotiable.

A board of education has a prerogative to determine curriculum and the type of classes to be offered. Rockaway Tp. Bd. of Ed. v. Rockaway Ed. Ass'n, 120 N.J. Super. 564, 569 (App. Div. 1972); Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78 (¶18036 1986). Article 10:2 significantly interferes with those prerogatives by directing, albeit in a general sense, what may take place in a classroom. It would also have the effect of allowing binding arbitration over what constitutes an educational activity, a judgment that goes to the core of a board's ability to set educational policy. Therefore, Article 10:2 is not mandatorily negotiable. The District does

not make any particularized arguments with respect to 10:1 so we do not address that section.

Certification

Article 11:1 is entitled Certification. It provides:

> The District agrees to hire only certificated teachers holding certificates issued by the New Jersey State Board of Examiners for every teaching assignment.

The District asserts that Article 11:1 is not mandatorily negotiable because it restricts the Board's prerogative to hire and select staff. While the Association maintains that this provision merely restates the laws mandating certification for teachers, N.J.S.A. 18A:27-2 and N.J.S.A. 18A:29-1, teacher certification requirements are not a mandatorily negotiable term and condition of employment and are therefore not appropriately included in a negotiated agreement. Compare Englewood and Rutherford (evaluator qualifications are not a term and condition of employment; proposal to incorporate regulatory requirements in agreement not mandatorily negotiable).

Previous Experience Credit

Article 11:2 is entitled Placement on Salary Schedule. Section 2-1, Previous Experience Credit, provides:

> When engaging teachers for service, the State District Superintendent is authorized to grant credit for outside teaching experience. Credit shall be based upon the amount of the increment in effect on the appropriate salary guide. Credit may only be given full-time contractual service achieved in any publicly

> owned and operated college, school or other institution of learning for one academic year in this or any other state or territory of the United States. Credit shall not be granted for full-time substitute service.

Citing Vernon Tp. Bd. of Ed., P.E.R.C. No. 2001-49, 27 NJPER 130 (¶32049 2001) and related cases, the District argues that this provision interferes with its ability to hire qualified personnel. The Association maintains that this article is mandatorily negotiable under well-established case law.

We and the courts have consistently held that initial placement on the salary guide is a mandatorily negotiable issue. In general, it intimately and directly affects employee work and welfare and does not significantly interfere with any governmental policy determinations. See, e.g., Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 334 N.J. Super. 512 (1999), aff'd o.b. 166 N.J. 112 (2000); Belleville Bd. of Ed. v. Belleville Ed. Ass'n, 209 N.J. Super. 93 (App. Div. 1986).

However, we have also considered claims that, in particular circumstances, an initial salary guide placement clause significantly interfered with a board's ability to hire qualified teachers in subject areas where there was a teacher shortage. Thus, in Vernon, the board sought to restrain arbitration of a grievance contending that new math and science teachers had been hired at a higher salary guide step than past practice dictated.

We stressed that arbitration could not be used to block management from fulfilling its educational obligation to provide qualified teachers to teach math and science courses, but noted that the Association did not appear to seek such a remedy. Therefore, we declined to restrain arbitration, but stated that the board could reactive its petition if the arbitrator issued an award that it believed significantly interfered with its educational obligation to provide qualified math and science teachers. We issued a similar order in Marlboro Bd. of Ed., P.E.R.C. No. 2002-61, 28 NJPER 222 (¶33078 2002), where the board maintained that it had a prerogative to determine the initial salary guide placement of a French teacher in light of a statewide shortage of language teachers and the individual's outstanding qualifications.

Vernon and Marlboro dealt with individual grievances and do not provide a basis for removing from the contract this general clause on initial salary guide placement. If, in the future, the District is faced with circumstances similar to those in Vernon and Marlboro, we expect that those cases will help guide the parties' conduct. Article 11:2 is mandatorily negotiable in the abstract.

Instructional Seniority and Job Security

Article 11:6 is entitled Instructional Assistant Probationary Period. Section 6-1, Definition, provides:

> During the first two (2) years of continuous employment, an Instructional Assistant shall be considered a probationary employee.

