

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2019-023

TRENTON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of contract clauses in an expired collective negotiations agreement between the Trenton Board of Education and the Trenton Education Association. The Commission finds not mandatorily negotiable: a provision allowing teachers' to opt out of using direct deposit of their paychecks; a provision requiring school administration to turn over students to law enforcement in cases of where a student assaults or threatens a school employee; a provision requiring written authorization by the principal prior to allowing misbehaving students, who have been removed from the classroom, to return; a provision concerning the handling of student discipline; a provision concerning the completion of teachers' final evaluations and the placement of information in teachers' personnel files; a provision requiring the Board to investigate and correct factual inaccuracies with teachers' evaluations; a provision prohibiting all public criticism of teachers by school officials; a provision limiting class size; a provision concerning teacher assignment; a provision concerning the Board's selection of textbooks and instructional materials; a provision requiring written notice prior to action being taken against a teacher upon a complaint; and a provision prohibiting teachers from being assigned cafeteria duty; a provision requiring the Board to fill a vacancy from among the top three ranking applicants; a provision requiring the Board to call for a substitute teacher.

The Commission finds mandatorily negotiable: a provision allowing teachers to remove misbehaving students from the classroom; a provision allowing for a nonbinding, advisory committee to consult on behavioral guides; a provision allowing teachers' evaluations to be subject to the grievance procedure

excluding binding arbitration; an advisory provision concerning achievement of teachers' professional development and educational improvement; an advisory provision concerning the placement of positive information in teachers' personnel files; a provision concerning a notice requirement prior to the placement of a complaint in teachers' personnel files; a provision which serves as a general statement of purpose concerning the hiring of aides to provide relief to teachers from non-instructional duties; and provisions concerning certain procedural requirements for filling vacancies and promotions.

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, Adams Gutierrez & Lattiboudere,
LLC, attorneys (Derlys M. Gutierrez, on the brief)

For the Respondent, Selikoff & Cohen, PA, attorneys
(Keith Waldman, of counsel and on the brief; Hop T.
Wechsler, on the brief)

DECISION

On September 17, 2018, the Trenton Board of Education (Board) petitioned for a scope of negotiations determination. The Board seeks a determination that fifteen articles of its expired collective negotiations agreement (CNA) with the Trenton Education Association (Association) are not mandatorily negotiable, and therefore, cannot be retained in a successor agreement. The Association asserts that all of these provisions are mandatorily negotiable, either as currently worded or subject

to reasonable revisions.^{1/} The parties have filed briefs.^{2/} These facts appear.

The Association is the exclusive representative for all covered employees as set forth in Article I of the parties' CNA. The Board and Association were parties to a series of CNAs, the most recent of which is valid from September 1, 2015 to August 31, 2016 and September 1, 2016 to August 31, 2018, which remain in effect until a successor agreement is negotiated.

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).

^{1/} The Board disputed the negotiability of Article XII, entitled "Teaching Conditions", section I.3. However, the Association concedes that the provision is "not negotiable, as the Board has the managerial prerogative to interrupt class instruction." Thus, the issue regarding the negotiability of the provision is moot.

^{2/} The Board filed a petitioner's brief and a reply brief. The Association filed a respondent's brief with exhibits. The parties did not file certifications in support of their briefs. The Board filed a Motion for Leave to File as Within Time and supporting certification for its brief pursuant to N.J.A.C. 19:13-3.6. We grant the Board's motion to accept its brief as filed within time. N.J.A.C. 19:10-2.1(c).

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).

The Board disputes the negotiability of Article IV, entitled "Salaries", section B.7, which states:

Teachers may individually elect to use direct deposit of their paychecks.

The Board argues that B.7 is preempted by N.J.S.A. 52:14-15h, which provides, in relevant part, "[e]ffective July 1, 2014 every

board of education ... may determine to have the net pay for all employees to be directly deposited ... designated in writing by the employee ... If the board provides for such direct deposit, compliance by an employee shall be mandatory". However, the Association asserts that B.7 is mandatorily negotiable because the statute is discretionary, providing for exemptions as follows:

The board is authorized to grant an exemption from the requirements adopted pursuant to this section on such terms and conditions as the board may deem necessary. The board is authorized to grant an exemption for seasonal and temporary employees as the board may deem necessary.

