P.E.R.C. NO. 99-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE-OPERATED SCHOOL
DISTRICT OF NEWARK,

Petitioner,

-and- Docket No. SN-98-20

NEWARK TEACHERS UNION,
LOCAL 481, AFT,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of certain articles in an expired agreement between the State-Operated School District of Newark and Newark Teachers Union, Local 481, AFT. The Commission finds not mandatorily negotiable: a portion of a provision that would require that before notification of non-renewal, a non-tenured teacher receive notice of any unsatisfactory evaluation and be offered assistance to improve performance; a portion of a provision requiring that letters of recommendation be placed in personnel files; a portion of a provision concerning supplies and instructional materials; portions of a provision concerning summer school and summer recreation programs; a portion of a provision concerning the filing of grievances by unsuccessful applicants for summer school positions; a portion of a provision which would establish a program where employees will be able to donate sick days to other employees in cases of serious illness; a portion of a provision requiring that district teachers be hired for evening high school before outside teachers.

The Commission finds mandatorily negotiable: a provision on non-tenured teacher notice of non-renewal to the extent it ensures that teachers will receive notice of unsatisfactory evaluations; a portion of a provision concerning letters of recommendation to the extent it requires that copies of letters of recommendation be placed in a personnel files; a provision concerning teacher's grade book; a portion of a provision concerning summer school and summer recreation programs, except to the extent it restricts the Board's right to seek additional applicants for new and different vacancies and a portion of a provision concerning the filing of grievances by unsuccessful applicants for summer school provisions, to the extent it permits the processing of grievances short of binding arbitration.

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, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys (Lester Aron, of counsel; Peter Schultz, on the brief)

For the Respondent, Eugene G. Liss, attorney

DECISION

On September 8, 1997, the State-Operated School District of Newark petitioned for a scope of negotiations determination. The District sought a declaration that certain provisions in its recently expired contract with the Newark Teachers Union, Local 481, AFT are not mandatorily negotiable.

The parties have filed exhibits and briefs. These facts appear.

Local 481 represents the District's teachers and certain other staff. The parties entered into a collective negotiations agreement which expired on June 30, 1997. During successor contract negotiations, the union proposed retaining several contractual provisions which the Board believes are not

mandatorily negotiable. The parties have entered into a new agreement, but have agreed to have the Commission resolve the negotiability questions raised by the instant petition.

Local 481 concedes the non-negotiability of nine provisions in dispute.[1/] Ten provisions remain in dispute.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
> [Id. at 404-405]

Article V is entitled General Conditions of Employment. Section 1 is entitled Non-Tenured Suspension or Discharge. Subsection B states:

> No non-tenured employee shall be suspended or discharged or separated from employment unless an informal conference has been held with the employee and his/her representative with the

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1/ Article 5, Sections 4A.1, 4A.2, 5, 8A.3, 8B.2, 8C.1 and 9E, last sentence; Article VII, Section C; Article XI.

> appropriate administrator. At the conference the employee shall be apprised of the reasons for the conference and given an opportunity to respond. Before any notification of non-renewal, the teacher shall receive notice of any unsatisfactory evaluation and offered assistance to improve his/her performance.

The District argues that the last sentence impinges on its managerial prerogative to renew or not renew a non-tenured teacher's contract by granting the teacher an improvement period and presumably the right to renewal upon demonstrated improvement. It relies on Union City Bd. of Ed. v. Union Cty. Teachers Ass'n, 145 N.J. Super. 435, 437 (App. Div. 1976), holding that local boards of education are vested with virtually unlimited discretion in deciding whether to renew the contracts of non-tenured teachers. See also Long Branch Bd. of Ed., P.E.R.C. No. 92-79, 18 NJPER 91 (¶23041 1992).

The union counters that this language places no restrictions on the District's prerogative not to renew a contract of a non-tenured teacher. It simply allows for performance improvement which benefits the students and it assists the teacher in responding to unsatisfactory evaluations which could impede future employment.

The disputed language procedurally ensures that teachers will receive notice of any unsatisfactory evaluations and does not infringe on the District's ability to refuse to renew the non-tenured teacher's contract. Englewood Bd. of Ed., P.E.R.C. No. 98-75, 24 NJPER 21 (¶29014 1997); Delaware Tp. Bd. of Ed.,

P.E.R.C. No. 87-50, 12 NJPER 840 (¶17323 1986). It does, however, require that the District assist a teacher in improving performance. To that extent, the provision impermissibly interferes with the District's prerogative to determine that assistance would be useful or appropriate.

