

P.E.R.C. NO. 2013-67

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTH HUNTERDON REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2012-012

SOUTH HUNTERDON REGIONAL
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of contract clauses in an expired collective negotiations agreement between the South Hunterdon Regional Board of Education and the South Hunterdon Regional Education Association. The Commission finds mandatorily negotiable: a provision concerning notice, participation, and recommendations regarding interviews of candidates for employment; portions of a provision concerning promotional procedures; a provision regarding in-district teacher priority for additional programs to the extent it applies to extracurricular activities and not teaching assignments; and a provision concerning use of sick leave for illness in the family. The Commission finds not mandatorily negotiable: provisions concerning qualifications to be considered in relation to teacher transfers or reassignments; portions of a provision concerning promotional procedures that require consideration of certain criteria; a provision regarding teacher preference in transfer or reassignment requests; a provision limiting class size; a provision requiring teacher approval of the structure of course schedules; a provision mandating the content of teacher evaluations; a provision concerning closing personnel files; and a provision concerning teacher assignments and certification requirements.

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. 2013-67

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTH HUNTERDON REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2012-012

SOUTH HUNTERDON REGIONAL
EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Schwartz Simon Edelstein & Celso LLC, attorneys (Allan Dzwilewski, of counsel and on the brief; Jennifer Paganucci, on the brief)

For the Respondent, Wills, O'Neill & Mellk, attorneys (Arnold M. Mellk, of counsel and on the brief; Gidian Mellk, on the brief)

DECISION

On October 4, 2011, the South Hunterdon Regional Board of Education petitioned for a scope of negotiations determination. The Board seeks a determination that certain sections in its collective negotiations agreement (CNA) with the South Hunterdon Regional Education Association are not mandatorily negotiable.

The parties have filed briefs. The Board has submitted the certification of its Superintendent of Schools, as well as a copy of the contract articles that it disputes. The Association has not filed a certification. These facts appear.

The Association represents all certificated personnel, non-confidential secretarial staff, custodial staff, and aides. The parties' CNA expired on June 30, 2012.^{1/}

The Board argues that numerous provisions of the 2009-2012 CNA are non-negotiable or illegal subjects of bargaining and should be removed from the 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

^{1/} In its brief, the Association argued that the petition was filed prematurely because the CNA had not yet expired and formal negotiations for a successor agreement had not yet commenced. However, that objection is moot now that the CNA has expired and the parties are required to be in negotiations. N.J.A.C. 19:12-2.1(a).

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].

The Board asserts that portions of two clauses in dispute, Articles XII and XIX, are not negotiable because they are preempted by law. Preemption will be found if a statute or regulation specifically, expressly, and comprehensively sets a term and condition of employment, thereby eliminating the employer's discretion to negotiate over that subject. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 330-31 (1989).

Article XII is entitled Teacher Assignment. The Board disputes the negotiability of Section B, which provides:

- B. In order to assure that pupils are taught by teachers working within their areas of competence, teachers shall not be assigned outside the scope of their teaching certification except if mutually agreeable and/or because of temporary and unexpected need. Disagreement on this subject shall be subject to the Grievance Procedure, if invoked.

The Board argues that the assignment of staff members within their areas of certification is governed by N.J.S.A. Title 18A, and N.J.A.C. Title 6A. It notes that N.J.A.C. 6A:9-1 et. seq. sets forth the requirements for teaching staff to hold specific

certificates and/or endorsements in order to hold specific positions. The Board specifically cites the certification requirement language of N.J.S.A. 18A:26-2 and N.J.A.C. 6A:9-5.1. It contends that even in situations where the contract language is consistent with the relevant statutory and regulatory requirements (which it asserts is not the case here), a board of education is not required to engage in negotiations over such language. The Board cites Rockaway Tp. Bd. of Ed. and Rockaway Tp. Ed. Ass'n, P.E.R.C. No. 90-107, 16 NJPER 321 (¶21132 1990), aff'd NJPER Supp.2d 250 (¶209 App. Div. 1991), in which we found that the following contract clause is not mandatorily negotiable:

The Board will endeavor to hire only fully certified teachers holding standard certificates issued by the New Jersey State Board of Examiners for every regular teaching assignment."

