

P.E.R.C. NO. 2006-75

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2006-038

EDUCATION ASSOCIATION OF PASSAIC,

Respondent.

SYNOPSIS

_____The Public Employment Relations Commission decides the negotiability of certain sections of the expired agreement between the Passaic Board of Education and the Education Association of Passaic. The Commission finds: the removal of derogatory material in personnel files to be not mandatorily negotiable; a portion of a sick leave provision to be mandatorily negotiable because the clause permits the restoration of sick leave days used in the limited instances where the employer itself excluded employees from school; a provision that requires that employees immediately report cases of assault suffered by them or students to be a governmental policy determination of who interacts with the police and the courts and to be not mandatorily negotiable; a provision requiring that upon notification by a teacher that a child needs attention, the principal shall arrange for a conference to be not mandatorily negotiable; a provision that teachers shall not be required to maintain a record of absences or tardiness to be not mandatorily negotiable; a provision concerning the qualifications for mentors to be not mandatorily negotiable; and a provision requiring that all training programs conducted outside the teacher workday, work year and during the summer shall be voluntary to be not mandatorily negotiable.

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

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Appearances:

For the Petitioner, Scarinci & Hollenbeck, LLC,
attorneys (Mark S. Tabenkin, on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys
(Gail Oxfeld-Kanef, of counsel; Benjamin A. Spivack, on
the brief)

DECISION

On October 26, 2005, the Passaic Board of Education petitioned for a scope of negotiations determination. The Board seeks a determination that certain sections in its expired collective negotiations agreement with the Education Association of Passaic are not mandatorily negotiable and cannot be included in a successor contract.

The parties have filed briefs and exhibits. The Association has submitted the certification of its president. The Board has submitted the certifications of the Acting Supervisor of Early Childhood Education, the Director of Curriculum and Staff

Development, the Supervisor of Language Arts Literacy, and the Director of Grants. These facts appear.

The Association represents certified teaching staff members and other titles. The parties' collective negotiations agreement expired on June 30, 2005. The parties are in negotiations for a successor agreement. The Association sought to carry over into the successor contract sections in the expired contract that the Board believed are not mandatorily negotiable. This petition ensued. The parties' briefs have eliminated disputes over the meaning and negotiability of many provisions which we accordingly do not address.

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), sets the standards for determining mandatory negotiability:

[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 4.5C provides:

Employees may request that all derogatory material in the permanent personnel file be removed. The decision to remove the derogatory material from the permanent personnel file shall remain in the sole discretion of the Superintendent, who will not unreasonably withhold consent for the removal of the derogatory material. Nothing in this section shall prevent the employee from challenging the Superintendent's decision in the grievance procedure.

The Association concedes that the last sentence is not mandatorily negotiable. Moorestown Bd. of Ed., P.E.R.C. No. 94-21, 19 NJPER 455 (¶24215 1993). It asserts that the rest of the section is negotiable because the superintendent retains sole discretion to grant a request. But the second sentence establishes a contractual duty not to unreasonably withhold consent. It restricts the Board's prerogative to determine when to remove derogatory material and is therefore not mandatorily negotiable. Winslow Tp. Bd. of Ed., P.E.R.C. No. 2000-95, 26 NJPER 280 (¶31111 2000).

Article 18.3 is entitled Sick Leave. Section 18.3C provides:

- C. Absence due to exclusion by any building nurse, the Board Physician, Board Alternate Physician or Nurse Supervisor because of an employee contracting a contagious or infectious disease at his/her residence or while discharging his/her responsibilities, shall not be counted as sick leave and no deduction of salary for the imposed loss of time shall be made. The below listed infectious or contagious diseases represent an all-inclusive list of recognized exclusions. Entitlement under this Article shall be according to the following formula:
- (1) Childhood diseases: Measles, Rubella, Chickenpox, Mumps - per contract limit (15 days).
 - (2) Uncomplicated cases of Conjunctivitis - 2 days
 - (3) Strep Throat - 2 days (Must be verified by a physician's report)
 - (4) Hepatitis - per contract limit (15 days)
 - (5) Nuisance diseases - Scabies, Impetigo, Pediculosis, Ringworm - non contagious once treated - no days honored.

All cases of disease identified in Article 18.3C(1), (2), (4) [above] must be verified by a physician's report to entitle the employee to restoration of any sick leave days.

