

P.E.R.C. NO. 2016-86

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST ORANGE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2016-055

WEST ORANGE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of contract proposals for a successor collective negotiations agreement between the Board of Education and the Association. The Commission finds not mandatorily negotiable a provision crediting full-time employees with "supplemental sick leave" and a provision precluding any teacher assignment designed to encourage reflective and self-critical practices from being required to be submitted to a supervisor or administrator or from being used as part of any performance evaluation. The Commission finds mandatorily negotiable provisions limiting the number of teacher subject areas and a provision establishing a sick leave donation program.

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, Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys (Matthew J. Giacobbe, of counsel and on the brief; Gregory J. Franklin, of counsel and on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Richard A. Friedman, of counsel and on the brief; Genevieve M. Murphy-Bradacs, on the brief)

DECISION

On February 25, 2016, the West Orange Board of Education (Board) petitioned for a scope of negotiations determination. The Board asserts that portions of its expired collective negotiations agreement (CNA) with the West Orange Education Association (Association) are not mandatorily negotiable and therefore cannot be retained in a successor agreement.

The Board filed a petitioner's brief and the Association filed a respondent's brief. The Board's brief concerns ten CNA provisions it asserts are not mandatorily negotiable. The Association's brief indicates that it no longer disputes that the

following CNA provisions implicate non-negotiable managerial prerogatives: Article V, Section A.1.a.; Article V, Section 2.a.; Article V, Section 2.b.(b)II. (last sentence); Article XX, Section D.; and Article XXI.

Therefore, this decision determines only the negotiability of the following CNA provisions that remain in dispute: Article V, Section 2.b.(b)I. (second, third, and fifth sentences); Article V, Section 2.b.(b)II. (fifth, sixth, tenth, and eleventh sentences); Article V, Section 2.b.(c) (third and fourth sentences); Article XV, Section A.3.; Article XV, Section B.; Article XVIII, Section B. (fourth paragraph, second and fourth sentences). These facts appear.

The Association represents various certificated personnel: all Teachers, Certified School Nurses, Guidance Counselors, Librarians, Social Workers, Learning Disability Teacher-Consultants, Psychologists, Learning Resource Teachers, Basic Skills Teachers, E.S.L. Teachers, Speech-Language Specialists, Occupational Therapists and District Technology Integration Specialist, amongst various other titles as defined in the CNA. The Board and Association were parties to a CNA in effect from July 1, 2012 through June 30, 2015.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. Ridgefield Park Ed.

Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). 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).

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

[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.

Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it speaks in the imperative and fixes a term and condition of employment expressly, specifically and comprehensively. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

Article V of the CNA is entitled "Work Hours and Work Load." The Board disputes the negotiability of the following underlined sentences in Article V, Sections 2.b.(b) and 2.b.(c):

b. The daily teaching load of teachers shall be as follows:

* * *

(b) MIDDLE SCHOOLS

At the Middle School level, the Board may adopt one of the following two options to govern the workload. . . . Once elected, that option shall apply for the entire school year, but may be changed from year to year.

I. Option 1 - In the middle schools, the regular load of a core curriculum teacher (English, Language Arts, Math, Reading, Science, Social Studies and World Language) shall consist of not more than five classes and a maximum of three courses, plus one team planning period and one Advisory period as a supervisory duty. A core curriculum teacher holding a non-elementary endorsed license shall be assigned to teach in not more than two subject areas. A core curriculum teacher holding an elementary endorsed license shall be assigned to teach in not more than three subject areas. The regular load of a non-core curriculum teacher shall consist of not more than either (a) five instructional periods with a maximum of three courses and a duty assignment or (b) six instructional periods with a maximum of three courses and no other duty. (Example: As a maximum, a core curriculum teacher with a non-elementary license may be assigned two periods of regular English six, one period of top English six and two periods of regular Social Studies six, plus advisory and a team meeting. This load would consist of five classes in three courses, in no more than two subject areas.)

