P.E.R.C. NO. 97-106

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and- Docket No. CO-H-96-8

COMMUNICATIONS WORKERS OF AMERICA,

Charging Party.

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Petitioner,

-and- Docket No. SN-97-11

COMMUNICATIONS WORKERS OF AMERICA,

Respondent.

SYNOPSIS

In a consolidated unfair practice and scope of negotiations proceeding, the Public Employment Relations Commission denies the request of the State of New Jersey (Department of Human Services) for a restraint of binding arbitration of a grievance filed by the Communications Workers of America. The grievance seeks automatic pay upgrades for teachers who have performed satisfactorily for three years from the title of teacher 2 to the title of teacher 1. Applying its precedents to the circumstances of this case, and stressing that the job duties of the two titles are the same, the Commission holds that movement from teacher 2 to teacher 1 presents a mandatorily negotiable issue which is not preempted by any Civil Service statute or regulation.

The Commission dismisses certain allegations in a Complaint that the State violated the New Jersey Employer-Employee Relations Act. The Complaint, based on an unfair practice charge filed by CWA, alleges that the employer violated the Act when it changed employment conditions in the Department of Human Services. The Commission dismisses allegations concerning automatic pay upgrades for nurses; vacation leave for unclassified teachers holding 12 month assignments; proof of an emergency when administrative leave is taken for that reason; alleged repudiations of negotiated employment conditions, alleged violations of subsection 5.4(a)(3); and alleged independent violations of subsection 5.4(a)(1).

The Commission defers to arbitration allegations concerning automatic pay upgrades for teachers; every other weekend off for certain DHS employees; and forced use of vacation for employees who are not unclassified teachers holding 12 month assignments.

Since all allegations in the Complaint were either dismissed or deferred to arbitration, the Commission vacates the order to hold a hearing. It remands the case to the Director of Unfair Practices for the purpose of carrying out the deferral to arbitration rulings and retaining jurisdiction of the deferral allegations pending submission to and completion of the grievance arbitration process.

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 Respondent, Peter Verniero, Attorney General
(Mary Cupo-Cruz, Senior Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(Judiann Chartier, of counsel)

DECISION AND ORDER

On July 10, 1995, the Communications Workers of America filed an unfair practice charge against the State of New Jersey (Department of Human Services). The charge alleged that the

employer violated subsections 5.4(a)(1), (3), and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it changed employment conditions in the Department of Human Services ("DHS"). Paragraphs 3 and 4 state:

> 3. The terms and conditions of employment the Department of Human Services announced it was changing included:
>
> a. The automatic pay upgrade of Teacher II to Teacher I and Graduate Nurse to Head Nurse. The past practice had been to automatically upgrade these titles from the lower title in the series to the higher title in the series after one year of service. The upgrade was the equivalent of an 11% raise for Nurses and a 16% raise for Teachers. CWA was informed the change would affect 75 Graduate Nurses and 100 Teacher II's who would otherwise be provided the aforementioned raises if the automatic upgrade program had not been eliminated.
>
> b. The elimination of the Every Other Weekend Off (EOWO) program. This policy was in effect since approximately 1981 and was a negotiated term and condition of employment which provided that employees in certain Human Service institutions in seven day a week, 24 hour a day positions would be guaranteed that their work schedules would allow them the entire weekend off every other week.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to...any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative...concerning terms and conditions of employment...."

c. Forced use of vacation leave in Day Training Facilities. Human Services initially announced CWA represented employees would be forced to use their vacation leave on 11 days during the year around State holidays. The Department subsequently announced CWA members would "only" have to use 5 of their vacation days around certain holidays.

