

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF THE ,  
SOMERSET HILLS REGIONAL SCHOOL  
DISTRICT, SOMERSET COUNTY,

Respondent,

-and-

OAL DKT. NO. EDU 16752-12  
AGENCY DKT. NO. 345-11/1S

SOMERSET HILLS  
EDUCATION ASSOCIATION,

Petitioner.

AND

SOMERSET HILLS BOARD  
OF EDUCATION,

Respondent,

-and-

OAL DKT. NO. PRC 16974-13  
PERC DKT. NO. CO-2013-101

SOMERSET HILLS  
EDUCATION ASSOCIATION,

**(CONSOLIDATED)**

Charging Party.

SYNOPSIS

On exceptions filed by the Somerset Hills Education Association (Association) to an Administrative Law Judge's (ALJ) Initial Decision in a consolidated proceeding, the Public Employment Relations Commission denies the Somerset Hills Board of Education's motion for summary judgment, grants in part the Association's motion for summary judgment, and remands the remaining issues to the ALJ. The Association's unfair practice charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by failing to negotiate before modifying dress code policies. The Commission holds that the Board violated 5.4a(1) and (5) by unilaterally implementing a schedule of discipline to be imposed on employees for violations of dress code policies. The Commission finds that there are fact-specific aspects of the dress code policies that may be mandatorily negotiable and give rise to severable and negotiable consequences on mandatorily negotiable terms and conditions of employment, and it remands these issues to the ALJ to make determinations.

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. 2014-55

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Appearances:

For the Petitioner/Charging Party, Oxfeld  
Cohen, attorneys (Samuel Wenocur, of counsel)

For the Respondent/Respondent, Methfessel &  
Werbel, attorneys (Eric L. Harrison, of  
counsel)

DECISION

This case comes to us on exceptions filed by the Somerset Hills Education Association to an Administrative Law Judge's Initial Decision in a consolidated proceeding. The Association

filed an unfair practice charge with the Commission against the Somerset Hills Board of Education and a Petition of Appeal with the Commissioner of Education (hereinafter Commissioner or COE).<sup>1/</sup> Both filings challenge the Board's revisions in dress code policies for teaching staff and support staff, respectively. The Association's unfair practice charge alleges that the Board breached its statutory duty to negotiate with the Association before modifying the policies in violation of N.J.S.A. 34:13A-5.4a(1) and (5).<sup>2/</sup> The Association alleges in its appeal to the Commissioner that the new policies are overly broad and vague and that the Board acted unreasonably in adopting them.

The cases were assigned to Administrative Law Judge (ALJ) Jeff S. Masin who issued an "Order on Consolidation and Predominant Interest" recommending that this Commission had the predominant interest in the dispute. The Commission Chair and the COE concurred with that conclusion.

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1/ We have amended the caption to accurately label the Association as the charging party in the unfair practice case and the petitioner in the appeal to the Commissioner of Education. The Board is the respondent in both matters.

2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. . . and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. . .

On December 13, 2013, the parties submitted their motions and cross-motions for summary judgement, previously filed with us, to ALJ Masin. These undisputed facts appear.

From October 1, 2008 until revised by the Board in June 2012, Policy No. 3126, applicable to teaching staff, titled "Dress and Grooming," provided:

The Board of Education believes that the appearance and dress of teaching staff members is an important component of the educational program of this school district. The attitude of teaching staff members about their professional responsibilities and the importance of education in the lives of their pupils are reflected in their dress and appearance. Accordingly, in order to create an atmosphere of respect for teachers and an environment conducive to discipline and learning, the Board establishes the following rules for the dress of teaching staff members in the performance of their professional duties:

Staff members should dress appropriately for the subject of instruction, the work being performed, or the occasion. Sneakers, slippers, flip-flops, T-shirts without collars, jeans, sweat pants, and shorts are not considered professional attire. Clothing that would attract undue attention, create disruption, or be potentially dangerous is not permitted. Examples might include transparent garments or clothing with inappropriate slogans.

On June 27, 2012, the Board adopted a revision of this policy, first read at its meeting of June 13, 2012.

#### 3216 DRESS AND GROOMING

The Board of Education believes that the appearance and dress of teaching staff

members is an important component of the educational program of this school district. The attitude of teaching staff members about their professional responsibilities and the importance of education in the lives of their pupils are reflected in their dress and appearance. Accordingly, in order to create an atmosphere of respect for teachers and an environment conducive to discipline and learning, the Board established the following rules for the dress of teaching staff members in the performance of their professional duties. All staff members, when students are present, shall:

1. Be physically clean, neat and well groomed, including maintaining clean and well-groomed hair.
2. Dress in a manner which reflects favorably upon the teaching profession. Dress and appearance must not be unduly distracting to an orderly teaching and learning process.