II. Option 2 - In the middle schools, a nine period day may apply. The nine period day shall not change the times at which school shall start and stop. Under this option, the regular load of a core curriculum teacher (English, Language Arts, Math, Reading, Science, Social Studies and World Language) shall consist of not more than five classes and a maximum of three courses, plus one team planning period, one Advisory period or cafeteria duty as a supervisory duty and, during one semester of the academic year, a single period duty assignment (cafeteria duty, hall duty, tutoring duty, clerical duty, etc.) During the semester without this duty assignment, the teacher shall utilize this time for additional preparation, for curricular review, for consultation with colleagues, for common planning, parent conferences or for other professional purposes. A core curriculum teacher holding a non-elementary endorsed license shall be assigned to teach in not more than two subject area. A core curriculum teacher holding an elementary endorsed license shall be assigned to teach in not more than three subject areas. The regular load of a non-core curriculum teacher shall consist of not more than either (a) five instructional periods with a maximum of three courses and a full year duty assignment or (b) six instructional periods with a maximum of three courses and no other duty. In addition to the foregoing, each non-core curriculum teacher shall, during one semester fo the academic year, be assigned to a single period duty assignment (cafeteria duty, hall duty, tutoring duty, clerical duty, etc.) During the semester without this duty assignment, the teacher shall utilize this time for additional preparation, for curricular review, for consultation with colleagues, for common planning parent conferences or for other professional purposes. (Example: As a maximum, a core curriculum teacher with a non-elementary license may be assigned two periods of regular English six, one period of top English six and two periods of regular

Social Studies six, plus advisory, a team meeting and a single semester hall duty assignment. This load would consist of five classes in three courses, in no more than two subject areas, with applicable duty assignments.)

* * *

(c) HIGH SCHOOL

In the high school, the regular load of a core curriculum teacher (as defined in section (ii) above) shall consist of not more than five instructional periods with a maximum of three courses and two supervisory duties. The regular load of a non-core curriculum teacher shall consist of not more than either (a) five instructional periods with a maximum of three courses and a duty assignment or (b) six instructional periods with a maximum of three courses and no other duty. No high school teacher shall be assigned to teach in more than two subject areas. (Example: A teacher may be assigned to teach two sections of Math and three of Science, but may not be assigned to teach two sections of Math, two sections of Science and one section of History.)

The Board asserts that the underlined language interferes with its right to determine curriculum and the types of classes to be offered. It argues that by limiting the Board to assigning teachers to a defined number of subject areas, the provisions substantially infringe on its prerogative to assign employees to carry out its education mission. The Association responds that the Commission and courts have held that similar contractual clauses limiting the number of a teacher's subject areas and teaching preparations are mandatorily negotiable workload issues.

The Commission and Appellate Division have held that contractual clauses limiting the number of a teacher's subject areas and teaching preparations are mandatorily negotiable aspects of workload. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 26 (App. Div. 1977); Ramsey Bd. of Ed., P.E.R.C. No. 85-119, 11 NJPER 372 (¶16133 1985), aff'd NJPER Supp.2d 160 (¶141 App. Div. 1986); West Paterson Bd. of Ed., P.E.R.C. No. 95-102, 21 NJPER 222 (¶26140 1995); Red Bank Reg. Bd. of Ed., P.E.R.C. No. 2013-92, 40 NJPER 70 (¶26 2013). The following contract clauses, similar to the Article V clauses at issue here, were found mandatorily negotiable: "Seventh and eighth grade teachers shall not be required to teach more than two (2) subject areas, nor more than a total of two (2) teaching preparations at any one time." (West Paterson Bd. of Ed.); "The teachers in grades seven (7) through twelve (12) shall not be required to teach more than two (2) subject areas, nor more than a total of three (3) teaching preparations at any time except in foreign languages." (Ramsey Bd. of Ed.); and "departmental area teachers should not have more than two subject area preparations" (Byram Tp. Bd. of Ed.). Such clauses prevent uncompensated workload increases and do not interfere with the Board's right to determine which teachers will teach what courses given negotiated workload limits. Accordingly, the contested sections of Article V are mandatorily negotiable.

Article XV of the CNA is entitled "Sick Leave and Temporary Leaves of Absence." The Board disputes the negotiability of Section A.3., which provides:

On written notice to the Superintendent or his designee, and subject to the limitations and conditions that follow, any employee may transfer any number of accumulated sick days to another employee with a prolonged or serious illness or who due to a prolonged or serious illness of a family member requires extended or repeated absences from work. All transfers shall be subject to the reasonable discretion of the Superintendent or his designee.