4. On 5/15/95, CWA received a letter from John F. DeFilippis, Director of the Governor's Office of Employee Relations which unilaterally changed the procedures for requesting vacation, administrative and sick leave. The changes were not previously discussed or negotiated with the CWA. In particular, the State, during the term of the contract, changed the provision governing administrative leave by reserving for management the right to require proof of emergencies when employees use administrative leave for emergencies. Under the new policy, management claims they will have the right to deny administrative leave if the employee does not provide proof of the emergency. There is no contractual obligation for employees to provide proof of emergencies and the change in policy constitutes a unilateral change in terms and conditions of employment.

Paragraph 5 alleges, in part, that the changes alleged in paragraphs 3 and 4 repudiated negotiated employment conditions, were discriminatorily motivated, and were made unilaterally.

A Complaint and Notice of Hearing issued. Paragraphs 2, 3 and 4 of the employer's Answer state:

2. Respondent admits that a meeting was held between representatives of the Department of Human Services and the CWA on or about January 25, 1995 to discuss with the CWA proposed initiatives which would affect certain employees represented by the CWA, including among other things, weekend staff coverage, use of intermittent/pool Temporary Employment Services, sick leave reduction, closing the Center for

> Autistic Children and freezing certain promotions but Respondent denies the remaining allegations in paragraphs 2 and 3 of the Complaint.
>
> 3. Respondent admits that on or about May 15, 1995, OER sent a letter to the CWA, and other unions representing State employees, providing a draft of a memorandum contemplated for dissemination to State employees but the draft memorandum itself was not disseminated although a similar document was ultimately disseminated and a Notice to All Employees was posted regarding job actions and/or strikes by State employees and the process in place for approval of leave time. The remaining allegations contained in paragraph 4 of the Complaint are denied.
>
> 4. Respondent denies the allegations contained in paragraph 5 of the Complaint.

The Answer also raises several defenses.

On August 13, 1996, the employer petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance seeking automatic pay upgrades for teachers.

The employer has moved for summary judgment in the unfair practice case and a permanent restraint of arbitration in the scope case. We have consolidated the cases.

The parties have filed certifications, exhibits and briefs. CWA affiliates represent four units of employees: administrative and clerical employees, professional employees, primary-level supervisors, and higher-level supervisors. The parties' contracts provide for arbitration of contractual disputes.

I. Automatic promotions/pay upgrades for nurses and teachers

A. Facts

1. Graduate nurses and head nurses

The graduate nurse and head nurse titles are included in the State employee career service. The graduate nurse title is part of class code 16 and is compensated at range 19. The head nurse title is part of class code 18 and is compensated at range 21 of the State compensation plan. Department of Personnel ("DOP") job specifications define the graduate nurse title this way:

> Either (a) under direction of a professional Registered Nurse in a health care facility within the Department of Human Services, assumes responsibility as a member of the treatment team. Works with residents, their families, and community agencies, and provides assistance, counseling, and instruction to residents. Carries out therapeutic and medical orders authorized by a Registered Nurse, licensed physician or other supervisor; does related work as required; or (b) under the direction of a nursing supervisor, a physician, or other supervising official in a state department institution, clinic, or agency, or municipal government, services health care facility, providing professional nursing care and treatment; does related work as required.

DOP job specifications define the head nurse title this way:

> Under direction of a Supervisor of Nurses or other supervisory official in a state hospital, medical center, or other institution that provides medical assistance and/or guidance to the physically and/or mentally ill, (a) has charge of the care and well being of the patients and the maintenance of quarters in an assigned area, or (b) supervises the work programs and activities of a staff of nurses providing care to patients in an assigned area; does related work as required.

The graduate nurse title is in the negotiations unit of professional employees. The head nurse title is in the negotiations unit of primary-level supervisors.

According to certifications submitted by a CWA staff representative and CWA's Area Director for District One, DHS has a practice of automatically promoting graduate nurses to head nurses and thus to a higher pay grade after one year of satisfactory work.[2/] The head nurse title requires one year of experience as a professional nurse in a large hospital or other institution, clinic, or medical center.