The Association did not submit an argument regarding this clause.

N.J.S.A. 18A:26-2 states, in pertinent part:

No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate, if any, as may be required by law.

N.J.A.C. 6A:9-5.1 states:

(a) Pursuant to N.J.S.A. 18A:26-2, any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate.

(b) In addition to the requirements set forth in this subchapter for certification, the certificate holder shall obtain any license, certificate or authorization that may be mandated by State or Federal law or by a licensing board in order for the individual to serve in a position. The district board of education that is considering employing the individual shall assure that the candidate holds all necessary licenses, certificates or authorizations.

(c) The employing district shall remove from the position any teaching staff member who fails to maintain the mandated license, certificate or authorization as set forth in (b) above. Pursuant to N.J.A.C. 6A:9-17.4(a), the district also shall report the names of these individuals to the Board of Examiners.

(d) The Board of Examiners may consider revocation or suspension of the certificate of any individual who fails to maintain the license, certificate or authorization as required in (b) above.

The education statute N.J.S.A. 18A:26-2 and related regulations, N.J.A.C. 6A:9-1 et. seq. (including N.J.A.C. 6A:9-5.1), set the statutory and regulatory requirements for public school teachers in New Jersey, thereby preempting negotiations on the topic.

Article XII, Section B is therefore not mandatorily negotiable.

Article XIX is entitled Sick Leave. The Board disputes the negotiability of Section C, which provides:

C. Illness in the family is cause for an employee to utilize sick leave.

The Board argues that N.J.S.A. 18A:30-1 limits sick leave to an employee's own illness or injury. See Hackensack Bd. of Ed., P.E.R.C. No. 81-138, 7 NJPER 341 (¶12154 1981), rev'd 184 N.J. Super. 311 (App. Div. 1982), certif. den. 91 N.J. 217 (1982).

The Association did not submit an argument regarding this clause.

N.J.S.A. 18A:30-1 states:

Section: 18A:30-1: Definition of sick leave

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 by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household.

The statute clearly limits sick leave to the employee's sickness only by specifying "because of personal disability due to illness or injury" and only contemplates other family members in the situation of quarantine for a contagious disease "in his or her immediate household." However, a family leave statute, N.J.S.A. 43:21-39.1, provides a specific exception to the definition of sick leave in the education statute, where it provides:

The employer of an individual may, notwithstanding any other provisions of law, including the provisions of N.J.S.A. 18A:30-1 et seq., permit or require the individual, during a period of temporary family disability leave, to use any paid sick leave, vacation time or other leave at full pay made available by the employer before the individual is eligible for disability benefits for family temporary disability leave pursuant to P.L. 2008, c. 17 (C.43:21-

39.1 et al.), except that the employer may not require the individual to use more than two weeks worth of leave at full pay.

In Carteret Bd. of Ed., P.E.R.C. No. 2009-71, 35 NJPER 213 (¶76 2009), we recognized that the family leave statute, N.J.S.A. 43:21-39.1, may permit use of sick leave for certain family illness; however, we concluded that:

While the new paid family leave statute may permit use of sick leave for certain family illness, Article XIV.C as currently written impermissibly permits sick leave to be used for family members not covered by the new statute. The Association may propose contract language that comes within the ambit of the new statute.^{2/}

In determining what family members are covered by the family leave statutes, we consider the following statutory definition in N.J.S.A. 43:21-27(n):

"Family member" means a child, spouse, domestic partner, civil union partner or parent of a covered individual.