Examples of appropriate dress include:

- a. For female staff members - dresses, pant suits, blouses/sweaters and skirts or slacks
- b. For male staff members - suits, slacks with or without jackets, shirts with collars and ties, turtleneck shirts, and sweaters

Examples of unacceptable dress include:

- a. Shorts and mini-skirts
- b. T-shirts, tank tops, and sweatshirts
- c. Any type of jeans (denim material), sweat pants, warm-ups, spandex, and/or jogging suits
- d. Excessively short or tight fitting clothing, exposed midriff or undergarments, provocative/excessive cleavage, and transparent garments

e. Any dress, jewelry or grooming that would attract undue attention, including sunglasses in the building (except for documented medical reasons)

f. Hats, bandanas, scarves, or other head coverings except for headgear with religious significance

g. Sneakers and flip-flops (dress sandals are acceptable)

h. Observable body piercing jewelry that is distracting to the educational process (ear piercing is acceptable)

i. Observable tattoos that are distracting to the educational process

3. Physical education teachers may wear clothing, which is conducive to their subject area. Athletic jackets, pullover shirt with collars, slacks, jogging suits, shorts, T-shirts, and sneakers in gym or outdoors are acceptable. When conducting class outdoors, an appropriate hat may be worn.

Physical education staff must wear sweat pants, jogging pants or warm up type pants and a collared shirt when out of the gym and in health class, on duty, in the cafeteria and/or in the hallway. When not in the gym all day, (teaching health all day) physical education teachers come under the regular dress policy.

4. Science teachers and related art teachers may wear appropriate clothing to accommodate special teaching situations including smocks, shop aprons, lab coats, or other protective attire. Safety equipment, such as goggles, glasses, etc. shall be worn as required by other policies, regulations codes or statutes. The Principal or his/her designee will determine if the attire is appropriate for that subject area.

5. Staff members are prohibited from wearing shirts, buttons, any other clothing that speaks to association/board issues while in the presence of students.

6. Administrators shall wear appropriate business or business casual attire.

7. Prior approval: Any request for an exemption for medical reasons (e.g. footwear) will be discussed with the Principal and appropriate medical documents must be provided. Requests for temporary exemptions will be determined by the Principal. Requests for permanent exemptions will be forwarded by the Principal to the Superintendent for a final decision.

Prior approval is required for any deviation from this policy.

If an employee is uncertain as to the appropriateness of a garment, a brief written description of the clothing in question should be submitted to the Principal who shall respond in writing within three school days.

8. Severe weather conditions: Dress standards may be modified by the Superintendent to permit more casual attire on delayed opening days due to inclement weather. This modification recognizes that staff members may have to shovel snow, etc. in order to arrive at work in a timely manner.

9. Special dress code exception days: When scheduled and approved by the Principal, more casual attire may be worn by staff members on days with a theme or activity planned that support the school program. However, such clothing must be linked specifically to the activity. For example, T-shirts may be permitted on a school spirit day, but T-shirts unrelated to the school will not be permitted.

10. Enforcement: A staff member who violates the dress code will be issued a verbal warning by the Principal. A second offense will result in a written warning by the Principal. The third offense will result in a letter of reprimand from the Principal and a copy will be placed in the employee's personnel file. Should there be a fourth offense, the Superintendent shall recommend appropriate disciplinary measures to the Board.

Such disciplinary measures may include, but will not be limited to increment withholding, charges of insubordination, and any other sanctions permitted by code, statute, or law.

11. Severability: The provisions of this dress code shall be deemed to be severable. If any section is found to be unreasonable or void by a forum of competent jurisdiction, only that section shall be deemed deleted.

Also, on June 27, 2012, the Board modified its dress and grooming policy applicable for support staff. Policy 4216, as further amended slightly in August 2012, consists of eight numbered sections and is analogous and in many respects identical to the new code that applies to teaching staff.

In its unfair practice charge, the Association contends that the Board unilaterally adopted a Dress and Grooming Policy for the school year 2012-2013. On July 19, 2012, its attorney wrote to the Board demanding negotiations on the "unilateral change in terms and condition of employment evidenced by the newly adopted policy" and that the Board had refused to negotiate terms and conditions of employment. It seeks to have the policy declared null and void until all aspects of the policy, "especially the aspects that are clearly negotiable are negotiated."

In its Petition of Appeal to the Commissioner, the Association notes the imposition of the "Dress and Grooming Code" for the teaching and support staff at the beginning of the 2012-2013 school year, and contends that the Code is not in conformity with school laws and is therefore ultra vires and



illegal. According to the ALJ, the petition does not identify any specific elements of the dress code that it contends are in violation of these requirements.