Section 6-2, Probationary Instructional Assistant Dismissal Procedure, provides:

> During said probationary period, the District may terminate the employment of such an employee under the guidelines established by the State of New Jersey for non-tenured teaching staff members.

Article 11:7 is entitled Instructional Assistant (I-V) Seniority and Job Security. Section 7-4, Non-Probationary Instructional Assistant Dismissal Procedure, provides:

> 11:7-4.1 Unless the District has a justifiable reason for not adhering to strict seniority based upon legitimate non-arbitrary criteria, then after the completion of a two (2) year probationary period, no Instructional Assistant employee shall be dismissed or be subject to reduction in salary except for inefficiency, incapacity or other just cause.
>
> 11:7-4.2 All employees shall be entitled to written notice of such reasons and a hearing, if requested, before the Superintendent or his designee.
>
> 11:7-4.3 Should the employee not be satisfied by the determination of the Superintendent or designee, at his/her request, the matter shall be subject to binding arbitration as provided in the grievance procedure of this Agreement.

The District argues that it has a managerial prerogative to hire, retain, promote, transfer, or dismiss employees, and that Article 11:7-4 interferes with that prerogative. The Association

responds that all of these provisions deal with job security for non-teaching staff and that such provisions are mandatorily negotiable.

We and the courts have held to be mandatorily negotiable proposals to grant tenure or job security protections to board of education employees who do not have statutory tenure. School boards and majority representatives may legally agree that just cause will be required before such employees are terminated mid-year or before their employment contracts are not renewed for the next year. See, e.g., Wright v. City of East Orange Bd. of Ed., 99 N.J. 112 (1985); Plumbers & Steamfitters Local No. 270 v. Woodbridge Tp. Bd. of Ed., 159 N. J. Super. 83 (App. Div. 1978). Wright held that such protections intimately and directly affect the work and welfare of public employees and that, in assessing whether such provisions "significantly interfere" with governmental policy, the focus should be on the extent to which students and teachers are congruently involved. 99 N.J. at 121. Applying that analysis, Wright held that a job security provision for custodians was distinguishable from such topics as teacher evaluations, hiring, and teacher transfers. See also Phillipsburg Bd. of Ed., P.E.R.C. No. 2003-73, 29 NJPER 181 (¶54 2003); Nutley Bd. of Ed., P.E.R.C. No. 2002-69, 28 NJPER 242 (¶33091 2002); cf. Hunterdon Central Reg. H.S. Bd. of Ed. v. Hunterdon Central Bus Drivers Ass'n, P.E.R.C. No. 94-75, 20 NJPER

68 (¶25029 1994), aff'd 21 NJPER 46 (¶26030 App. Div. 1995), certif. den. 140 N.J. 272 (1995) (bus driver may arbitrate termination and non-renewal).

The Wright analysis governs this article concerning instructional assistants, who do not have statutory tenure and who perform supportive duties. The Board has not shown how a job security provision for such individuals would significantly interfere with educational policy or impact on students. Further, while the District notes that the clause results in assistants achieving job security in a shorter period of time than teaching staff members, it does not explain how that circumstance significantly interferes with educational policy. We decline to assume such interference given that the statutory tenure scheme in Title 18A sets forth different acquisition periods for different categories of employees. Compare N.J.S.A. 18A:17-3 (janitor not appointed for fixed term acquires tenure immediately) with N.J.S.A. 18A:28-5 (teaching staff members acquire tenure after one of three enumerated time periods).

Prohibition of Disciplinary Transfers

Article 13:2 is entitled Prohibition of Disciplinary Transfers. It provides:

> Disputes over whether an employee was transferred for disciplinary reasons may be submitted by the Association to the Public Employment Relations Commission (PERC) for adjudication. If PERC sustains the Association's claim, the employee involved

> shall be returned to the site from which the transfer emanated.