This definition places a limit on what relationships qualify as "family" for purposes of using sick leave for temporary family disability leave. Using the reasoning applied in Carteret, it would appear that Article XIX, Section C's use of the general term "family" falls outside the statutory definition and the

^{2/} Article XIV.C provided: "In case of illness of parent, brother, sister, husband, wife, child or any other relative living at home within the immediate family, paid leave will be permitted up to a maximum of five (5) days in the fiscal year. This time will be charged against sick leave provided in A.1, above." Carteret.

contract language should be rewritten to come within the limits of the statutes. However, N.J.S.A. 43:21-39.1 goes on to state:

Nothing in P.L. 2008, c.17 (C.43:21-39.1 et al.) shall be construed as nullifying any provision of an existing collective bargaining agreement or employer policy, or preventing any new provision of a collective bargaining agreement or employer policy, which provides employees more generous leave or gives employees greater rights to select which kind of leave is used or select the order in which the different kinds of leave are used. Nothing in P.L. 2008, c.17 (C.43:21-39.1 et al.) shall be construed as preventing an employer from providing more generous benefits than are provided under P.L. 2008, c.17 (C.43:21-39.1 et al.) or providing benefits which supplement the benefits provided under P.L. 2008, c.17 (C.43:21-39.1 et al.) for some or all of the employer's employees.

This provision of N.J.S.A. 43:21-39.1 permits employers and collective bargaining agreements to give employees more generous leave or benefits than what is contained in the statute.

Therefore, Article XIX, Section C ("Illness in the family is cause for an employee to utilize sick leave.") is not preempted by statute limiting sick leave to only certain family members, and is mandatorily negotiable.

Article XIV is entitled Involuntary Transfers and Reassignments. The Board disputes the negotiability of Sections A and C, which provide:

- A. No vacancy shall be filled by means of involuntary transfer or reassignment if in the judgment of the Superintendent

there is a qualified volunteer available to fill said position.

- C. When an involuntary transfer or reassignment is necessary, a teacher's area of competence, major or minor field of study, length of service in the South Hunterdon Regional School District, and other relevant factors, including among other things, state and/or federal laws, rules, regulations or administrative directives, shall be considered in determining which teacher is to be transferred or reassigned.

Article XV is entitled Promotions. The Board disputes the negotiability of Section C, which provides:

- C. All qualified teachers shall be given adequate opportunity to make application and no position shall be filled until all properly submitted applications have been considered. The Board agrees to give due consideration to the professional background and attainments of all applications and other relevant factors, including length of service in the district. In filling such vacancies, consideration shall be given to qualified teachers already employed by the Board. Applicants not selected shall, upon request, receive a written or oral explanation from the Superintendent.

The Board argues that Article XIV, Section A impedes on the Board's managerial prerogative to make transfer determinations. The Association did not submit an argument regarding this clause.

In general, transfer criteria and transfer decisions are not mandatorily negotiable, but procedures pertaining to transfers are. N.J.S.A. 34:13A-25; Local 195; Ridgfield Park; Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523 (1985);

Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982). We have found that clauses such as Section A are not mandatorily negotiable unless limited to situations where the Board has found several applicants to be equally qualified and one is a volunteer. The general use of the term "qualified" in Section A does not meet such limitation. Franklin Tp. Bd. of Ed., P.E.R.C. No. 2005-18, 30 NJPER 408 (¶133 2004). Therefore, Article XIV, Section A is not mandatorily negotiable.

The Board argues that Article XIV, Section C and Article XV, Section C attempt to dictate the criteria to be considered by the Board before taking employment actions, which is contrary to its managerial prerogative to establish staffing qualifications. The Association did not submit an argument regarding these clauses.

Under the traditional Local 195 tests, it is well-established that a school board can unilaterally determine the criteria for selecting teachers and select the teachers it believes most qualified. See, e.g., North Bergen Tp. Bd. of Ed., 141 N.J. Super. 97 (App. Div. 1976). However, as a procedural matter, a school board may agree to consider current employees before considering non-employees. See, e.g., Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989).

The first, third, and fourth sentences of Article XV, section C are mandatorily negotiable matters of procedure. Rockaway Tp. Bd. of Ed. and Rockaway Tp. Ed. Ass'n, P.E.R.C. No. 90-107, 16 NJPER 321 (¶21132 1990), aff'd NJPER Supp.2d 250 (¶209 App. Div. 1991); Trenton Bd. of Ed., P.E.R.C. No. 88-139, 14 NJPER 458 (¶19190 1988); E. Brunswick Bd. of Ed., P.E.R.C. No. 81-123, 7 NJPER 242 (¶12109 1981). The first sentence provides a procedural right to notice of promotion opportunities, and the right to have applications considered. The third and fourth sentences supply procedural rights to prior consideration and an explanation of denial, but do not require a substantive preference - or priority - for in-district teachers. Contrast Black Horse Pike Reg. School Dist. Bd. of Ed., P.E.R.C. No. 2007-38, 32 NJPER 396 (¶164 2006) (priority for in-district teachers considered to be substantive and not mandatorily negotiable).