The Association also expressed concerns regarding these dress and grooming codes in a meeting held on September 24, 2012, with the Superintendent, Board President, Director of Curriculum and a Board member.

On December 18, 2012, the Association submitted written comments on the dress code on these issues:

- No Shorts - all parts of the building are not air-conditioned on hot days
- No mini-skirts - Given the fashion trends define "mini-skirt."
- No T-shirts - Does this imply T's with graphics or all T-Shirts?
- What [is meant by] "excessively short" or "tight-fitting?"
- What is considered a "sneaker?"
- Where [is the line] between a fashionable thong sandal and "flip flop?"
- Scarves - These are [fashionable accessories not addressed by the policy]
- No "dress, jewelry or grooming that would attract attention," [would hinder freedom of expression or religion].
- [Please define] observable tattoos that are distracting to the educational process.
- What is deemed "distracting to the educational process?"

- [Clarify whether phys ed teachers] when not in the gym must adhere to regular dress code.

The Association letter also notes that advance permission to deviate from the code may not always be possible and asks how will the presence of "severe weather conditions" be determined?<sup>3/</sup>

There is no dispute between the parties that the Board adopted the 2012 policies in June and later the revision in August, without seeking to negotiate the adoption of, or the terms of, the policies with the Association.

After reviewing the facts, the exhibits, the parties arguments, and applicable precedents, for the reasons explained below, we will modify the ALJ's recommendation, by denying the Board's motion for summary judgment, granting, in part, the Association's motion and remanding the remainder of the case to the ALJ for a plenary hearing.<sup>4/</sup>

In analyzing this dispute we are guided by these principles, statutes and precedents.

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3/ Individual teaching staff and/or aides later submitted statements noting the following: an aide related that her work included recess supervision outside in conditions (e.g. muddy fields) that could ruin good clothing; Another aide assigned to work with small or special needs children noted that activities (e.g. finger-painting) or attending to pupil personal hygiene needs caused their own clothes to become soiled, thus making the wearing of jeans a desirable option; a teaching staff member listed the costs of purchasing new code-compliant outfits.

4/ Following the remand, we encourage the parties to engage in discussions to settle their differences, rather than continuing to litigate.

In general, a public employer, especially in an educational setting, is free to adopt a dress code as an exercise of educational policy aimed at instilling an atmosphere of professionalism among teaching staff as well as establishing and maintaining proper classroom decorum and respect among students.<sup>5/</sup> See Egg Harbor Township Board of Education, P.E.R.C. No. 86-84, 12 NJPER 99 (¶17038, 1985).

However, where an educational or managerial decision has severable effects on employee terms and conditions of employment, those issues are subject to the duty to negotiate, provided that they do not interfere with the managerial action. See, generally, Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022 1983), aff'd 198 N.J. Super. 382 (App. Div. 1985) (requirement that employees produce a doctor's note for any absence was non-negotiable; cost of obtaining the notes was severable from the production requirement and was mandatorily negotiable). In dress code cases we have applied Elizabeth's severability analysis, commenting in Egg Harbor Tp. Bd. of Ed., 12 NJPER at 101, that advance notice of a dress code's implementation and disputes over alleged uneven

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<sup>5/</sup> See Carlstadt Teachers Ass'n v. Carlstadt Bd. of Ed., 1980 S.L.D. 370, aff'd, 1982 S.L.D. 1448, 1450-51 (App. Div. 1982), .

enforcement of the code were severable from its adoption and were mandatorily negotiable subjects.<sup>6/</sup>

Third, both of the dress codes adopted by the Board have disciplinary components. N.J.S.A. 34:13A-5.3, applicable to all public employers, requires negotiations over disciplinary disputes and review procedures. In addition, N.J.S.A. 34:13A-34:13A-24 provides that a schedule for the imposition of minor discipline of school employees is mandatorily negotiable..

Applying these principles, we first hold that the Board violated N.J.S.A. 34:13A-5.4a(1) and (5) by unilaterally implementing, in Section 10 of the policy applicable to teaching staff, and Section 7 of the policy applicable to support staff, a schedule of discipline to be imposed on employees for violations of the respective policies. Cf. Bergen Community College, P.E.R.C. No. 2010-25, 35 NJPER 376 (¶127 2010) (adoption of no-smoking policy not negotiable, but prior negotiations required where employer unilaterally established disciplinary procedures and sanctions for violations of policy). Accordingly, we conclude that the Board engaged in unfair practices by adopted

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6/ Egg Harbor Tp. Bd. of Ed., involved only teaching staff. The decision expressly declined to rule on the negotiability of a dress code for non-teachers. However, in Carteret Bd. of Ed., P.E.R.C. No. 2009-71, 35 NJPER 213 (¶76 2009), we held that a proposed alteration in the dress code for custodial and maintenance employees that would prevent them from wearing blue jeans at work affected employee safety and was mandatorily negotiable. The pertinent contract article also contained a stipend for the purchase of work clothes.