The District argues that this article is non-negotiable because it requires the District to guarantee rights already guaranteed by N.J.S.A. 34:13A-27. The Association responds that this provision simply advises employees of PERC's jurisdiction to hear and resolve disputes as to disciplinary transfers and does not interfere with any managerial prerogatives. The Association stipulates that the last sentence cannot be asserted to require a return to a former work location unless PERC orders that remedy in a particular case.

Statutes setting forth terms and conditions of employment are incorporated by reference in negotiated agreements, State v. State Supervisory Ass'n, 78 N.J. 54, 80 n.6 (1978), and may be included in contract language. N.J.S.A. 34:13A-27 gives us jurisdiction to resolve disputes as to whether transfers between work sites are disciplinary and that proposition may be included in a negotiated agreement, subject to the Association's representation concerning the last sentence. However, the article is not mandatorily negotiable to the extent it requires the Commission to resolve Association claims that a transfer within a work site is disciplinary. Disciplinary transfers, other than those between work sites, may be submitted to binding arbitration. See, e.g., Knowlton Bd. of Ed., P.E.R.C. No. 2003-47, 29 NJPER 19 (¶5 2003). We would resolve a dispute over

whether such a transfer was in fact disciplinary only if the District filed a scope of negotiations petition contending otherwise.

Posting Procedures

Article 13:7-2 is entitled Posting Procedure. Section 2.2 provides:

> The District agrees to give due weight to the background, experience and attainments of all applicants and other relevant factors.

The District argues that this provision restricts its managerial prerogative to determine the criteria for the selection and promotion of employees. The Association argues that this section does not limit the District's ability to rely on any criterion it chooses.

Public employers have a non-negotiable right to fill vacancies and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195; Ridgefield Park. Promotional and hiring criteria are not mandatorily negotiable, although the procedural aspects of promotions, and of filling vacancies, are. Bethlehem Ed. Ass'n v. Bethlehem Bd. of Ed., 91 N.J. 38 (1982); State Supervisory Employees Ass'n; see also Washington Tp., P.E.R.C. No. 2002-80, 28 NJPER 294 (¶33110 2002) and cases cited therein.

Article 13:7-2 establishes neither hiring criteria nor promotional criteria. Nor does it establish any of the

procedural requirements - e.g., posting of vacancies; notice of promotional criteria - that we have found to be mandatorily negotiable. However, by requiring the District to give "due weight" to relevant factors such as background, experience and attainments, it intrudes into the District's decision-making process for reaching hiring and promotional decisions. We conclude on balance that the clause is not mandatorily negotiable.

Employee Evaluation

Article 14 is entitled Employee Evaluation. Section 14:2-2 is entitled Observation Sessions. It provides:

> Each observation session should be long enough to enable the employee to demonstrate the full activity being observed, and no portion of the activity not actually observed should be commented upon. (For example, an observer of a teacher should observe an entire class period or lesson, and should not comment about the teacher's effectiveness at opening the session and establishing student expectations unless s/he was there to observe from the beginning.)
>
> An observation may be conducted for a shorter time if it is explicitly intended to focus on only a portion of the entire activity underway. (For example, if an earlier observation found a teacher ineffective at closing a lesson, after a conference discussion the prior observation, the evaluator would be free to observe only the closing section of a subsequent lesson.)

The District argues that these provisions are preempted by N.J.A.C. 6:3-4.1, governing evaluations of non-tenured teachers.

The Association maintains that evaluation procedures are mandatorily negotiable and that 14:2-2 is procedural because it is meant to ensure that sufficient time is spent to actually observe a class.

We have upheld the negotiability of clauses requiring that observations of both tenured and non-tenured teachers last a minimum of one class period in the high and middle schools, and one complete subject lesson in the elementary school. Englewood. We found that such a provision incorporated regulatory requirements for non-tenured teachers. Ibid. With respect to tenured teachers, we found that the clauses were basically procedural and designed to ensure that formal observations were long enough to enable a supervisor to assess a teacher's performance in accordance with Board-established criteria. Ibid.