All complications of the above must be individually judged by the Board Physician or his alternate physician. Employees who are granted non-chargeable days as a result of the application of this Article shall be

notified of the number of days restored to their account by the Payroll Department.

The Board argues that N.J.S.A. 18A:30-1 preempts this section. That education law provides:

Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or being quarantined for such a disease in his or her immediate household.

It maintains that this law requires that employees taking sick leave actually be sick and asserts that under Chatham School Dist. Bd. of Ed., P.E.R.C. No. 2006-16, 31 NJPER 296 (¶116 2005), a provision cannot establish periods of presumptive disability for conditions except pregnancy. It also argues that this section changes the statutory definition of sick leave by allowing employees not to be charged for absences due to specified sicknesses.

The Association argues that N.J.S.A. 18A:30-1 does not preempt this section because the cited absences are considered sick leave and are initially counted as such, subject to being restored.

This section is mandatorily negotiable. Its premise is that a Board doctor or nurse has excluded an employee from the school given one of the specified conditions. If an employee has not been excluded, the employee will not be able to recover any sick

leave days. If an employee asserts that he or she has one of the specified conditions, the Board's doctor can require the employee to verify that the condition exists and later reexamine the employee to verify that the condition is continuing. We do not read this section as entitling employees to take sick leave days if they no longer continue to be sick from a specified condition; instead, we read the section as capping the number of legitimately used sick leave days that can be restored for a specified condition. We add that parties may negotiate a greater number of sick leave days than the statutory minimum. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

This section essentially granted a greater benefit by allowing the restoration of sick leave days used in the limited instances where the employer itself excluded employees from school.

Compare City of East Orange, P.E.R.C. No. 99-34, 24 NJPER 511 (¶29237 1998) (declining to restrain arbitration of grievance seeking restoration of sick leave days taken for work-related injury).

Article 21 is entitled Protection of Employees. Sections 21.2A and B require that employees immediately report cases of assault suffered by them or their students. Section 21.2C provides:

Such notification [of cases or assault] shall be immediately forwarded to the Superintendent by the building principal or immediate supervisor who shall comply with

any reasonable request from the employee for any information in the possession of the Superintendent relating to the incident or the persons involved and shall act in appropriate ways as liaison between the employee, the police and the courts.

This section is not mandatorily negotiable. The determinations of who interacts with the police and the courts and how that responsibility will be carried out are matters of governmental policy. Employees may negotiate for a right to request information about assaults on them, subject to a board's right to deny requests that are unreasonable given demonstrable concerns about the confidentiality of ongoing criminal proceedings or student records. This provision, as written, sweeps beyond a simple procedural right to request information and unduly restricts the Board's right to deny inappropriate requests.

Article 22 is entitled Maintenance of Classroom Control and Discipline. Section 22.2 provides:

When in the judgment of the teacher, a student requires the attention of the principal, assistant principal, a counselor, psychologist, physician or other specialist, he/she shall inform his/her principal or immediate supervisor. As soon as possible, after notification by the teacher, the principal or immediate supervisor shall arrange for a conference with the teacher, an appropriate specialist and him/herself, to discuss the problem and to decide upon appropriate steps for its resolution.

In Nutley Bd. of Ed., P.E.R.C. No. 80-33, 5 NJPER 401 (¶10208 1979), we addressed a provision with an identical first sentence and a subsequent clause that called for a prompt child study referral. We held that the provision primarily involved educational policy concerning the welfare and evaluation of students and was thus not mandatorily negotiable. While the provision in this case calls for a conference rather than a referral, the focus of the clause is still on student welfare and evaluation. The provision is not simply a procedural right to alert the administration about a problem. When intervention is required and how and by whom are matters of non-negotiable educational policy.

Article 26 is entitled Non-Teaching Duties. Sections 26.1 and 26.2 provide:

Teachers shall not be responsible for posting and/or balancing monthly attendance reports for classrooms/homerooms. Teachers will report attendance to the office once per day by marking the appropriate attendance form with the appropriate symbol for "absent" or "tardy." The Superintendent shall designate the appropriate form.

The form referenced in 26.1 (above) shall be the only form of reporting attendance used within the school system. No teacher shall be required to list names of absent or tardy students for the office nor shall they be required to maintain a record of those absent or tardy.