Notwithstanding the foregoing, (1) no non-tenured employee may transfer sick days to another employee, except that instructional assistants who have been in the employ of the Board for more than three years and are otherwise qualified to transfer sick days shall be permitted to transfer sick days to another employee; (2) no employee with fewer than 25 accumulated sick days may transfer sick days to another employee, and no transfer may result in the transferring employee having fewer than 25 sick days; (3) with the exception of retiring employees, no employee who is not returning to the employ of the Board for the school year following the request to transfer sick days shall be permitted to transfer any sick days, and any transfer effectuated and followed within ten months by the resignation of the transferor shall be subject to rescission by the Superintendent if done with apparent intent to circumvent this prohibition; and (4) in the event an employee shall retire or otherwise terminate employment (except by reason of death) within three years from the date of transfer, then the compensation for accumulated sick days set forth in Article XV.D hereof shall be reduced as follows:

If the retiring employee accumulates, from the date of transfer to the date of retirement, the same or greater number of sick days than those transferred, there shall be no reduction from the compensation.

If the retiring employee accumulates less than the number of sick days transferred, then the number of accumulated sick days for which compensation shall be available shall be diminished by the difference between the number transferred and the number subsequently accumulated.

(For example, if an employee with 215 accumulated sick days transfers 12 sick days to another employee on January 1, 2006, and retires on June 30, 2008, having accumulated an additional 12 or more sick days, then no reduction in compensation shall occur; if the same transfer occurs, and the employee retires having accumulated 5 additional sick days, then the number of accumulated sick days for which compensation shall be available shall be reduced by the 7 days transferred but not re-accumulated; if the same transfer occurs and no additional days are accumulated, the transferor's right to compensation shall be reduced by the entire 12 days transferred. If an employee retires more than 3 calendar years after the date of transfer, no deduction shall be made.)

It is expressly acknowledged that the receipt and use of accumulated sick days will not shield an employee from administrative charges of unjustified excessive absences and the possible negative ramifications to the employee's status as a result of unjustified and excessive absences.

The Board contends that this provision allowing for employees to donate their accumulated sick leave into a sick leave bank for use by other employees is preempted by N.J.S.A. 18A:30-6, which provides:

18A:30-6 Prolonged absence beyond sick leave period

When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary.

The Board argues that the creation of a donated sick leave bank permits employees to acquire additional sick leave days without district approval and without consideration of individual circumstances in contravention of N.J.S.A. 18A:30-6. The Board further asserts that the donated sick leave bank provision is preempted by N.J.S.A. 18A:30-1 because it permits the use of donated sick leave for the care of family members in addition to personal illness or disability. N.J.S.A. 18A:30-1 states:

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 Association responds that the donated sick leave bank provision is not specifically preempted by N.J.S.A. 18A:30-6 and is expressly authorized by N.J.S.A. 18A:30-10, which provides:

18A:30-10 Establishment of sick leave bank for employees of board of education.

Notwithstanding any other provision of law to the contrary, a sick leave bank may be established for employees of a board of education if both the board and the majority representative or majority representatives of the employees who would be eligible to participate consent to the establishment of the sick leave bank. The purpose of the sick leave bank shall be to enable employees of the board who are entitled to sick leave under chapter 30 of Title 18A of the New Jersey Statutes to draw needed days of sick leave in addition to any days to which they are otherwise entitled. The sick leave days available to a board employee from the sick leave bank shall be leave days previously donated to the bank by board employees. Employees may donate sick leave days or any other leave time as agreed upon by the board and the majority representative. Sick leave drawn from the bank shall be treated for all purposes as if it were accrued sick leave time of the employee who receives it. No employee shall be required to participate in the bank.

The Association further argues that the donated sick leave banks are not preempted by N.J.S.A. 18A:30-1 from being used for family because N.J.S.A. 18A:30-12 provides that parties may negotiate more generous sick leave benefits. N.J.S.A. 18A:30-12 states:

18A:30-12. Certain policies unaffected

No provision of this act [C.18A:30-10 et seq.], or regulation promulgated to implement or enforce this act, shall be deemed to

justify a board of education in reducing or making less favorable to employees any sick leave, disability pay or other benefits provided by the board or required by a collective bargaining agreement which are more favorable to the employees than those required by this act, nor shall any provision of this act, or any regulation promulgated to implement or enforce this act, be construed to prohibit the negotiation and provision through collective bargaining agreements of sick leave, disability pay or other benefits which are more favorable to the employee than those required by this act, irrespective of the date that a collective bargaining agreement takes effect.