The second sentence of Article XV, section C, as well as the entirety of Article XIV, section C, are not mandatorily negotiable because they encroach upon the Board's right to determine promotional criteria by requiring consideration of certain professional factors and seniority in the district. See Rockaway Tp. Bd. of Ed.; Black Horse Pike Reg. Bd. of Ed.

Article XIII is entitled Voluntary Transfers and Reassignments. The Board disputes the negotiability of Section B, which provides:

- B. 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 and no such request shall be denied arbitrarily or capriciously.

The Board argues that provisions of Article XIII, Section B seek to inappropriately interfere with the Board's authority in taking employment action. The Association argues that pursuant to Franklin Tp. Bd. of Ed., the first part of Section B (from "In the determination" through "school system") is negotiable, but it concedes that the latter part of the sentence ("and no such request shall be denied arbitrarily or capriciously") is not negotiable as it limits the Board's right to deny a transfer request. The Board replies that although the language in Franklin was nearly identical, the Board in that case did not challenge the first part of the provision^{3/} and thus the negotiability of that portion was never adjudicated.

This section is not mandatorily negotiable. We have found that the phrase "shall be honored" in similar clauses establishes a substantive limit on a board's right to deny a request, despite the caveat that it not conflict with instructional requirements and the best interests of the school system. Piscataway Tp. Bd.

^{3/} In Franklin, we noted that: "The Board argues that the first sentence of Section D appears to leave the final discretion in its hands."

of Ed., P.E.R.C. No. 87-151; National Park Bd. of Ed., P.E.R.C. No. 87-102, 13 NJPER 194 (¶18082 1987); Edison Tp. Bd. of Ed., P.E.R.C. No. 83-100, 9 NJPER 100 (¶14055 1983). Similar clauses requiring only that a teacher's wishes be "considered" and that any denials be explained are procedural rights that are mandatorily negotiable. Rockaway Tp. Bd. of Ed. and Rockaway Tp. Ed. Ass'n. However, Article XIII, section B, as written, is not mandatorily negotiable.

Article XVI is entitled Home Teaching and Federal Programs. The Board disputes the negotiability of Sections B and C, which provide (Section A provided for context):

- A. All openings for positions in home teaching, new, old and continuing federal programs, summer school and other programs (including non-teaching positions for which teachers may be qualified and eligible) shall be adequately publicized by the Superintendent in accordance with procedures for publicizing promotional vacancies set forth in Article XIV, Section B of this Agreement. Home teaching openings shall be posted as they occur.
- B. Every effort shall be made to distribute such assignments equitably among qualified teaching personnel.
- C. Teachers now employed by the Board shall have priority to the above positions before appointment of applicants from outside the district.

The Board argues that Article XVI, Section B restricts its ability to provide a course of study and make assignments. It

argues that Article XVI, Section C restricts the Board's ability to seek candidates who are qualified, to establish the minimum qualifications, and to refuse candidates it feels are inappropriate. The Association concedes that both Article XVI, Section B and Section C are non-negotiable to the extent that they apply to teaching assignments, but argues that the provisions are negotiable when applied to non-teaching workload or positions. It notes that N.J.S.A. 34:13A-23 governs the negotiability of extracurricular activities and provides that:

"All aspects of assignment to, retention in, dismissal from, and any terms and conditions of employment concerning extracurricular activities shall be deemed mandatory subjects for collective negotiations..."

The Board replies that even if the provisions of Article XVI do refer to extracurricular activities, they seek to restrict criteria by granting preferences that limit its ability to make staffing decisions.