Based on the plain language of the statute, the Board may determine to have the employees' net pay directly deposited; thus, the Board's determination whether or not to use direct deposit is discretionary. However, the plain language of the statute also provides that once the Board chooses to use direct deposit, compliance by employees is mandatory. The statute further provides that the Board can grant exemptions to the direct deposit requirement on such "terms and conditions as the board may deem necessary." Here, Article B.7, as written, allows individual teachers to opt out of direct deposit, undermining the Board's managerial prerogative to mandate the uniform use of direct deposit by employees once it has opted to use that process. Article B.7 also undermines the Board's managerial

prerogative to grant exemptions to the use of direct deposit as it deems necessary. Thus, Article B.7 is not mandatorily negotiable.

The Board disputes the negotiability of four provisions of Article X, entitled "Student Discipline," contained in the "Legal Rights" section of the CNA, which are as follows:

A.2

Whenever a student assaults or threatens a school employee, the school principal shall, on application by the teacher take the student into custody and turn him or her over to the appropriate authorities for criminal prosecution or remedial treatment.

G.1

A teacher may exclude a pupil from his/her class when the grossness of the offense, the persistence of the misbehavior or the disruptive effect of the violation makes the continued presence of the student in the classroom intolerable. In such cases, the teacher will immediately furnish the principal with knowledge of the exclusion, and within one (1) full school day, full particulars of the incident. The affected pupil will be readmitted to the classroom only upon written authorization of the principal, or when requested, by written guidelines from the principal for the future handling of this case.

G.3

School authorities will endeavor to achieve correction of student misbehavior through counseling and interviews with the child and his/her parents, when warranted. Other measures, short of suspension, will first be exhausted. Suspension of students from

school may be imposed only by a principal or his/her designated representative.

H.1

The Behavioral Guides established and adopted by the Board shall continue in full force and effect, subject to modification by the Board with the advice of the Joint Discipline Committee. The currently functioning Joint Discipline Committee shall maintain similar codes for all secondary as well as elementary schools. Teachers should get a copy of the discipline code on the opening day of each school year.

The Board argues that paragraph A.2 is non-negotiable as it mandates certain conduct by the Board, regardless of Board policy. The Association, citing Perth Amboy Bd. of Ed., P.E.R.C. No. 98-59, 23 NJPER 632 (¶28308 1997), argues that A.2 is mandatorily negotiable because the provision protects the employees' health and safety. Further, the Association, citing Maurice River Tp. Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987), argues that A.2 merely restates N.J.S.A. 18A:37-2.3, entitled "Responsibility for removal, report [of students]."

A school board has a managerial prerogative to establish student discipline policies. See, e.g., Highland Park Bd. of Ed., P.E.R.C. No. 89-83, 15 NJPER 100 (¶20047 1989); Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶17323 1986); Edison Tp. Bd. of Ed., P.E.R.C. No. 83-100, 9 NJPER 100 (¶14055 1983); Jersey City Bd. of Ed., P.E.R.C. No. 82-52, 7 NJPER 682 (¶12308 1981). Employees have a right to negotiate over contract

provisions protecting their health and safety. See, e.g., Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985).

Perth Amboy is distinguishable from the instant matter as it involved a teacher's ability to call the police as a result of student misbehavior, contravening the board's policy that the school administrator had sole responsibility for notifying the police regarding student disciplinary problems. The Commission concluded the board has the right to set student discipline policy, but the union may seek to negotiate over a narrow exception where a teacher's safety is threatened. Unlike the policy challenged in Perth Amboy, A.2 focuses on actions the Board must take regarding student disciplinary problems rather than permissible actions by the employee.

Similarly, Maurice River is also distinguishable from the instant matter. Maurice River involved a CNA provision which allowed an employee to use reasonable force to protect against violence, which reiterated the language of N.J.S.A. 18A:6-1. The Commission found the provision was mandatorily negotiable because it did not conflict with the statute, did not interfere with the Board's managerial prerogative regarding student discipline, and directly related to employee safety.

Here, A.2 is not merely a reiteration or paraphrase of a statute. A.2 requires the school principal, upon the teacher's request, to take a student into custody and turn them over to

appropriate authorities for criminal prosecution or remedial treatment. N.J.S.A. 18A:37-2.3 requires that, following the removal of an assaultive student, the principal notify the appropriate law enforcement agency. Furthermore, like Perth Amboy, Maurice River focused on permissible actions by the employees to protect their health and safety while A.2 focuses on disciplinary actions that the Board must take toward students. Thus, A.2, as written, is not mandatorily negotiable.