DHS Personnel Circular (#95-90) is entitled Automatic Promotions. It states that from March 23 until August 1, 1995, certain types of promotions would be suspended. The types of promotions included graduate nurse to head nurse. According to CWA's Area Director, the DHS Commissioner advised him of DHS's intent to suspend "the automatic promotion procedure."

2/ The employer asserts that parts of these certifications contain information beyond the signers' personal knowledge. It then asserts that such hearsay cannot be used to defeat its summary judgment motion. We set forth the disputed parts of the certifications not for purposes of considering the summary judgment motion, but for purposes of considering the scope petition and the related negotiability issue raised by paragraph 3a of the charge. In assessing a negotiability dispute as opposed to a charge, we do not ask whether the facts asserted in support of a contractual claim are true. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). We ask only whether the contractual claim is within the scope of negotiations. Id.

According to a DHS Employee Relations Coordinator, no automatic promotion policy exists, in writing or in practice. The chief officer at a DHS institution decides whether a promotion should be made after considering an employee's work record, the eligibility requirements, the workforce configuration, and the budget. A matching promotional vacancy does not exist for each current employee in a lower title. Therefore, promotion of an employee may require approval from DHS and then authorization from DOP and OMB to create a position, reclassify an unfilled position, or reclassify an encumbered position to a higher title. DHS closed 12 child day care centers in 1994 and 1995 and 17 adult activities center in 1995. She finally asserts that workforce configurations, the impact of layoffs, and the budget influence all personnel decisions.

2. Teacher 2 and teacher 1[3/]:

The teacher 2 and teacher 1 titles are not included in the career service: they are unclassified. The teacher 2 title is part of class code 19 and is compensated at range 21. The teacher 1 title is part of class code 22 and is compensated at range 24. DOP job specifications for the unclassified title of teacher 2 define that title this way:

> Under the direction of the Supervisor of Educational Program, plans, executes, and

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3/ Given the DOP job specifications we use teacher 2 and teacher 1 rather than teacher II and teacher I for these titles.

> evaluates the lessons and educational experiences of the assigned pupils, class, or classes. Performs these duties exercising independent judgment and with a comprehensive knowledge of Department rules, regulations, and policies; does related work as required.

DOP job specifications for the unclassified title of teacher 1 define that title in the same words used to describe the teacher 2 title and cite essentially identical examples of work. The teacher 1 specifications have two eligibility requirements not contained in the teacher 2 specifications: three years experience in an approved school and a permanent teacher's license endorsement in a special education field. The knowledge and abilities required by the two job specifications are identical. Both the teacher 2 and teacher 1 titles are in the same negotiations unit of professional employees.

On March 30, 1995, Rod Schumacher, Supervisor of Education in the Adaptive Learning Center at the Hunterdon Developmental Center, wrote a memorandum to the Acting Director of the Office of Education. The memorandum requested the processing of a promotion of Pamela Umbrello from teacher 2 to teacher 1 because she met the criteria for that title and consistently exceeded the performance standards. On May 15, 1995, Schumacher similarly recommended the processing of a promotion of Arlene Shaplow.

Personnel Circular #95-90 suspended all automatic promotions from teacher 2 to teacher 1 so Umbrello and Shaplow were not promoted. According to a CWA staff representative, each employee continues to perform the same functions as a teacher 1, but continues to be compensated as a teacher 2.

CWA filed a grievance alleging that the employer violated Article XL, Section B of the professional contract when it did not upgrade them. That section provides:

> Regulatory policies initiated by the various institutions and agencies where these employees are working which have the effect of work rules governing the conditions of employment within the institution or agency and which conflict with any provision of this Agreement shall be considered to be modified consistent with the terms of this Agreement, provided that if the State changes or intends to make changes which have the effect of elimination in part or in whole of such terms and conditions of employment, the State will notify the Union and, if requested by the Union within ten (10) days of such notice or of such change or of the date on which the change would reasonably have become known to the employees affected, the State shall within twenty (20) days of such request enter negotiations with the Union on the matter involved, providing the matter is within the scope of issues which are mandatorily negotiable under the Employer-Employee Relations Act as amended and further, if a dispute arises to the negotiability of such matters, that the procedures of the Public Employment Relations Commission shall be utilized to resolve such dispute.