The clause is mandatorily negotiable, pursuant to N.J.S.A. 34:13A-23, with respect to programs involving extracurricular activities, but it cannot be applied to summer school or other teaching assignments. Black Horse Pike Reg. Bd. of Ed. If Article XVI, section C is retained in the successor agreement and the Association seeks to arbitrate a grievance that the Board believes is not legally arbitrable given the distinction we have made, it may file a scope petition seeking to restrain

arbitration.

Article X is entitled Teacher Employment. The Board disputes the negotiability of Section A, which provides:

- A. The Board will notify the Department Chairperson of pending interviews and will invite Department Chairperson to take part in interviews of prospective candidates for employment in their department and make recommendations regarding same.

The Board argues that Article X, Section A requires input and recommendations regarding potential new hires, which infringes on the managerial prerogative to determine appropriate staffing levels and detracts from the managerial right to determine criteria for candidate employment. The Association argues that a public employer may include an employee representative on the interview committee, but is not required to negotiate over proposals requiring the representative to be part of the decision-making process. The Board replies that the provision is impermissive to the extent that it shares the responsibility to make staff selections with a committee member.

A public employer may elect to include an employee representative on an interview committee, but is not required to negotiate over proposals requiring that employee representatives be part of the process involved in making personnel decisions. Edison Tp. Bd. of Ed., P.E.R.C. No. 2005-71, 31 NJPER 140 (¶61 2005). Section A allows department chairpersons to participate

in interviews and make recommendations regarding prospective candidates for teaching positions in their department. This provides a procedural opportunity for a recommendation only, and does not significantly interfere with the determination of selection criteria or the actual decision to hire.

State-Operated School District of the City of Newark, P.E.R.C. No. 2001-10, 26 NJPER 368 (¶31149 2000), aff'd in pt., rev'd in pt. 28 NJPER 154 (¶33054 App. Div. 2001). Article X, section A is therefore mandatorily negotiable.

Article VIII is entitled Teaching Hours, Teaching Load and Specialists. The Board disputes the negotiability of Sections E.4 and 5, which provide:

4. The maximum number of students in all classes, with the exception of physical education, shall be twenty-five (25) whenever possible.
5. Teachers must approve a schedule that involves more than one course offering in any one class period. Exceptions to this are Industrial and Fine Arts and Physical Education.

The Board argues that Article VIII, Section E.4 should be stricken from the CNA because a local board of education has a non-negotiable managerial right to determine class size. The Association concedes that limits on class size are not negotiable, as class size is predominately an issue of educational policy. However, it asserts that the issue of additional compensation for class size exceeding a certain number

is negotiable, and that E.4 can be modified to allow negotiation of compensation for class size in excess of twenty-five.

In general, limits on class size are not negotiable. Although increasing class size impacts teacher workload, it does not lengthen a teacher's work day or pupil contact time and is predominately an issue of educational policy. Franklin Tp. Bd. of Ed., P.E.R.C. No. 2003-58, 29 NJPER 97 (¶27 2003), aff'd 30 NJPER 201 (¶75 App. Div. 2004), certif. den. 181 N.J. 547 (2004). However, Franklin Tp. also holds that majority representatives and school boards may agree that teachers will receive additional compensation if class size exceeds a specified number. Such clauses are enforceable workload/compensation clauses. See Wanaque Bor. Bd. of Ed., P.E.R.C. No. 2003-69, 29 NJPER 157 (¶45 2003); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 90-80, 16 NJPER 176 (¶21075 1990), aff'd NJPER Supp.2d 258 (¶214 App. Div. 1991). The Association may seek to negotiate compensation for class size beyond a certain number. As written, however, Article VIII, section E.4 is not mandatorily negotiable.

The Board argues that Article VIII, Section E.5 improperly requires teacher approval (with some exceptions) prior to the Board's establishment of course schedule and offerings. The Association concedes that the Board has managerial prerogative to determine the structure of the school day and establish block scheduling, but argues that the Association may negotiate over

work schedules and workloads of individual teachers. It asserts that the article may be re-written to refer to teacher work schedules and workload once the structure of the school day is established.