Regarding G.1, the Board argues it is not negotiable because the provision permits a teacher to establish his or her own disciplinary policy, possibly undermining the Board's policy. Furthermore, the Board contends that nothing in G.1 limits the teacher's permissible actions to situations involving the teachers' health and safety. The Association argues, citing Jersey City Bd. of Ed., P.E.R.C. No. 82-52, 7 NJPER 682 (§12308 1981), that G.1 is mandatorily negotiable because the Commission has previously found an analogous provision, allowing for a teacher to remove a misbehaving student from the classroom, to be mandatorily negotiable.

The first two sentences of G.1 are mandatorily negotiable. The Commission has previously found provisions allowing teachers' removal of unruly students from the classroom to be mandatorily negotiable. See Highland Park Bd. of Ed., P.E.R.C. No. 89-83, 15 NJPER 100 (§20047 1989). The Commission has found that the

ability of teachers to deal immediately and directly, but in a non-binding way, with unruly students intimately and directly affects the work and welfare of teachers. Jersey City at 19.

The first two sentences of G.1 focus on the teachers' health and safety inside the classroom. The Board's concern that G.1 does not precisely limit the teachers' actions to situations affecting their health and safety can be addressed through negotiations.

However, the third sentence of G.1, as written, is not mandatorily negotiable as it sets forth the conditions upon which the school administration will allow the misbehaving student back into the classroom. As stated in Highland Park, "once a student is sent to the [principal's] office to alleviate a disruption in class, the student's future disposition is a matter of educational policy," which is not mandatorily negotiable.

G.3, as written, is not mandatorily negotiable. This provision imposes requirements on the Board for the future disposition of student discipline. Again, G.3 focuses on actions the Board must take regarding student discipline rather than permissible actions by the employee. As stated above, such provisions are not mandatorily negotiable because student discipline is a matter of educational policy within managerial prerogative. See, e.g., Highland Park, supra; Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶ 17323 1986); Edison Tp. Bd. of Ed., P.E.R.C. No. 83-100, 9 NJPER 100 (¶ 14055 1983);

Jersey City Bd. of Ed., P.E.R.C. No. 82-52, 7 NJPER 682 (¶ 12308 1981).

Regarding H.1, the Board argues that the first two sentences in H.1 are non-negotiable because they appear to mandate how the Board establishes and applies its discipline policy. The Association, citing Matawan Reg'l Bd. of Ed., P.E.R.C. No. 80-153, 6 NJPER 325 (¶11161 1980), argues that H.1 is mandatorily negotiable because the provision simply establishes a non-binding, advisory forum for the expression of faculty views and opinions regarding student disciplinary procedures.

H.1 is mandatorily negotiable. The Commission has found committees, such as those set forth in H.1, that meet and discuss matters of governmental policy are mandatorily negotiable. See Matawan, supra; In re Commercial Tp. Bd. of Ed., P.E.R.C. No. 80-20, 5 NJPER 384 (¶ 10195 1979). Our Supreme Court has affirmed that non-binding forums to consider non-negotiable subjects (such as student discipline) may induce parties to resolve disputes without formal proceedings. Bernards Tp. Bd. of Ed. v. Bernard Tp. Ed. Ass'n, 79 N.J. 311, 325-326 (1979).

Here, H.1 plainly states that the "Behavioral Guides" (i.e. discipline policy) are established and adopted by the Board, and are subject to modification by the Board. The "Joint Discipline Committee" is advisory. Thus, H.1 sets forth a non-binding committee, such as those countenanced in the above-cited cases,

and does not impose any significant limitation on the Board's managerial prerogative regarding student discipline.

The Board next disputes the negotiability of Article XIII of the CNA, Sections D, E, and F, entitled "Teaching Evaluation," which state:

D. Final evaluation of a teacher upon termination of his/her employment shall be concluded prior to separation and no documents and/or other material shall be placed in the personnel file of such teacher after separation except as in accordance with the procedure set forth in this Article.

E. If, in the teacher's judgment, an evaluation may affect his/her continuous employment, the matter shall be subject to the Grievance Procedure, to the level of the Board, but shall not be a proper subject for arbitration.

F. In the event of a claim by a teacher that his/her evaluation is not factually correct, said claims shall be investigated on behalf of the Board of Education; and if the claim is found to be valid, said evaluation shall be amended so as to accurately reflect the situation.

The Board argues, generally, that the provisions in question are statutorily preempted and not negotiable because they address the teacher evaluation process, which has been largely restricted by N.J.S.A. 18A:6-117, et. seq. ("TEACH NJ Act"). The Association argues that where a CNA provision concerning teacher evaluations does not conflict with the TEACH NJ Act, the relevant provision is mandatorily negotiable unless it involves "matters of educational policy or managerial prerogatives." Further,

N.J.S.A. 18A:6-126 states, "Notwithstanding the provisions of this act, aspects of evaluation not superseded by statute or regulation shall continue to be mandatory subjects of collective negotiations."