An employer designee conducted a grievance hearing. Umbrello and Shaplow stated that they were told at their preemployment interviews that promotions from teacher 2 to teacher 1 would be automatic. An employer representative stated that the teachers were eligible for promotion, but could not be promoted given Personnel Circular #95-90. The designee denied the grievance, finding that the personnel circular was not a

"regulatory policy" and that no contractual provision limited the employer's prerogative and discretion to deny promotions.[4/]

CWA demanded arbitration and the scope petition ensued.

CWA alleges that there is an automatic promotion practice requiring that a teacher 2 be advanced to the higher pay grade of a teacher 1 after three years of satisfactory service. Its Area Director further alleges that such promotions do not depend upon vacancies in teacher 1 positions or require testing. The DHS Employee Relations Coordinator denies any such practice. She asserts that the same considerations apply in deciding whether to promote a teacher 2 to teacher 1 as apply in deciding whether to promote a graduate nurse to head nurse.

B. Analysis

While the scope-of-negotiations case involves only the teacher 2/teacher 1 dispute, the unfair practice case depends upon the same negotiability analysis. We will thus analyze both the teacher 2/teacher 1 and graduate nurse/head nurse disputes together.

Our jurisdiction in a scope-of-negotiations case is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope

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4/ Article XII, Section A defines a promotion as "advancement of an employee to a job classification within the unit at a higher salary range."

> of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider whether any automatic promotion practice existed; whether the employer had a contractual obligation to negotiate before acting; or whether the management rights clause or the contractual definition of promotion defeats CWA's claims. Instead, we ask only whether the employer could have legally agreed, as CWA maintains it did, to negotiate before changing its alleged automatic promotion practices.

Local 195, IFPTE v. State, 88 N.J. 293, 404-405 (1982), articulates the tests 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]

We will defer our preemption analysis until after we have examined our case law concerning the interests of employees and employers.

These two automatic promotion disputes implicate two lines of cases. One line concerns the right of employers to set promotional criteria and make promotional decisions. The other line concerns the right of employees to negotiate over the compensation they receive in exchange for the duties they do.

As a rule, a public employer has a prerogative to determine promotional criteria and make promotional decisions, but must negotiate over promotional procedures. See, e.g., State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90 (1978); Rutgers, the State Univ. and Rutgers Council of AAUP Chapters, 256 N.J. Super. 104 (App. Div. 1992), aff'd 131 N.J. 118 (1993); State v. State Troopers NCO Ass'n., 179 N.J. Super. 80, 90-91 (App. Div. 1981); North Bergen Tp. Bd. of Ed. v. North Bergen Fed. of Teachers, 141 N.J. Super. 97, 104 (App. Div. 1976); Monmouth Cty., P.E.R.C. No. 96-15, 21 NJPER 347 (¶26213 1995). Employers also have a prerogative not to fill promotional positions. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981). Employers thus remain free to promote the employees who can best do the new duties required in higher positions and to determine the number of employees needed to do those duties.

As a rule, employees have a right to negotiate over the compensation they receive for the duties they perform. See, e.g., Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 333 (1989);

Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980); Englewood Bd. of Ed. v. Englewood Ed. Ass'n, 64 N.J. 1, 6 (1973); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER ___ (¶_____ 1997). Negotiable issues include merit pay questions, Hunterdon; Essex Cty., P.E.R.C. No. 87-48, 12 NJPER 835 (¶17321 1986); and Essex Cty., P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986), consol. and aff'd, NJPER Supp.2d 182 (¶158 App. Div. 1987); longevity benefits and salary upgrades, Wall Tp., P.E.R.C. No. 92-95, 18 NJPER 165 (¶23079 1992); and salary classifications. East Brunswick Bd. of Ed., P.E.R.C. No. 91-12, 16 NJPER 448 (¶21193 1990), aff'd NJPER Supp.2d 285 (¶229 App. Div. 1992). We have specifically declined to restrain arbitration over grievances alleging that the parties had agreed that after several years of satisfactory service, employees would be automatically promoted to a higher title with a higher rate of pay when the record showed that the duties in the higher title remained the same as in the lower title. Sussex Cty. Community College, P.E.R.C. No. 96-48, 22 NJPER 39 (¶27019 1995); Ridgewood Village, P.E.R.C. No. 93-87, 19 NJPER 216 (¶24104 1993). Employees thus have an opportunity to negotiate over the pay they will receive in light of the duties they continue to perform and their years of experience performing them.

These bodies of case law -- developed under the applicable Supreme Court tests -- recognize, balance, and accommodate the interests of both employers and employees. We now examine where the instant disputes fit within that case law.

Applying our precedents to the circumstances of this case, we hold that the graduate nurse/head nurse dispute is not mandatorily negotiable. The duties of the two titles are much different and head nurse is a supervisory title whereas graduate nurse is not. The two titles are even in different negotiations units. Enforcing a practice of automatically promoting graduate nurses to head nurses would significantly interfere with the employer's prerogative to decide which employees are best qualified to perform supervisory duties. We therefore dismiss the part of paragraph 3a of the Complaint regarding these titles.

Applying our precedents to the circumstances of this case, we hold that movement from teacher 2 to teacher 1 presents a mandatorily negotiable issue if not preempted. The duties of the two positions are the same and the examples of work are essentially identical. The knowledge and abilities required by the two job specifications are also identical and there is no supervisory relationship between the two positions or difference in negotiations unit placement. While eligibility requirements differ slightly, Umbrello and Shaplow indisputably have satisfied the experience and endorsement requirements for teacher 1. CWA asserts that the employer has a practice of automatically promoting employees from teacher 2 to teacher 1 after three years of satisfactory service and that the two employees were assured at their preemployment interviews that such promotions would be automatic. The record does not reveal the reason for suspending

the "automatic promotions" described in Personnel Circular #95-90, but CWA asserts the employer did so to reduce compensation costs. Compare Sussex Cty. Community College (employer's interest in saving money by delaying automatic promotions after three years of satisfactory teaching does not outweigh employees' interest in seeking higher salaries). The focus of this dispute, then, is upon the employees' claim that having performed their duties satisfactorily for three years, they are now contractually entitled to receive a higher rate of pay for continuing to perform the same duties unless the employer negotiates over suspending its alleged automatic promotion practice. This claim, if proven, protects the employees' interest in negotiating over the equation between compensation and experience and does not interfere with the employer's prerogative to decide that a promotion should not be given to an employee who is not the best qualified person to perform new promotional duties. This claim, if proven, also does not interfere with the employer's prerogative to leave vacancies unfilled because the alleged agreement would not require the employer to organize or deploy its work force in a functionally different manner or change the number of employees delivering particular services. Instead the same number of employees would continue to perform the same services regardless of their titles. We thus hold that the employer could legally agree that it would automatically promote employees in the teacher 2 title to the higher-paid teacher 1 title after three years of satisfactory

service, provided that such an agreement is not preempted by Civil Service law. We turn to the preemption question next.

A statute or regulation will not preempt negotiations unless it speaks in the imperative and expressly, specifically, and comprehensively sets an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); Local 195 at 406; State Supervisory at 80-82; State of New Jersey (DEP) v. CWA, 285 N.J. Super. 541, 550 (App. Div. 1995), certif. den. 143 N.J. 519 (1996). We ask not whether a statute or regulation permits an employer to take an action, but whether it precludes the employer from exercising any discretion over an employment condition so that there is nothing left to negotiate. Hunterdon at 330-331. Thus, we focus on whether Civil Service statutes or regulations eliminate the employer's discretion to promote employees automatically from teacher 2 to teacher 1 after three years of satisfactory service.