Prior to the passage of the donated sick leave bank law in 2007 (P.L. 2007, c. 223, codified as N.J.S.A. 18A:30-10 through 13) sick leave banks were mandatorily negotiable in general but had to preserve a school board's right to grant or deny extended sick leave on a case-by-case basis consistent with N.J.S.A. 18A:30-6. See Winslow Tp. Bd. of Ed., P.E.R.C. No. 2000-95, 26 NJPER 280 (¶31111 2000); State-Operated School Dist. of City of Newark, P.E.R.C. No. 2000-51, 26 NJPER 66 (¶31024 1999); State-Operated Sch. Dist. of Newark, P.E.R.C. No. 99-25, 24 NJPER 479 (¶29223 1998); Plainfield Bd. of Ed., P.E.R.C. No. 88-46, 13 NJPER 842 (¶18324 1987); Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶17323 1986).

However, P.L. 2007, c. 223 changed the negotiability landscape by allowing the creation of donated sick leave banks "[n]otwithstanding any other provision of law to the contrary." N.J.S.A. 18A:30-10. Furthermore, N.J.S.A. 18A:30-13 specifically

designates a board's discretionary granting of extended sick leave per N.J.S.A. 18A:30-6 as being triggered only after all sick days - including donated sick leave bank days - are used:

18A:30-13 Construction of act.

No provision of this act shall be construed as limiting the authority of a board of education to provide an employee with additional days of salary pursuant to N.J.S.18A:30-6 after all sick leave available to the employee, including days provided under this act, has been used.

Therefore, the new law considered the interplay between donated sick leave under 18A:30-10 and extended sick leave under 18A:30-6 and established that discretionary extended sick leave is triggered once donated sick leave has been exhausted. Finally, the new sick leave bank law does not constrain use of donated sick days to personal illness only, as N.J.S.A. 18A:30-12 specifically provides that the provisions shall not "be construed to prohibit the negotiation and provision through collective bargaining agreements of sick leave, disability pay or other benefits which are more favorable to the employee than those required by this act." Accordingly, Article XV, Section A.3. is not preempted by N.J.S.A. 18A:30-6 or N.J.S.A. 18A:30-1.

Next, the Board disputes the negotiability of Article XV, Section B., entitled "Supplementary Sick Leave," which provides:

Full-time employees shall be credited with five (5) days of supplementary sick leave allowance for each year of service, with unused days to be accumulated. Full-time

employees who have exhausted their regular sick leave may utilize the accumulated supplementary sick leave to the extent necessary to provide total compensation of up to three (3) days beyond this period in any month wherein less than three (3) days' compensation has been earned.

The Board argues that supplemental sick leave cannot be used as a means to continue employees' health insurance coverage because it must conform to the definition of sick leave in N.J.S.A. 18A:30-1 and the accumulation limits in N.J.S.A. 18A:30-7.

The Association responds that the Commission has previously found that the same contract provision between these parties is mandatorily negotiable. West Orange Bd. of Ed. and West Orange Ed. Ass'n, P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992), aff'd NJPER Supp.2d 291 (¶232 App. Div. 1993). It also cites Hopewell Valley Reg. Bd. of Ed., P.E.R.C. No. 97-91, 23 NJPER 133 (¶28065 1997), wherein the Commission held that N.J.S.A. 18A:16-16 allows a board to provide continued health benefits coverage during unpaid leaves of absences and that N.J.S.A. 18A:30-6 and 18A:30-7 do not preempt negotiations over this benefit.

West Orange and Hopewell Valley stand for the proposition that the provision of health benefits coverage during unpaid leaves of absences is a mandatorily negotiable subject; however, those cases involved narrower questions than the present case because they arose in the context of grievance arbitrations. Thus, application of the relevant contract clause was confined to

the known circumstances of the issues sought to be arbitrated. Although the "Supplementary Sick Leave" provision at issue in West Orange is nearly identical to the clause here, the issue to be arbitrated was whether the Board violated the contract "when it discontinued health insurance benefits for employees on unpaid leaves of absence." 18 NJPER at 272. In finding that the Association was not seeking statutory paid sick leave days, but was only seeking health insurance benefits during unpaid leaves, the Commission stated: "Nor does the Association appear to be claiming that Article XV.B.1 entitles employees to extended paid sick leave." 18 NJPER at 273. Thus the Commission considered a narrower application of the supplementary sick leave clause and specifically noted it was not analyzing it as an extended sick leave clause. The crucial distinction here is that the instant case requires a negotiability analysis - rather than an arbitrability analysis - so we must view the clause as written and determine whether it is statutorily preempted regardless of how the Association may have utilized or grieved it in the past.