Section 11 of Article V is entitled Letters of Recommendation. It provides:

> As an employee requests a letter of recommendation from her/his immediate administrative superior, principal, supervisor, or director, the individual to whom the request is made shall be required to prepare and transmit such a letter of recommendation within a reasonable time but no later than one (1) week after the request is made. If the employee so requests, a copy of such letter of recommendation shall be placed in the personnel file.

The District asserts that letters of recommendation do not intimately and directly affect the work of employees because they relate to outside employment. Therefore, the subject does not satisfy the standard of negotiability as set forth in Local 195.

The union counters that this section should be read in conjunction with the contract provision which gives employees the right to include in their personnel files any information which they consider germane and that the letters of recommendation are not used solely for outside employment but are also used for internal promotional applications and assignments.

Letters of recommendation are implicitly positive. An employer cannot be required to issue a positive evaluation or a

positive recommendation. To the extent, however, the employer issues a letter of recommendation, the requirement that a copy be placed in a personnel file is mandatorily negotiable.

Section 15 of Article V is entitled Teacher's Grade Book. It provides:

> A. Each teacher will consider her/his record book for the keeping of grades her/his own private property during the school year. No administrator shall request the teacher's record book to evaluate since this is considered an infringement of the teacher's academic freedom.

The District argues that student grades and academic freedom clauses are matters of educational policy and therefore not negotiable. The union counters that, unlike a teacher's grade book,[2/] a record book is the personal property of the teacher because it is created as a memory aid and not meant for the use of a second party. The District does not dispute this distinction.

Student grading predominantly relates to educational policy. Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989). But given the existence of separate grade books and the absence of a specific showing of how this provision would significantly interfere with grading or any other educational policy, we decline to find the provision not mandatorily negotiable. Contrast Rutgers, the State Univ., P.E.R.C. No.

2/ Article V, Section 15, Subsection B provides that teachers will make available their grade books on an as needed basis by prior appointment and that the grade book is the property of the district.

84-44, 9 NJPER 661 (¶14286 1983)(academic freedom clause which restricts prerogative to determine grading policy not mandatorily negotiable).

Section 19 of Article V is entitled Supplies and Instructional Materials. Subsections C and D provide:

> C. In each school to which a Psychologist or Social Worker is assigned, such supplies and materials [sic] are usually utilized for the work of the respective Psychologists or Social Worker shall be ordered by the school as part of the School's regular process of purchase of materials and supplies and shall be subject to the same limitations and requirements as apply to all other staff within the school. Such supplies and materials shall be placed at the disposal of the respective Psychologist [or] Social Worker whenever needed.
>
> D. The Newark Public Schools agrees that the materials necessary for diagnostic work by Learning Disabilities Teacher Consultants shall be budgeted for and made available by the Department of Special services upon approval by the appropriate Assistant State District Superintendent.

The District argues that both subsections infringe on the managerial prerogative to decide which supplies are educationally beneficial. The union counters that the disputed provisions do not infringe on the District's determination of what supplies should be ordered or who should order the supplies but insure that supplies are provided at the school that psychologists and social workers service. The union asserts that since psychologists and social workers often service more than one school, these provisions obviate the need for the transportation of supplies between schools by the employees.

School boards have the exclusive right to decide course content and curriculum and what textbooks, teaching materials and supplies would be educationally beneficial. Delaware Tp. Bd. of Ed.; see also Jersey City Bd. of Ed., P.E.R.C. No. 82-52, 7 NJPER 682 (¶12308 1981); Byram Tp. Bd. of Ed., P.E.R.C. No. 76-27, 2 NJPER 143, 146-147 (1976) aff'd 152 N.J. Super. 12 (App. Div. 1977). These provisions are not mandatorily negotiable.

Article VII is entitled Summer School and Summer Recreation Programs. The contested sections provide:

> A. Positions in the Newark summer schools and in the Newark summer recreation program shall be filled by employees in the Newark school system who are qualified.
>
> B. Before such positions are filled, vacancies shall be posted by April 1 in the schools and applicants shall apply prior to May 1.
>
> Successful applicants shall be notified by June 1. Such applicants as have not yet been accepted as of June 1 for summer employment shall be placed on a special job waiting list and so notified. The job waiting list shall be made available to the Union by June 3.
>
> When any summer programs are expanded or new programs are initiated after the above dates, notice of such vacancies shall be posted within one week of the Newark Public Schools' decision. Any new job opening for summer work made available after June 1 shall be filled by qualified applicants on the special job waiting list.
>
> E. Unsuccessful applicants who wish to grieve must do so prior to June 15 and such grievances shall be initiated at the State District Superintendent's level and proceed without delay.