N.J.S.A. 11A:1-1 et seq. and N.J.A.C. 4A:1-1 et seq. govern the Civil Service system. These statutes and regulations do not apply to unclassified employees unless otherwise specified. N.J.S.A. 11A:3-4; N.J.A.C. 4A:1-1.2(b).

N.J.S.A. 11A:3-1 provides that the Merit System Board ("MSB") "shall assign and reassign titles among the career service, senior executive service and unclassified service" and that the Commissioner of the Department of Personnel ("DOP") shall

"[e]stablish, administer, amend and continuously review a State classification plan governing all positions in State service." The Commissioner must also provide a job specification for each title. See also N.J.A.C. 4A:3-3.1 and 3.3.

N.J.S.A. 11A:3-7 requires the Commissioner to "establish, administer, and amend an equitable State employee compensation plan which shall include pay schedules, the assignment and reassignment of salaries for all State titles, and standards and procedures for salary adjustments other than as provided for in the State compensation plan for the career, senior executive and unclassified services." See also N.J.A.C. 4A:3-4.1(d).

N.J.A.C. 4A:3-4.7 concerns the type of pay adjustment to be made when an employee moves to a different title. If an employee is promoted, pay must be adjusted in accordance with N.J.A.C. 4A:3-4.9. Under that regulation, employees promoted to a title with a higher class code receive a minimum salary increase. N.J.A.C. 4A:3-4.9(a)(3) applies when employees are advanced to a title with a higher class code if DOP finds that employees have served continuously in the lower title for at least four months before the effective date of advancement and service in a lower title provided a significant preparation and training for service in the higher title.

N.J.A.C. 4A:1-1.3 defines a "promotion" in the State service as "an advancement to a title having a higher class code than the former permanent title." N.J.S.A. 11A:4-14 provides that

the Commissioner "shall establish the minimum qualifications for promotion and shall provide for the granting of credit for performance and seniority where appropriate." This provision does not expressly cover unclassified employees and they are not subject to the promotional examinations required by N.J.A.C. 4A:4-2.5. N.J.A.C. 4A:4-1.10 provides, however, that all promotions are subject to DOP's approval and DOP must notify the appointing authority of its actions and reasons.

Both teacher titles are unclassified. They are nevertheless subject to the State classification and compensation plans. Thus, DOP sets the job duties, class codes and salaries for these positions. CWA does not contest the duties, class codes, or salaries.

Movement from a teacher 2 title to a teacher 1 title is considered a promotion under Civil Service law and an employee cannot be promoted to a teacher 1 title without meeting the eligibility requirements in the job specifications. The grievants have indisputably met these requirements. It is also indisputable that each grievant has served as a teacher 2 for at least four months and that service as a teacher 2 prepares and trains employees to perform the same service as a teacher 1. N.J.A.C. 4A:3-4.9(a)(3).

Civil Service examinations are not required for promotions to unclassified positions. The Civil Service system contemplates that appointing authorities will have more discretion

and be subject to less regulation with respect to unclassified employees. State Troopers Fraternal Ass'n v. State (Dept. of Law and Public Safety), 115 N.J. Super. 503 (Ch. Div. 1971), aff'd 119 N.J. Super. 375 (1972), aff'd 62 N.J. 302 (1973). No Civil Service statute or regulation eliminates the employer's discretion to move employees automatically from the teacher 2 title to the teacher 1 title after three years of satisfactory service, provided the employees meet the eligibility requirements.