Regarding Section D, the parties agree that the portion of the provision that limits the placement of documents or materials in employees' personnel files after their separation is not negotiable.^{3/} The Appellate Division has found a nearly identical provision to Section D to be non-negotiable. E. Brunswick Bd. of Ed. and E. Brunswick Ed. Ass'n, NJPER Supp.2d 115 (¶97 App. Div. 1982) (reversing, in part, P.E.R.C. No. 81-123, 7 NJPER 242 (¶12109 1981); see also Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 95-15, 20 NJPER 334 (¶ 25175 1994); South Hunterdon Reg'l Bd. of Ed., P.E.R.C. No. 2013-67, 39 NJPER 460

3/ But see, Princeton Reg'l Bd. of Ed., P.E.R.C. No. 2003-15, 28 NJPER 399 (¶33143 2002) (finding an analogous provision to be mandatorily negotiable because it "simply required that any material placed in a file also be sent by the Board to the teacher," thereby protecting the teacher's interest in knowing the contents of the teacher's personnel file and would not interfere with any educational policy determinations); Carteret Bd. of Ed., P.E.R.C. No. 2009-71, 35 NJPER 213 (¶76 2009) (finding an analogous provision to be mandatorily negotiable because it did "not restrict the right to place materials in a personnel file, but simply required notice and an opportunity to review and respond to the material, even after severance from employment"). Section D, together with the other provisions of Article XIII, is distinguishable from the provisions addressed in Princeton and Carteret.

(¶146 2013). Thus, Section D, in its entirety, is non-negotiable.

Regarding Section E, the Board argues that the provision is not negotiable because it makes all aspects of the evaluation subject to the grievance procedure, and the TEACH NJ Act limits the manner and means in which an evaluation may be challenged. The Association argues that the provision is negotiable because it merely restates N.J.A.C. 6A:10-4.4(c)(7) and Commission precedent under which performance evaluations are grievable but not arbitrable.^{4/}

First, regardless of the possible preemptive effect of the TEACH NJ Act, the subject of teacher evaluations is generally a non-negotiable, managerial prerogative. See Bethlehem, supra, at 46-7. In Bethlehem, one of the issues before the Court was whether regulations concerning the evaluation of tenured teachers served to preempt collective negotiations on the subjects they covered. In its analysis, the Court stated:

^{4/} We do not find that Section E restates existing law, but rather is more broad. N.J.A.C. 6A:10-4.4(c)(7) allows teachers to submit written objections to an evaluation within ten working days, but does not speak to grievance procedures or arbitration. The Association cites Flemington-Raritan Reg'l Bd. of Ed., P.E.R.C. No. 2016-71, 42 NJPER 514 (¶143 2016) in support of its argument. However, in that case the Commission restrained arbitration, which challenged a teacher's evaluation through a CNA's grievance procedure, because it interfered with the Board's managerial prerogative regarding evaluations.

We need not discuss the preemptive effect of those provisions that address the substantive aspects of teacher evaluation. Such matters, which involve sensitive educational policy decisions, could not be the subject of mandatory negotiations, even in the absence of preempting legislation ... A negotiated agreement on that subject would significantly interfere with the determination of governmental policy.

[Ibid.]

However, here, Section E states "the matter [the evaluation] shall be subject to the Grievance Procedure . . . but shall not be a proper subject for arbitration," which allows for a grievance procedure that does not culminate in binding arbitration. Such grievance procedures, allowing for grievances in non-binding forums or advisory arbitration of otherwise non-negotiable or statutorily preempted subjects, have been found mandatorily negotiable. See Teaneck Bd. of Ed. and Teaneck Teachers Ass'n, P.E.R.C. No. 82-27, 7 NJPER 576 (¶12258 1981), rev'd and rem'd, 185 N.J. Super. 269 (App. Div. 1982), aff'd, 94 N.J. 9 (1983) ("In the past we have encouraged the establishment of grievance procedures for issues that will not be subject to binding arbitration"). Accordingly, Section E, as written, is mandatorily negotiable.