The District asserts that Section A is not mandatorily negotiable because it impinges on its managerial prerogative to select candidates from within or without the school system. It argues that the last sentence of Section B is not mandatorily negotiable because although a local board may agree to fill vacancies from a list of candidates, the district has a right to seek additional candidates for new vacancies which arise subsequent to June 1. The District argues that Section E is not mandatorily negotiable because it interferes with its managerial prerogative to assign staff. Finally, the District argues that N.J.S.A. 34:13A-23, which establishes that all aspects of assignment to extracurricular activities are mandatorily negotiable, is inapplicable. It contends that the summer school program involves academic programs, class preparation, grading and teaching. It further contends that the summer recreation program is not among the educational obligations of the district, nor is it intended to supplement the education of district students.

Local 481 argues that the summer program has traditionally been an extension of the school year and as such is work which the union can negotiate to preserve for unit employees to the exclusion of non-unit personnel. The union asserts that Section E is negotiable because it establishes a grievance procedure for violations of the posting requirements. Finally, the union contends that summer school and recreation programs are

not mandated by law and are extracurricular under N.J.S.A. 34:13A-23.

An employer generally cannot be required to fill positions with current employees. Byram Tp. Bd. of Ed.; North Bergen Tp. Bd. of Ed., 141 N.J. Super. 97 (App. Div. 1976); Jersey City Bd. of Ed., P.E.R.C. No. 86-1, 11 NJPER 442 (¶16152 1985); Jersey City Bd. of Ed.; Garfield Bd. of Ed. N.J.S.A. 34:13A-23 carves out an exception that permits a school district to give a preference to candidates within a district for extracurricular positions. N.J.S.A. 34:13A-22 defines extracurricular activities to:

> include those activities or assignments not specified as part of the teaching and duty assignments scheduled in the regular work day, work week, or work year.

Teaching is a curricular assignment specified as part of the teaching assignments scheduled in the regular work day, work week and work year. Thus, the summer school teaching program is not an extracurricular assignment subject to N.J.S.A. 34:13A-23. Section A obligates the employer to hire for the summer school from within the district. This provision is not mandatorily negotiable. We reject the union's argument that the unit work doctrine restricts an employer's prerogative to hire applicants outside the bargaining unit to fill vacancies.

Section B restricts selection of summer school candidates after June 1 to a special job waiting list. Although procedural aspects of filling job vacancies have been held to be negotiable,

this provision is not mandatorily negotiable to the extent it restricts the District's right to seek additional applicants for new and different vacancies. See Jersey City Bd. of Ed., P.E.R.C. No. 82-52.

Section E is not mandatorily negotiable to the extent it may subject the District's decision in filling a vacancy to binding arbitration. Since the filling of vacancies is a managerial prerogative and not mandatorily negotiable, it is not legally arbitrable. The provision is mandatorily negotiable to the extent it permits processing of grievances short of binding arbitration. Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979). We reject the union's argument that this provision addresses a grievance procedure in respect to the procedural requirements of posting of notice of positions and vacancies. A plain reading of Section E does not support this argument.

The summer recreation program is conducted in conjunction with the City of Newark and is neither curricular nor extracurricular. Teachers are not required to participate in the program and N.J.S.A. 34:13A-23 was not intended to change the voluntary nature of such programs. See N.J.S.A. 34:13A-28. Finding the program to be extracurricular would permit the Board to require teachers to participate in the program under certain circumstances. N.J.S.A. 34:13A-23. Accordingly, our separate analysis of Sections A, B and E applies to summer vacation as well as summer school.

Article X is entitled Leaves. Section 3J, entitled Sick Day Program, provides as follows:

> The Newark Public Schools and Union agree to establish a sick day program whereby unit employees will be able to donate sick days to other unit employees in cases of serious illness. Specific guidelines will be developed for implementation in 1991-1992 year.
>
> The Newark Teachers' Union and the Newark Public Schools agree that all provisions of the sick day program shall be excluded from the contractual grievance procedure up to and including binding arbitration.