The Board asks for a declaration that Section 26.2 is not mandatorily negotiable. It does not contest the negotiability of

Section 26.1. We have quoted it because the Association asserts that the two sections must be read together.

Prohibitions on assigning clerical duties incidental to a teacher's primary responsibilities are not mandatorily negotiable. Bayonne Bd. of Ed., P.E.R.C. No. 87-109, 13 NJPER 268, 269 (¶18110 1987). Maintaining attendance registers for a teacher's own classes is an example of such a non-negotiable assignment. Holland Tp. Bd. of Ed., P.E.R.C. No 2002-47, 28 NJPER 150 (¶33051 2002); Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989). We agree with the Association that teachers can negotiate protection against having to maintain school-wide attendance registries for the main office, but this provision prohibits the Board from requiring teachers to maintain attendance registers for their own students as well as to submit lists of their absent and tardy students to a central office. Section 26.2 is therefore not mandatorily negotiable.

Article 27 is entitled Mentoring. Section 27.3 provides:

QUALIFICATIONS OF MENTORS. Applicants must meet the following criteria:

- A. They must be tenured.
- B. They should currently teach or be experienced in the same field of study/discipline as the new teacher being mentored, if possible.
- C. They should not have served as a mentor the previous year, if possible.

N.J.A.C. 6A:9-8.4(d)1 provides that a board must implement a plan for mentoring novice teachers and must provide criteria for selecting mentor teachers. The regulation then specifies nine criteria that a plan must include at a minimum. The Board argues that this regulation preempts negotiations over Section 27.3. The Association responds that this provision sets more stringent criteria than those specified in the regulation.

We conclude that the provision is not mandatorily negotiable. The regulation does mandate the nine minimum criteria and this section stops short of meeting them. For example, the minimum criteria require that a mentor teacher have "demonstrated exemplary command of content area knowledge and of pedagogy." Further, setting the qualifications for a teacher to be chosen to mentor novice teachers is a matter of educational policy. Ridgefield Park; State Supervisory (promotional criteria are not mandatorily negotiable).

Article 28 is entitled Professional Development. Section 28.5 provides:

All programs conducted by the District outside the teacher workday, work year, during the summer or during breaks in the calendar shall be voluntary and compensated at the hourly rate set forth in Section 10.8 of this agreement.

The Board argues this restriction on its ability to train teachers will adversely affect the quality of instruction. The Board has submitted certifications explaining the necessity of

requiring training outside the regular work schedule in certain instances connected to vital educational programs. For example, the Supervisor of Language Arts literacy has explained why summer training is necessary for teachers of the many students in Passaic schools who have limited proficiency in English. One of the principal methodologies used in ESL instruction is the Sheltered Instruction Observation Protocol (SIOP) and the New Jersey State Department of Education has initiated a professional development program that has as its centerpiece training SIOP coaches during the summer and then having them mentor other teachers. The Acting Supervisor of Early Childhood Education has explained why a High/Scope training program for preschool teachers cannot be done within the regular work schedule. That program requires 20 days of training, which the district provides intensively during two summer weeks and one February vacation week. Taking preschool teachers out of the classroom for 20 school days during the year would hurt the continuity of preschool instruction. The Director of Curriculum and Staff development has explained that summer training is an integral part of professional development for Literacy Coaches developed by the Department of Education. Finally, the Director of Grants has explained why several grant-funded projects require intensive paid professional development for teachers during the summer and

after the school day. The Association has not submitted certifications disputing these explanations.

We find not mandatorily negotiable the requirement that all professional development programs outside the normal work schedule be voluntary. The Board has demonstrated that this absolute rule would significantly interfere with its ability to provide necessary training to its employees. The Association's reliance on Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989), is misplaced. That case involved restrictions on meetings before weekends or holiday; this case involves restrictions on training, some of which can occur only during the summer. The Board has not challenged the negotiability of the compensation component of this provision. We need not address that issue further.

ORDER

Section 18.3C is mandatorily negotiable. The following are not mandatorily negotiable: second sentence of section 4.5C; sections 21.2C, 22.2, 26.2, 27.3; and the requirement in 28.5 that all professional development programs outside the normal work schedule be voluntary.

BY ORDER OF THE COMMISSION

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

ISSUED: March 30, 2006

Trenton, New Jersey