Section F, as written, is not mandatorily negotiable. Section F, as written, requires the Board to investigate alleged factual inaccuracies in a teacher's evaluation and make any necessary corrections. Flemington, supra at n.5, directly dealt

with a teacher's grievance alleging inaccuracies in the teacher's evaluation report and sought corrections to make the report factually accurate. The Commission found "while teachers have an interest in being accurately evaluated, this dispute predominately involves the Board's prerogative to apply evaluation criteria and evaluate a teacher's performance," and thus, the grievance challenging the accuracy of the evaluation was not arbitrable and non-negotiable.

The Association's citing of Paterson State-Operated School District, P.E.R.C. No. 2017-63, 43 NJPER 433 (¶121 2017), app. dism. (App. Div. Dkt. No. A-4056-16) is inapplicable here. In Paterson, the Commission held that alleged procedural errors which resulted in a failure to issue summative teaching evaluations (affecting the teachers' incremental salary step increase) were arbitrable. The alleged procedural errors in the evaluations at issue in Paterson did not involve any factual or substantive content of the teacher's evaluations. In contrast, Section F only addresses the factual content of evaluations and requires the Board to investigate and correct any alleged inaccuracies.

Article XIV of the CNA is entitled "Teacher and Association Rights." The Board disputes the negotiability of Section F, which provides:

Any question or criticism by a superior,
administrator, or Board member of a teacher

and his instructional methodology shall be made in confidence and not in the presence of students, parents, or other public gatherings. Criticism of any staff member shall be in complete confidence. Conversely, teachers will observe the same professional courtesy toward the administration as set forth above.

The Board argues that the Commission has held that provisions like Section F are not mandatorily negotiable. The Association argues that while the Commission has held such provisions non-negotiable, the provision would be negotiable if it were reworded to include reasonable exceptions for situations where immediate public reprimand were necessary to prevent injury or other emergencies.

The Commission has held non-negotiable provisions prohibiting all public rebukes. Flemington-Raritan Reg. Bd. of Ed., P.E.R.C. No. 90-58, 16 NJPER 40 (¶ 21018 1989); Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶ 17323 1986); Keansburg Bd. of Ed., P.E.R.C. No. 85-55, 10 NJPER 649 (¶ 15313 1984). In Flemington-Raritan, we conditioned our holding on the absence of any exceptions permitting public criticism in an emergency or other appropriate situation, such as where a student faces imminent injury. Based on that reasoning, we have found a provision barring public criticism of an individual teacher without justifiable, substantive reasons to be mandatorily negotiable. Monroe Tp. Bd. of Ed., P.E.R.C. No. 93-9, 18 NJPER

428 (¶ 23194 1992). These cases balance an individual employee's interest in not being unjustifiably humiliated with a board's interest in criticizing a teacher publicly when necessary.

Here, Section F, as written, is not negotiable because it prohibits all public criticism like the similar provisions found to be non-negotiable in Flemington-Raritan, Delaware, and Keansburg. Unlike the provision in Monroe, Section F does not contain any reasonable exceptions to the blanket prohibition on public criticism.

Article XVI of the CNA is entitled "Professional Development and Educational Improvement". The Board disputes the negotiability of Section A, which provides:

The Board and Association support the principle of continuing training of teachers, since in our rapidly changing society teachers must constantly review curricular content, teaching methods and materials, educational philosophy and goals, social change, and other topics related to education. The Board recognizes that it shares with its professional staff responsibility for the upgrading and updating of teacher performance and attitudes. These objectives can best be achieved by hiring only fully certified and qualified applicants, an active in-service program, encouraging teachers to seek advanced training degrees, and encouraging teachers to actively participate in professional organizations in their area of specialization.

The Board argues that the first two sentences of this paragraph may be included in the CNA. However, the Board argues

that the first half of the third sentence (" . . . by hiring only fully certified and qualified applicants . . .") is not negotiable because it interferes with its right to hire or not hire the individual of its choice, which is limited only by the qualifications that are legally required. The Association states that Section A is merely an advisory statement of purpose that does not interfere with the Board's managerial prerogative to hire. Citing Delaware, supra, the Association claims such advisory provisions are mandatorily negotiable.

Section A, as written, is mandatorily negotiable. We agree with the Association that the provision is primarily advisory. While it states that its purpose of professional development and educational improvement can best be achieved by hiring fully certified teachers, it cannot be used to challenge the Board's hiring decisions.

Article XVII of the CNA is entitled "Class Size (See Legal Rights Section)." The Board disputes the negotiability of the following:

The goal for class size will be to maintain academic classes in accordance with "at risk numbers."