The Board argues that this contractual provision is preempted by N.J.S.A. 18A:30-6. That statute allows a school district to extend sick leave beyond a contractual limit on a case-by-case basis and to deduct the cost of a substitute teacher from the sick leave benefit granted. It contends that the creation of sick leave banks permits employees to acquire additional sick leave days without district approval and without consideration of individual circumstances.

Local 481 counters that the parties' guidelines provide for approval before the recipient of the donated sick days may utilize the additional sick time and that the contract prohibits a grievance challenging a determination to deny additional sick leave. It asserts that the District has retained its managerial right to review additional sick leave requests on a case-by-case basis and to grant leave in excess of the negotiated minimum as allowed by N.J.S.A. 18A:30-6.

Cases interpreting N.J.S.A. 18A:30-6 have required that extended sick leave determinations be based on a school board's consideration of individual circumstances, not on the 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); Red Bank Bor. Bd. of Ed., P.E.R.C. No. 96-2, 21 NJPER 270 (¶26174 1995); Toms River Bd. of Ed., P.E.R.C. No. 94-68, 20 NJPER 59 (¶25022 1993); Bayonne Bd. of Ed., P.E.R.C. No. 89-25, 14 NJPER 579 (¶19245 1988); Essex Cty. Voc. School Dist. Bd. of Ed., P.E.R.C. No. 88-36, 13 NJPER 812 (¶18311 1987); Matawan-Aberdeen Reg. School Dist. Bd. of Ed., P.E.R.C. No. 83-112, 9 NJPER 155 (¶14073 1983). The contested provision provides for the donation of sick days. The procedures by which an employee may utilize the donated sick days are set forth in guidelines developed by the parties. These guidelines provide for submission by the employee requesting use of donated sick days of a medical certificate to the Division of Health Education and Service. The District physician approves or disapproves the medical certificate and declares eligibility for the program. The language contained in the contractual provision, together with the guidelines, does not reserve to the District the right to approve requests for extended sick leave as required by the statute. Approval by the District physician of the medical certificate submitted by the employee is

not a substitute for the case-by-case determination contemplated by the statute and reserved to the District. Therefore, Article X, Section 3J is not mandatorily negotiable.3/

Article XVII is entitled Teacher Salary. Section 14 provides, in part:

> No teacher from outside the Newark school system shall be hired for Newark Evening High School unless insufficient applications are received from regularly employed Newark teachers certified to fill the available openings.

An employer cannot be required to favor current employees for vacancies or promotions to the exclusion of applicants outside the unit. See Byram Tp. Bd. of Ed.; North Bergen Tp. Bd. of Ed.; Jersey City Bd. of Ed., P.E.R.C. No. 86-1; Jersey City Bd. of Ed., P.E.R.C. No. 82-52; Garfield Bd. of Ed.; Piscataway Tp. Bd. of Ed., P.E.R.C. No. 87-151, 13 NJPER 508 (¶18189 1987). Therefore, this provision is not mandatorily negotiable.

ORDER

A. The following provisions are not mandatorily negotiable:

1. Article V, Section 1, Subsection B (last sentence), except to the extent it ensures that teachers will

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3/ Assembly Bill 874, pre-filed for introduction in the 1998 legislative session, would permit the establishment of sick leave banks for school employees.

receive notice of unsatisfactory evaluations; Section 11, except to the extent it requires that copies of letters of recommendation be placed in a personnel file; and Section 19

2. Article VII, Section A; Section B to the extent it restricts the Board's right to seek additional applicants for new and different vacancies; Section E, to the extent a grievance can be submitted to binding arbitration

3. Article X, Section 3J

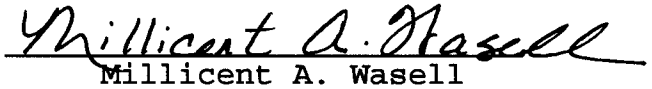
4. Article XVII, Section 14

B. The following provisions are mandatorily negotiable:

1. Article V, Section 1, Subsection B (to the extent it ensures that teachers will receive notice of unsatisfactory evaluations); Section 11 (to the extent it requires that copies of letters of recommendation be placed in a personal file); Section 15

2. Article VII, Section B, except to the extent it restricts the Board's right to seek additional applicants for new and different vacancies; Section E, to the extent it permits the processing of grievances short of binding arbitration.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration. Commissioner Wenzler was not present.

DATED: September 24, 1998
Trenton, New Jersey
ISSUED: September 25, 1998