While N.J.A.C. 4A:4-1.10 requires DOP approval of all promotions, that regulation does not empower DOP to invalidate promotions within the employer's discretion if the eligibility requirements have been met. Civil Service statutes and regulations do not apply to unclassified employees unless otherwise specified and the statutes or regulations concerning promotions do not limit an employer's discretion to promote unclassified employees eligible for a higher title. An employer could legally agree to maintain an automatic promotion practice without displacing DOP's authority under N.J.A.C. 4A:4-1.10 to ensure that employees promoted to teacher 1 have met its eligibility requirements. State of New Jersey (Dept. of Transportation), P.E.R.C. No. 84-77, 10 NJPER 42 (¶15024 1983), aff'd 11 NJPER 333 (¶16119 App. Div. 1985); State of New Jersey (Dept. of Human Services), P.E.R.C. No. 82-83, 8 NJPER 209 (¶13088 1982). Contrast State of New Jersey (DEP) v. CWA, 285 N.J. Super.

541, 551-552, (App. Div. 1995), certif. den. 143 N.J. 519 (1996) (Civil Service statutes and regulations create a comprehensive demotional layoff scheme and mandate that Commissioner designate lateral, demotional and special reemployment rights of all titles before layoffs). We therefore hold that no Civil Service statute or regulation prohibits or preempts the alleged automatic promotion practice and we thus decline to restrain arbitration.

We next consider the related unfair practice allegations. To the extent that paragraphs 3a and 5 of the charge allege a repudiation of a negotiated employment condition, we dismiss these allegations as unsupported by any specific allegations or evidence. To the extent that paragraphs 3a and 5 allege a unilateral change in an employment condition, we defer those allegations to the pending grievance arbitration, subject to our retaining jurisdiction to consider the unfair practice allegations if the dispute is not resolved or submitted to arbitration with reasonable promptness, if any award is repugnant to the Act, or if the arbitration procedures were not fair and regular. State v. Council of New Jersey State College Locals, 153 N.J. Super. 91 (App. Div. 1977); Brookdale Community College, P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983); East Windsor Reg. Bd. of Ed., E.D. No. 76-6, 1 NJPER 59 (1976). See also State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

II. Weekends Off

A. Facts

Paragraph 3b of the charge alleges that the employer eliminated the "Every Other Weekend Off (EOWO) Program." It also alleges that EOWO had been in effect since 1981 and was "a negotiated term and condition of employment."

An OER Employee Relations Coordinator asserts that the employer has a contractual right to alter work schedules unilaterally under this article:

> A. Hours of Work
>
> 1. The number of hours in the workweek for each job classification within the unit shall be consistent with its present designation in the State Compensation Plan.
>
> 2. Hours of work for "NL" employees may be adjusted by the responsible agency official in keeping with existing regulations and procedures.
>
> 3. Where practicable the normal workweek shall consist of five (5) consecutive work days.
>
> 4. For fixed workweek employees, when schedule changes are made the maximum possible notice, which shall not be less than seven (7) working days except for unforeseen circumstances, shall be given to the affected employees.
>
> 5. For fixed workweek employees, when such employees' shift is changed, adequate advance notice which normally will be at least seven (7) working days and which shall not be less than forty eight (48) hours, except in case of an emergency, will be given to the affected employee. [Article VIII, Section A]

He further asserts that during the 1986-1989 contract negotiations, the employer rejected a proposal to limit its power

to establish work schedules, but did agree to add paragraphs 4 and 5. Moreover, CWA and IFPTE filed charges in 1989 contesting a requirement that some DOT employees work on Saturdays or Sundays and the charges were withdrawn after a hearing and briefs and without a settlement.

A DHS Employee Relations Coordinator asserts that DHS did not guarantee employees every other weekend off and that DHS complied with paragraphs 4 and 5. She also asserts that 41 grievances have been consolidated and CWA has demanded arbitration.

The employer's brief cites two other articles: Management Rights and Complete Agreement. Neither article refers to work schedules or weekends off.