Our decisions have also distinguished between informal classroom visits by administrators and formal observations designed to gather information for an annual evaluation. Woodstown-Pilesgrove Reg. Bd. of Ed., P.E.R.C. No. 2000-103, 26 NJPER 302 (¶31122 2000); Fair Lawn Bd. of Ed., P.E.R.C. No. 84-39, 9 NJPER 648 (¶14281 1983). A board may not legally agree to require a report for every informal visit or to require an administrator to stay an entire class period in order to place a memorandum about the visit in a teacher's personnel file. Woodstown-Pilesgrove.

It appears, based on the use of the term "observation" and the parties' arguments, that Article 14:2-2 pertains to formal observations. We proceed from that premise and conclude that Article 14:2-2 is preempted to the extent, if any, it would allow for shorter observations of non-tenured teachers than required by N.J.A.C. 6:3-4.1. With respect to tenured teachers, the provision advances the teachers' interest in having an observation last long enough to give a fair and contextual sense of a teacher's performance on that day. Woodstown-Pilesgrove. The District has not described how or why the clause significantly interferes with its responsibility to evaluate tenured teachers, and we hold that it is mandatorily negotiable.

Evaluation By Certificated Personnel

Article 14:2-3, Evaluation By Certificated Personnel, provides:

> 14:2-3.1 Employees shall be evaluated only by persons certificated by the New Jersey State Board of Examiners to supervise instruction.
>
> 14:2-3.2 Employees shall be evaluated by the principal, vice principal(s) and/or the department chairperson of the school, as appropriate.
>
> 14:2-3.3 An employee may request other relevant observers, such as department chairpersons or curriculum administrator.

The District argues that all three paragraphs significantly interfere with its prerogative to select its evaluators. The

Association maintains that 3.1 imposes no burden on the District because N.J.A.C. 6:3-4.1 and N.J.A.C. 6:3-4.3 already require that only certified individuals may conduct teacher evaluations. It also contends that 3.2 is mandatorily negotiable because, although it is intended to ensure that at least one evaluation will be done by a building administrator who works with the teacher, it does not bar other evaluators. Similarly, it asserts that 3.3 is designed to allow for a fair evaluation of a teacher by permitting him or her to request an additional observation by another administrator, but does not bar the District from using other staff as well.

Evaluation criteria and the selection of evaluators are not mandatorily negotiable matters. Bethlehem; Rutgers v. Rutgers Council of AAUP, 256 N.J. Super. 104 (App. Div. 1992), aff'd 131 N.J. 118 (1993). Because evaluator qualifications are not a term and condition of employment, clauses requiring that evaluators be certified supervisors are not mandatorily negotiable even though they may reflect regulatory requirements. Englewood. Accordingly, 3.1 and 3.2 are not mandatorily negotiable.

However, 3.3 is mandatorily negotiable. Teachers have a strong interest in being able to request evaluation by an administrator whom they believe is best able to assess their performance. The clause does not significantly interfere with

the District's prerogative to select evaluators because it does not require the District to agree to the request.

Appeals of Termination

Article 15:2 is entitled Appeals of Termination. Section 2-1 provides:

> Appeals from a decision not to renew the contract of a non-tenured teaching staff member or instructional assistant shall be conducted according to the provisions of the New Jersey Administrative Code 6:3-4.20. To the extent permitted by law, claims of procedural defects in the implementation of said procedures may be submitted to the grievance procedure.

The District argues that this section is controlled by regulation. The Association responds that this is a job security provision for instructional assistants. With respect to non-tenured teachers, the Association argues that the provision simply adopts the regulatory framework and only allows arbitration if permitted by law.

Statutes and regulations requiring that non-tenured teaching staff members be given notice of non-renewal, and an opportunity to appear before the board, establish terms and conditions of employment and are incorporated by reference in the parties' agreement. West Windsor Tp. v. PERC, 78 N.J. 98, 107 (1978); Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554, 558 (App. Div. 1980). Parties may agree to arbitrate grievances involving the application of such statutory and regulatory

provisions, even though an employee might also have a remedy before the Commissioner of Education. Atlantic City Bd. of Ed., P.E.R.C. No. 98-26, 23 NJPER 507 (¶28247 1997). Article 15:2 reflects this case law; is limited to procedural claims; and is mandatorily negotiable. Contrast Hunterdon Central Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-92, 18 NJPER 134 (¶23064 1992) (teacher tenure statutes preclude an arbitrator from granting tenure or ordering renewal of a non-tenured teacher's employment contract).