A school board has a prerogative to determine the structure of the school day and to establish block scheduling. Morris Hills Reg. Bd. of Ed., P.E.R.C. No. 2012-12, 38 NJPER 153 (¶43 2012); Elizabeth Bd. of Ed., P.E.R.C. No. 2004-9, 29 NJPER 389 (¶123 2003), Jersey City School Dist., P.E.R.C. No. 97-151, 23 NJPER 396 (¶28182 1997); South Brunswick Tp. Bd. of Ed., P.E.R.C. No. 97-117, 23 NJPER 238 (¶28114 1997). The Association is correct that work schedules of individual employees are, generally, mandatorily negotiable. See Woodstown-Pilesgrove Reg. School Dist. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980); Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 6-7 (1973). However, Article VIII, Section E.5, as written, concerns the school board's prerogative to determine how class schedules are structured within the school day, and is thus not mandatorily negotiable.

Article XVII is entitled Teacher Evaluation. The Board disputes the negotiability of Sections A.2 and D.1, which provide:

- A.2. Teachers shall be evaluated only by fully certified administrators to whom they report and who are not recognized in this contract. Such evaluation shall

be reasonably detailed as to strengths, weaknesses and suggestions for improvement.

D.1. Final evaluation of a teacher upon termination of his/her employment shall be concluded prior to severance and his/her file thereupon closed.

The Board argues that Article XVII, Section A.2 impedes on its managerial prerogative to determine policy to establish evaluation criteria, as well as its right to determine the identity of the evaluator. Citing West Morris Reg. H.S. Bd. of Ed., P.E.R.C. No. 2003-3, 28 NJPER 304 (¶33114 2002), the Board argues that the second sentence of A.2 interferes with its establishment of evaluation criteria because it mandates that evaluations focus on particular areas such as strengths and weaknesses. Citing Rutgers, State University v. Rutgers Council of AAUP Chapters, 256 N.J. Super. 104, 121 (App. Div. 1992), the Board argues that the first sentence of A.2 is an impermissive restriction on the individuals who may conduct an evaluation.

Evaluation criteria are not mandatorily negotiable, but evaluation procedures, including notice of the criteria to be applied are mandatorily negotiable unless preempted. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982); Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397 (App Div 1991), aff'd 130 N.J. 312 (1992). We agree with the Board that the first sentence of section A.2 is not mandatorily negotiable because it designates who will perform

evaluations. Burlington County College, P.E.R.C. No. 2010-38, 35 NJPER 439 (¶144 2009); Essex County College, P.E.R.C. No. 2007-46, 33 NJPER 19 (¶8 2007), citing Rutgers, State University v. Rutgers Council of AAUP Chapters, 256 N.J. Super. 104 (App. Div. 1992), aff'd 131 N.J. 118 (1993). The second sentence of section A.2 is not mandatorily negotiable because it sets promotional criteria by requiring that evaluations be detailed in particular areas (strengths, weaknesses and suggestions for improvement), rather than just a procedure for providing notice of the promotional criteria that will be used.

The Board argues that Article XVII, section D.1 is not negotiable because an employer may not be prohibited from adding information to a file simply because the employment relationship has severed. We have found that prohibition on placement of post-employment materials in personnel files is not mandatorily negotiable. East Brunswick Bd. of Ed., P.E.R.C. No. 81-123, 7 NJPER 242 (¶12109 1981), aff'd in pt., rev'd in pt., NJPER Supp.2d 115 (¶97 App. Div. 1982). Therefore, Article XVII, section D.1 is not mandatorily negotiable.

ORDER

A. The following provisions of the 2009-2012 agreement are not mandatorily negotiable:

Article VIII, sections E.4 and E.5;

Article XII, section B;

Article XIII, Section B;

Article XIV, sections A and C;

Article XV, section C, sentence two; and

Article XVII, Sections A.2 and D.1.

B. The following provisions of the 2009-2012 agreement are mandatorily negotiable:

Article X, Section A;

Article XV, Section C, sentences one, three, and four;

Article XVI, Section C, to the extent it applies to extracurricular activities; and

Article XIX, Section C.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Wall voted in favor of this decision. Commissioner Jones voted against this decision. Commissioners Eskilson and Voos were not present.

ISSUED: March 21, 2013

Trenton, New Jersey