Section 10 of the teacher dress code and Section 7 of the support staff dress code without prior notice to and negotiations with the Association.<sup>7/</sup> We will order those sections of the policies to be excised.

Second, given the list of concerns submitted by the Association on December 18, 2012 as well as later written statements submitted by individual employees, we find that there are aspects of the policies that may be mandatorily negotiable or may give rise to severable and negotiable consequences on mandatorily negotiable terms and conditions of employment, including clarification of some terms of the policies so that employees will be on notice as to what constitutes compliance or non-compliance with the Policies' requirements. We do not believe that the resolution of these issues can be made on motions for summary judgment as their negotiability or non-negotiability may be fact-specific.<sup>8/</sup> We will remand these

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<sup>7/</sup> We note that the policy at issue in Egg Harbor Tp. Bd. of Ed., did not contain any disciplinary provisions.

<sup>8/</sup> The ALJ noted that the list of concerns was submitted by the Association after it had already filed its Unfair Practice Charge. The Initial Decision seems to regard that chronology as significant and focuses on the Association's broad-based July, 2012 objections that followed the Board's unilateral adoption of the policies. We do not share the view that negotiations demands made after the filing of a charge should not be deemed relevant, especially where those demands are part of the record and were the subject of litigation. Where an employer has unilaterally changed working conditions without negotiations, it is not thereby  
(continued...)

issues to the ALJ to make determinations, but we hope that the parties will use this opportunity to settle the remainder of this dispute regardless of whether the subjects raised are mandatorily negotiable. See Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17, 31 (1973) (even where disputed subject is not mandatorily negotiable, boards are well-advised to solicit timely input from, and discussions with, the representatives of their teachers).

Before sending this case back to the ALJ, we provide these general guidelines. Where an employer sets new managerial or educational policies affecting employees:

1. The issue of advance notice of such changes may be mandatorily negotiable;<sup>8/</sup>
2. If employees incur additional costs in order to comply with the new policy, the issue of offsetting compensation may be mandatorily negotiable;<sup>10/</sup>

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8/ (...continued)  
absolved from responding to subsequent demands to negotiate or allowed to make further changes in negotiable terms and conditions of employment. See Hunterdon Cty. and CWA, 116 N.J. 322 (1989)

9/ Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80, 90 (App. Div. 1981)

10/ City of Elizabeth.

3. If the new policy has a direct impact on employee safety and comfort, that issue may be mandatorily negotiable.<sup>11/</sup>

The above list is not exhaustive and we make no determination at this time as to the negotiability of those provisions of the policy to be examined following our remand. And, the above observations are subject to the caveat that negotiations over any severable effects cannot impede the adoption and execution of the new policy, and must not conflict with any statutes or regulations, that expressly, specifically, and comprehensively preempt negotiations.<sup>12/</sup>

#### ORDER

A. The Motion of the Somerset Hills Board of Education for summary judgment is hereby DENIED.

B. The Motion of the Somerset Hills Education Association for summary judgment is hereby GRANTED as to the allegation that the Board violated N.J.S.A. 34:13A-5.4a(5) and derivatively N.J.S.A. 34:13A-5.4a(1) with regard to the allegation that the Board unilaterally, and without prior negotiations with the

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<sup>11/</sup> Carteret Bd. of Ed.

<sup>12/</sup> We do not determine whether the policy satisfies the standards for clarity, reasonableness and other factors set forth in Carlstadt. That aspect of the case is within the jurisdiction of the Commissioner of Education to consider, separate and apart from the ultimate determination of those provisions of the policy that are mandatorily negotiable.

Association, adopted Section 10 of policy 3216 and Section 7 of Policy 4216. The motion is otherwise DENIED.

C. Section 10 of policy 3216 and Section 7 of Policy 4216 are deemed null and void and may not be re-implemented without prior negotiations with, and the agreement of, the Association.<sup>13/</sup>

D. This matter is remanded to ALJ Jeff S. Masin for a ruling on the remaining issues in this case.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: February 27, 2014

Trenton, New Jersey

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<sup>13/</sup> Because this decision does not resolve all issues in this case, the customary "Notice to Employees" and full remedial order will not be issued until a final decision in this case has been issued. In addition, as the ALJ's Initial Decision has been modified, review by the Commissioner of Education should await the ALJ's decision after remand.