Physician's Certificate

Article 18:5, Physician's Certificate, provides:

> A physician's certificate may be required by the District for personal illness after four (4) consecutive days.

The District argues that its managerial prerogative to adopt sick leave verification procedures includes establishing the number of absences that will automatically trigger a requirement to submit a doctor's note. The Association responds that the District can demand medical verification for illness at any time, regardless of Article 18:5 and that Article 18:5 simply puts employees on notice that they should always be prepared to verify absences of over four consecutive days.

An employer has the prerogative to verify sickness, which includes the prerogative to determine how many absences trigger a verification requirement. Piscataway Tp. Bd. of Ed., P.E.R.C.

No. 82-64, 8 NJPER 95 (¶13039 1982); City of Jersey City, P.E.R.C. No. 2003-57, 29 NJPER 108 (¶33 2003). By stating that the District "may" ask for medical verification after four consecutive sick days, Article 18.5 in effect precludes the District from automatically requiring a note after a lesser number of absences. Accordingly, it is not mandatorily negotiable as written. See North Hudson Reg. Fire & Rescue, P.E.R.C. No. 2000-78, 23 NJPER 184 (¶31075 2000) (proposal stating that employer may request a medical slip after three single or two consecutive absences not mandatorily negotiable because it implied that the employer was prohibited from seeking verification in other circumstances).

NJEA Convention

Article 19:3 is entitled NJEA Convention. It provides:

> Teachers may attend the annual convention of the New Jersey Education Association for a period of not more than two days in any school year without loss of pay in accordance with the provisions as more particularly set forth in N.J.S.A. 18A:31-2.

The District argues that N.J.S.A. 18A:31-2 preempts negotiations over attendance at NJEA conventions. The Association responds that this article merely incorporates N.J.S.A. 18A:31-2.

Paid leave for union officials to attend union meetings is mandatorily negotiable. See, e.g., Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987). Statutes and regulations

setting terms and conditions of employment may be expressly incorporated in negotiated agreements and made subject to negotiated grievance procedures. State Supervisory; Camden Cty., P.E.R.C. No. 2004-7, 29 NJPER 385 (¶121 2003). This article incorporates N.J.S.A. 18A:31-2 and is mandatorily negotiable.

Protection of Employees, Students and Property

Article 25 is entitled Protection of Employees, Students and Property. Sections 4-2 and 4-3 under "Assault" provide:

> Article 25:4-2 Leave
>
> When absence arises out of or from such assault or injury, the employees shall be entitled to full salary and other benefits for the period of such absence but shall not forfeit any sick leave or personal leave.
>
> Article 25:4-3 Worker's Compensation
>
> Benefits derived under this or subsequent Agreements shall continue beyond the period of any Worker's Compensation until the complete recovery of any employee when absence arises out of or from assault or injury.

The District argues that N.J.S.A. 18A:30-2.1 bars paid injury leave in excess of one year; that only the Commissioner of Education may decide whether sick days must be used for a work-related injury; and that the Commissioner usually defers his decision until a worker's compensation judge has determined that an injury is work-related. The Association responds that N.J.S.A. 18A:30-2.1 does not prohibit parties from negotiating

benefits above its minimum benefits, including salary payments beyond one year.

N.J.S.A. 18A:30-2.1 provides:

> a. Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in N.J.S. 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.