- Grades K through 3 not to exceed 21
- Grades 4 through 5 not to exceed 23
- Grades 6 through 12 not to exceed 24

No academic class will be maintained at a level in excess of twenty-five (25) pupils.

The Board contends that it is well settled that establishing class size is a non-negotiable, managerial prerogative. The Association argues that this provision is mandatorily negotiable because it merely restates the Board's obligations under an existing regulation. N.J.A.C. 6A:13-3.1 (limiting class size in "high poverty school districts" in which 40 percent or more of students are "at risk"). The Board responds that nothing in the Class Size provision establishes that the Board is subject to N.J.A.C. 6A:13-3.1.^{5/}

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).

While the class size provision may closely mirror N.J.A.C. 6A:13-3.1, which if applicable to the Board would set a cap on

^{5/} The Association cites a Settlement Agreement, attached to its brief, where the Board agreed to "abide by and comply with" N.J.A.C. 6A:13-3.1. We find that Settlement Agreement irrelevant to our scope of negotiations analysis. See Bergen County Sheriff's Office, P.E.R.C. No. 2015-27, 41 NJPER 221 (¶73 2014) (stating, at n.1, "[w]e also do not consider settlement agreements that were entered into between the parties" when citing the Commission's scope of negotiations standard).

class size, the provision does not expressly incorporate the class size regulation or exactly track its language. The provision, as written, does not allow for the possible inapplicability of N.J.A.C. 6A:13-3.1 if, at some time, the district is not deemed a "high poverty school district." Thus, Article XVII is not mandatorily negotiable as it interferes with the Board's managerial prerogative to set class sizes.

Article XIX of the CNA is entitled "Teacher Assignments."

The Board disputes the negotiability of Section A:

The Superintendent shall assign all newly selected personnel to their positions which, except for substitute teachers, shall be within the type of service for which the teacher has been employed. The Superintendent shall give notice of assignments to new teachers as soon as after appointment is practicable.

The Board, citing Ridgefield Park, argues that the first sentence of Section A is not negotiable because the Board has the managerial right to assign teaching staff members as it sees fit and according to law. The Association concedes that teacher assignments are generally non-negotiable. However, the Association argues that Section A is mandatorily negotiable to the extent that it refers to extracurricular activities, citing N.J.S.A. 34:13A-23. We find that the first sentence of Section A is not negotiable because it applies generally to teacher assignments, and it is well settled that teacher assignments are

a matter of educational policy within the Board's managerial prerogative.

Article XXII of the CNA is entitled "Textbooks and Instructional Materials." The Board disputes the negotiability of Sections A, B, and C, which state:

A. In the event a teacher's order for books or supplies must be altered, the teacher shall be consulted regarding priorities on the original list and be given the opportunity whenever possible to restructure priorities on the original list and order alternative material.

B. Teachers, who use particular textbooks, other instructional materials, and equipment shall be directly involved with supervisors and directors in making the initial recommendation for the purchase of additional textbooks and other instructional materials, changes in such materials or selection of new materials.

C. Textbooks and instructional materials in all subject areas and at all grade levels shall be selected so as to best: (1) show the cultural diversity and pluralistic nature of our society in both textual and illustrative material and (2) reflect the most recent authoritative scholarship on the history and roles of various racial, ethnic, and religious groups and their prominent representatives in American life.

The Board argues that these provisions are non-negotiable because they limit the Board's ability to choose instructional materials, which the Commission has found to be within a board's managerial prerogative. The Association argues that provisions, such as Sections A and B, that require the Board to consult with

teachers over textbooks have been found to be mandatorily negotiable, provided that the Board retains the ultimate right to select the textbooks. The Association further argues that the effects on a teacher's preparation time and/or workload resulting from the Board's actions regarding textbooks and instructional materials are mandatorily negotiable.^{6/} Specifically, regarding Section C, the Association argues that it is merely advisory, and thus, mandatorily negotiable.

The selection of textbooks and instructional materials is an educational policy determination not subject to negotiations. See, e.g., Paterson School Dist., P.E.R.C. No. 92-118, 18 NJPER 303 (¶23130 1992); Jersey City Bd. of Ed., P.E.R.C. No. 82-52, 7 NJPER 682 (¶12308 1981). As in Paterson, we find that Sections A, B, and C, as written, do not protect the Board's ultimate

^{6/} But see West Paterson Bd. of Ed., P.E.R.C. No. 98-31, 23 NJPER 540 (¶28267 1997) stating:

While we have held that the number of teaching preparations is a mandatorily negotiable aspect of workload, we have understood the concept of teaching preparations to encompass the number of classes or subjects or separate curricula to be taught. We do not believe that the concept requires negotiations over the amount or variety of supplemental materials to be used in a class and curriculum because such a requirement would entrench too much upon educational policy determinations concerning the best textbooks or instructional materials to use.

right to select the textbooks and instructional materials and are not mandatorily negotiable.