We find that because Article XV, Section B. establishes five additional sick leave days annually after all regular and donated sick leave is exhausted, it reads like an extended sick leave benefits clause, which is preempted by N.J.S.A. 18A:30-6, supra. Cases interpreting N.J.S.A. 18A:30-6 have required that extended sick leave determinations be at the school board's discretion,

not by application of a negotiated rule. See, e.g., Piscataway Tp. Bd. of Ed. v. Piscataway Maint. & Cust. Ass'n, 152 N.J. Super. 235 (App. Div. 1977); Lyndhurst Bd. of Ed., P.E.R.C. No. 91-16, 16 NJPER 481 (¶21208 1990), aff'd NJPER Supp.2d 252 (¶210 App. Div. 1991); Waldwick Bd. of Ed. and Waldwick Ed. Ass'n, P.E.R.C. No. 2004-61, 30 NJPER 104 (¶41 2004), aff'd 31 NJPER 46 (¶22 App. Div. 2005); Fort Lee Bd. of Ed., P.E.R.C. No. 2006-37, 31 NJPER 360 (¶144 2005); Moonachie Bd. of Ed., P.E.R.C. No. 97-134, 23 NJPER 340 (¶28155 1997). Given this case law, although health coverage during unpaid leaves of absence is negotiable per N.J.S.A. 18A:16-16, the Association cannot achieve such a contractual benefit in the guise of supplementary sick leave that allows for extra paid sick leave days to be earned and utilized via blanket rule rather than per the Board's discretion within the constraints of N.J.S.A. 18A:30-6. Accordingly, Article XV, Section B., is not mandatorily negotiable as written.

Article XVIII of the CNA is entitled "Professional Development and Educational Improvement," and Article XVIII, Section B. is entitled "New Teacher Training." The Board disputes the negotiability of the following underlined sentences in Article XVIII, Section B.:

No in class assignments designed to encourage reflective and self-critical practices will be required to be submitted to any instructor or supervisor. . . . No assignment, mandatory or optional, designed to encourage reflective and self-critical practices, shall be

required to be submitted to any supervisor or administrator, and no such assignment, or failure to submit such an assignment, shall form a basis for any performance evaluation, and no negative comments or other information shall be placed in any such employee's personnel file and/or be included as part of any evaluatory report, including APRs, and shall not be used in any way in the evaluation and/or determination of an employee's job performance and/or continued employment status.

The Board asserts that the underlined language would impermissibly infringe on its managerial prerogative to establish evaluation criteria by not allowing it to require certain types of self-assessments as part of any performance evaluations. The Association responds that the disputed language is merely procedural in nature and does nothing to impair the Board's ability to evaluate staff performance.

The Commission has previously found that similar clauses concerning the use of teacher-prepared self-assessment documents as part of the evaluation process are not mandatorily negotiable. In Burlington County College, P.E.R.C. No. 2010-38, 35 NJPER 439, 440 (¶144 2009), we found that a clause providing for each unit member to "submit an Annual Performance Report" including such objectives as "professional responsibilities, professional growth, College contributions and community contributions" was not mandatorily negotiable. The Commission held:

Except to the extent this paragraph sets deadlines and notifies the unit member of the identity of the recipient, the duty to

prepare and submit a self-evaluation and list of goal objectives is not mandatorily negotiable. The obligation of a faculty member to prepare such a document relates primarily to non-negotiable evaluation criteria.

[35 NJPER at 440]

Similarly, in Warren County Community College, P.E.R.C. No. 2016-48, 42 NJPER 344, 350-351 (¶98 2016), we found non-negotiable a provision requiring that "an annual professional self-assessment with short-and-long-term goals, as defined by the Administration" be part of the annual evaluation. In the instant case, Article XVIII, Section B. seeks to exclude self-assessments from the evaluation process, rather than include them. Either way, the determination of whether or not teacher self-assessments will be required as part of the evaluation process involves the selection of evaluation criteria, which must be left to the Board. Accordingly, the contested sections of Article XVIII, Section B. are not mandatorily negotiable.

ORDER

- A. The following provisions are not mandatorily negotiable:
- Article XV, Section B.;
 - Article XVIII, Section B. (fourth paragraph, second and fourth sentences)
- B. The following provisions are mandatorily negotiable:
- Article V, Section 2.b.(b)I. (second, third, and fifth sentences);
 - Article V, Section 2.b.(b)II. (fifth, sixth, tenth, and eleventh sentences);

- Article V, Section 2.b.(c) (third and fourth sentences);
- Article XV, Section A.3.

BY ORDER OF THE COMMISSION

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

ISSUED: June 30, 2016

Trenton, New Jersey