Paid injury leave is a mandatorily negotiable subject absent a statute or regulation preempting negotiations. See, e.g., Woodbridge Tp., P.E.R.C. No. 98-101, 24 NJPER 124 (¶29062 1998); Morris Cty., P.E.R.C. No. 79-2, 4 NJPER 304 (¶4153 1978). To a limited extent, N.J.S.A. 18A:30-2.1 is such a preemptive statute. It mandates that a board of education pay the full salary of an employee injured on the job for a period of up to one year, without having such absence charged to accumulated or annual sick leave. Thus, N.J.S.A. 18A:30-2.1 preempts Article 25:4-2 and -3 to the extent they would allow for paid leave beyond one year

without charge to annual or accumulated sick leave. In that vein, the Association has not convinced us that the "up to one year" language simply sets a minimum period for the benefit described in N.J.S.A. 18A:30-2.1. By common usage "up to" one year means "not exceeding" one year. Compare Woodbridge and cases cited therein (N.J.S.A.40A:14-137, allowing municipality to grant paid injury leaves "not exceeding" one year, bars leaves beyond that). However, we are not persuaded by the District's contention that Article 25:4-2 and 3 are preempted in their entirety by N.J.S.A. 18A:30-2.1 and the workers' compensation statute, N.J.S.A. 34:15-49.

Workers' compensation rests on the premise that an employer receives insulation from an employee's tort actions in exchange for assuming strict liability for workplace injuries. Burlington Cty., P.E.R.C. No. 98-86, 24 NJPER 74 (¶29041 1997); Burlington Cty., P.E.R.C. No. 97-84, 23 NJPER 122 (¶28058 1997), aff'd 24 NJPER 200 (¶29092 App. Div. 1998); East Orange Bd. of Ed., P.E.R.C. No. 99-34, 24 NJPER 511 (¶29237 1998); New Brunswick Bd. of Ed., P.E.R.C. No. 86-8, 11 NJPER 453 (¶16159 1985). Therefore, we and the courts have held that workers' compensation laws do not prevent majority representatives from seeking to negotiate contractual clauses providing paid leaves of absence and to enforce such clauses by seeking remedies limited to restoring sick leave days. Since Articles 25:4-2 and -3 do not

provide for damages, they are consistent with the workers' compensation scheme.

With respect to N.J.S.A. 18A:30-2.1, the District contends that, under education law, only the Commissioner can determine whether an education employee may be charged sick leave days for an injury leave. Further, it stresses that the Commissioner makes such a determination only afer a workers' compensation judge has decided whether an injury is work-related.

In Paterson State-Operated School Dist., P.E.R.C. No. 2002-75, 28 NJPER 259 (¶33099 2002), the District urged us to restrain arbitration of a grievance under Article 25:4 based on this analysis, but we declined. We reasoned that N.J.S.A. 18A:30-2.1 did not preclude an agreement to restore sick leave days to an employee who was absent for a short time because of an allergic reaction to pesticides used in the workplace. Nor did it preclude an arbitrator from determining whether such an agreement was made and breached.

Paterson governs here. N.J.S.A. 18A:30-2.1 does not preclude a contractual agreement to provide paid leave and restoration of sick leave for any injury arising out of an assault in the workplace, even if the injury would not be compensable under the workers' compensation system. Nor does it prevent an arbitrator from deciding whether such an agreement was made or breached. Finally, court review is available to resolve

any asserted conflict between the workers' compensation statute and an arbitrator's award. Burlington, P.E.R.C. No. 97-84. Therefore, Article 25:4-2 and -3 are mandatorily negotiable except to the extent they would allow for paid leave beyond one year without charge to annual or accumulated sick leave.

Reporting Injuries

Article 25:6 is entitled Reporting Injuries. Article 25:6-1, Responsibility, provides:

> In the event of injuries sustained by any employee in the course of his/her employment, it is the responsibility of the principal to report the same to the District. The report shall be made out in quadruplicate; one copy sent to the State District Superintendent, one to the Counsel, the third copy retained by the principal, and the fourth copy to be retained by the injured party.

The District argues that this provision is not negotiable because it places additional duties and responsibilities on building principals. The Association responds that reports concerning on-the-job injuries impact employees' terms and conditions of employment. The Association does not object to the District assigning another person to file the report so long as it is filed.

Clauses seeking to protect employee health and safety are mandatorily negotiable. See, e.g., City of Perth Amboy, P.E.R.C. No. 98-146, 24 NJPER 311 (¶29148 1998); State of New Jersey, P.E.R.C. No. 92-55, 18 NJPER 35 (¶23011 1991). Thus, procedures

concerning the reporting of injuries are mandatorily negotiable. Because the Association does not challenge the District's right to assign someone other than the principal to report injuries, we do not address this aspect of the article. The remainder of the article is mandatorily negotiable.