Article XXIII of the CNA is entitled "Teacher Files." The Board disputes the negotiability of Section A.1, which states:

A. Official teacher files shall be maintained in accordance with the following procedures:

1. Administrators will be encouraged to place in the file information of a positive nature indicating special competencies, achievements, performances, or contributions of an academic, professional or civic nature. All material received from and signed by responsible sources concerning a teacher's conduct, service or character may be placed in the file.

The Board argues that the language mandating the inclusion of certain documents in a personnel file is non-negotiable. The Association argues that Section A.1 is mandatorily negotiable because it is merely advisory and does not require the Board to place any type of content in a teacher's personnel file; thus, Section A.1 does not interfere with the Board's managerial prerogative.^{7/}

Section A.1, as written, is mandatorily negotiable. A.1 is primarily advisory and aspirational. The phrases "will be encouraged" and "may be placed" do not require the Board to

^{7/} The Association cites several cases regarding an arbitrator's authority to expunge disciplinary records from a teacher's personnel file in support of its argument that A.1 is mandatorily negotiable. We find those cases are inapplicable to the scope of negotiations analysis of A.1, as written.

include any type of content in the teacher's personnel file, but rather, promotes the inclusion of positive information in the teacher's personnel file. A.1, as written, does not significantly interfere with the Board's managerial prerogative regarding the content of teachers' personnel files.

The Board disputes the negotiability of "Legal Rights," "Teacher Protection," Section B of the CNA,^{8/} which states:

No action shall be taken upon any complaint directed toward a teacher, nor shall any notice thereof be included in said teacher's personnel file unless such matter is promptly reported in writing to the teacher concerned.

The Board argues that Section B is non-negotiable because it impermissibly limits the Board's right to take immediate action when necessary. The Association argues, citing Princeton, supra, that Section B is mandatorily negotiable because it merely requires the Board to notify a teacher, in writing, of any complaint prior to its placement in the teacher's personnel file.

The first clause of Section B, as written, ("No action shall be taken upon any complaint directed toward a teacher"), is non-negotiable as it would significantly interfere with the Board's managerial rights to take necessary action in emergent situations involving possible teacher misconduct. However, the second

^{8/} The Board also disputes the negotiability of Section A of "Teacher Protection," which requires the staffing of a school nurse. However, the Association concedes that Section A, as written, is non-negotiable.

clause of Section B ("nor shall any notice thereof be included in said teacher's personnel file unless such matter is promptly reported in writing to the teacher concerned") is mandatorily negotiable because it permits the Board to place a complaint in a teacher's personnel file so long as it notifies the affected teacher of the complaint, in writing. See Carteret, supra at n.2, (citing Princeton, supra).

The Board disputes the negotiability of "Legal Rights," "Relief From Non-Instructional Duties," Sections A and B.1 of the CNA,^{9/} which state:

A. The Board and the Association recognize that employment of teacher aides and school aides are useful and necessary in order to implement this principle.

B. 1. When possible, teachers will not be assigned to cafeteria duty but can be assigned to alternative duties which will free other staff members to replace them in the cafeteria.

The Board argues Section A is non-negotiable if it is construed to require the Board to employ teacher and school aides. The Association argues that Sections A and B.1 are "general statements of purpose" and do not require the Board to staff certain positions, but rather relate to teacher workload.

^{9/} The Board also disputes the negotiability of Section B.2 of "Relief From Non-Instructional Duties," which requires the Board provide a security force. However, the Association concedes that Section B.2, as written, is non-negotiable.

Section A, as written, is a "general statement of purpose," which is mandatorily negotiable. See Paterson State-Operated School District, P.E.R.C. No. 2009-58, 35 NJPER 136 (¶49 2009). To the extent that Section A is construed to require the Board to hire teacher aides or to refrain from assigning non-teaching duties to teachers who are on duty, it would not be mandatorily negotiable. Mahwah Bd. of Ed., P.E.R.C. No. 83-96, 9 NJPER 94 (¶14051 1983).

Section B.1, as written, affects the Board's prerogative to hire aides who would relieve teachers of cafeteria duties. As such, Section B.1 is not mandatorily negotiable. See Paterson State-Operated School District, P.E.R.C. No. 98-29, 23 NJPER 514 (¶28250 1997).