Representation Fee

Article 27:6 is entitled Representation Fee. Article 27:6-2 provides:

> Prior to September 1, of each year the Association shall notify the District in writing of the amount of the regular membership dues charged by the Association. The representation fee paid by nonmembers shall be equal to 85% of that amount.

The District argues that under Woodbridge Tp. Bd. of Ed., P.E.R.C. No. 81-131, 7 NJPER 330 (¶12147 1981), the percentage of the representation fee is not mandatorily negotiable. The Association argues that N.J.S.A. 34:13A-5.5(a) specifically requires negotiations over payment of the agency fee and the reducing of any agreement to writing. However it agrees that the percentage used to calculate the agency fee is not a negotiable issue. The second sentence of Article 27 is not mandatorily negotiable. We do not consider the negotiability of the first sentence.

Nondiscrimination

Article 28 is entitled Miscellaneous Provisions. Article 28:1 is a non-discrimination clause. It provides:

> The District and the Association agree that there shall be no discrimination, and that all practices, procedures, and policies of the school system shall clearly exemplify that there is no discrimination in the hiring, training, assignment, promotion, transfer, or discipline of employees or in the application or administration of this Agreement on the basis of race, creed, color, religion, national origin, sex, domicile, or marital status.

The District argues that under Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n, 94 N.J. 9 (1983), this provision is not mandatorily negotiable. The Association disputes that reading of the case.

Clauses stating that an employer shall not engage in invidious discrimination when making personnel decisions are mandatorily negotiable and may remain in a collective negotiations agreement. However, Teaneck bars binding arbitration under such a clause if the challenged personnel action involves a managerial prerogative. See, e.g., Piscataway Tp. Bd. of Ed., P.E.R.C. No. 87-151, 13 NJPER 508 (¶18189 1987). Accordingly, Article 28:1 is mandatorily negotiable.

ORDER

The following contract provisions are mandatorily negotiable:

Article 3:5-3	Separate Grievance File
Article 4:5	Evaluation of Students, last sentence
Article 4:7	Public Criticisms
Article 5:1	Information

Article 6:2-1	School Calendar
Article 8:4	Grievances
Article 9:2	Inclusion of Job Descriptions
Article 11:2-1	Previous Experience Credit
Article 11:7:4	Instructional Assistant Seniority and Job Security
Article 13:2	Prohibition of Disciplinary Transfers, except to the extent it requires PERC to resolve claims that a transfer, other than between work sites, is disciplinary
Article 14:2-2	Employee Evaluation, except to the extent it would allow for shorter observations of non-tenured teachers than required by N.J.A.C. 6:3-4.1.
Article 14:2-3.3	Evaluation by Certificated Personnel
Article 15:2	Appeals of Termination
Article 19:3	NJEA Convention
Article 25:4-2 & 25:4-3	Protection of Employees, Students and Property
Article 25:6	Reporting Injuries (second sentence)
Article 28	Nondiscrimination

The following contract provisions are not mandatorily negotiable:

Article 4:5	Evaluation of Students, first sentence
Article 7:1-1	Check-In Procedures
Article 7:2-8	Instructional Planning
Article 8:1 through 8:1-3	Class Size

Article 10:2	Non-Instructional (Teaching) Duties
Article 11:1	Certification
Article 13:7-2	Posting Procedure
Article 14:2-3.1 & 3.2	Evaluation by Certificated Personnel
Article 18:5	Physician's Certificate
Article 25:4-2 & -3	To the extent they would allow for paid leave beyond one year without charge to annual or accumulated sick leave.
Article 27:6	Representation Fee (second sentence)

BY ORDER OF THE COMMISSION

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz, Mastriani, Sandman and Watkins voted in favor of this decision. None opposed.

DATED: August 12, 2004
Trenton, New Jersey
ISSUED: August 13, 2004