The Board disputes the negotiability of "Legal Rights," "Vacancies, Promotions, Special Programs and Projects," Sections A, B, C, and D of the CNA,^{10/} which state:

A. Each applicant who meets the qualifications for a vacancy shall be interviewed by a committee appointed by the Superintendent, and a record of the interview shall be filed with the application. Interview ratings for each applicant shall be prepared independently by each member of the committee.

B. The committee shall then combine the independent interview ratings, which shall

^{10/} The Board's brief also refers to Sections E and F, but concedes that these sections are restatements of law and may be included in the CNA.

include the applicant's formal training and professional experience in the Trenton School System into a total rating.

C. All applicants shall be placed on a ranked list according to their total ratings.

D. Selection for a vacancy shall be made from among the three (3) top ranking applicants, as submitted by the interviewing committee, by the Superintendent of Schools.

The Board argues that the above sections are non-negotiable because they infringe on the Board's managerial prerogative to establish hiring criteria and its right to appoint any applicant it deems qualified by limiting the number of applicants the Board can choose from to three. The Association argues that procedures by which promotional vacancies are filled are mandatorily negotiable.

Public employers have a non-negotiable right to fill vacancies and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs, as well as the non-negotiable right to select promotional criteria. Pascack Valley Reg'l H.S. Dist. Bd. of Ed., P.E.R.C. No. 2000-27, 25 NJPER 423 (¶30185 1999). However, promotional procedures are mandatorily negotiable and subject to arbitration so long as such procedures are subject to the board's ultimate authority to appoint. See Jersey City, supra; North Bergen Twp. Bd. of Ed. v. North Bergen Fed. of Teachers, 141 N.J. Super. 97 (App. Div. 1976).

Section A, Section B, and Section C are procedural in nature, and as such, they are mandatorily negotiable. Section D is not mandatorily negotiable because it interferes with the Board's managerial prerogative by limiting the number of applicants it can select from to three.

The Board disputes the negotiability of the "Legal Rights," "Substitutes" section of the CNA, which states:

The Board agrees at all times to maintain an adequate list of substitute teachers. Once a teacher has reported unavailability, it shall be the responsibility of the administration to arrange for a substitute teacher.

The Board argues that the provision is not mandatorily negotiable because it is the Board's managerial prerogative whether or not to call for a substitute teacher. The Association concedes that the provision, as written, is non-negotiable only to the extent it interferes with the Board's right to hire or not hire a substitute. However, the Association argues that the provision is mandatorily negotiable because it merely restates the law and creates no additional obligation. The Commission has determined that a board's decision to hire or not hire substitute teachers is a managerial prerogative. Edison Tp. Bd. of Ed., P.E.R.C. No. 83-100, 9 NJPER 100 (¶14055 1983), recon. den., P.E.R.C. No. 83-121, 9 NJPER 209 (¶14097 1983). We agree with the Board that this provision, as written, is non-negotiable because it requires the Board to call for a substitute teacher.

ORDER

A. The following provisions of the 2015-2018 agreement are not mandatorily negotiable:

Article IV, B.7;

Article X, A.2 (of the CNA's Legal Rights Section);

Article X, G.1 (of the CNA's Legal Rights Section), third sentence;

Article X, G.3 (of the CNA's Legal Rights Section);

Article XIII, sections D, and F;

Article XIV, section F;

Article XVII;

Article XIX, section A, first sentence;

Article XXII, sections A, B, and C;

Section B of "Teacher Protection" in the "Legal Rights" section, first clause ("No action shall be taken upon any complaint directed toward a teacher,");

Section B.1 of "Relief From Non-Instructional Duties" in the "Legal Rights" section;

Section D, of "Vacancies, Promotions, Special Programs and Projects" in the "Legal Rights" section; and

"Substitutes" in the "Legal Rights" section of the CNA.

B. The following provisions of the 2015-2018 agreement are mandatorily negotiable:

Article X, G.1 (of the CNA's Legal Rights Section), first two sentences;

Article X, H.1 (of the CNA's Legal Rights Section);

Article XIII, section E;

Article XVI, section A;

Article XXIII, A.1;

Section B of "Teacher Protection" in the "Legal Rights" section, second clause;

Sections A of "Relief From Non-Instructional Duties" in the "Legal Rights" section; and

Sections A, B, and C of "Vacancies, Promotions, Special Programs and Projects" in the "Legal Rights" section.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: May 30, 2019

Trenton, New Jersey