CWA's Area Director asserts that EOWO was a longstanding practice. As CWA's lead negotiator, he further asserts that the parties intended paragraphs 4 and 5 to apply only when starting or quitting times were altered or an employee's shift was changed. A CWA staff representative asserts that in January 1996, DHS unilaterally stopped its EOWO program.

B. Analysis

N.J.A.C. 19:14-4.8(d) provides:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995), adopted a new standard in determining whether a "genuine issue" of material fact precludes summary judgment. The decisionmaker must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." If that issue can be resolved in only one way, it is not a "genuine issue" of material fact.

N.J.S.A. 34:13A-5.3 provides in part:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

A public employer may violate this obligation by: (1) repudiating a negotiated agreement, or (2) implementing a new work rule without negotiating or having a contractual defense. See, e.g., Bridgewater Tp., P.E.R.C. No. 95-28, 20 NJPER 399 (¶25202 1994), aff'd 21 NJPER 401 (¶26245 App. Div. 1995); Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). If a repudiation is proven, the employer must restore the employment condition and retain it until the contract expires. If a unilateral change is proven, the employer need only restore the employment condition until it negotiates.

The charge alleges that EOWO's elimination repudiated an agreement. The employer has submitted a competent certification

that no written agreements concerning EOWO exist and CWA has not submitted any competent contrary evidence. Even if a contractual breach could be found, it would not rise to a repudiation. State of New Jersey (DHS), P.E.R.C. No. 84-148. We thus grant summary judgment on this allegation.

The charge also alleges that the employer eliminated EOWO without negotiations. Based on the pleadings and the certifications, we believe it is essentially undisputed that employees had received every other weekend off for many years and that this practice has been changed without specific negotiations over that change. The employer, however, maintains that CWA has contractually waived its right to negotiate. To succeed in that defense, the employer must show that the contract clearly and unequivocally authorized this unilateral change. Elmwood; Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983). See also Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978).

Citing State of New Jersey, P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985), the employer specifically maintains that res judicata establishes a waiver. We disagree. That case involved a different issue: the employer's right to change starting and stopping times of shifts without negotiations. We first observed that the parties' contract did not clearly and unequivocally authorize the changes. While we then noted the broad management

rights clause and an arbitration textbook stating that "except where specifically restricted by the contract, management generally has been held to have the right to change the work week and work shifts" id. at 726; we did not end our inquiry there. Instead, we stated that it was necessary to examine the parties' negotiations history to see if the union had clearly waived its right to negotiate. Based on specific conversations about starting and stopping times, we found that it had. This case involves a different issue and the employer has not submitted any specific evidence that EOWO was discussed in negotiations. Compare State of New Jersey (Dept. of Military and Veterans Affairs), P.E.R.C. No. 91-40, 16 NJPER 583 (¶21257 1990)(employer did not have clear right to stop granting employees every other weekend off). Further, while the employer asserts that the contractual notice provisions apply, CWA's lead negotiator has certified that the parties intended that these provisions would apply only to changes in starting and stopping times. Thus, the earlier State case, decided after a full hearing and based on negotiations history, does not establish a waiver here.

The employer also asserts that CWA waived its right to negotiate over all work schedules changes when it withdrew a 1989 charge contesting DOT's requiring some employees to work on weekends. This single instance alone does not establish a past practice warranting such a broad waiver and the cases cited by the employer do not so indicate. Burlington Cty., P.E.R.C. No. 87-37,

12 NJPER 774 (¶17295 1986), simply holds that a party cannot withhold evidence in one part of a proceeding and introduce it later in that proceeding; and Old Bridge Tp., P.E.R.C. No. 78-67, 4 NJPER 186 (¶4092 1978), merely holds that a union did not timely contest a "test-score" seniority system where that system had been instituted almost three years earlier and several personnel actions and grievance rulings had been based on that system. Contrast Shamong Tp. Bd. of Ed., P.E.R.C. No. 91-21, 16 NJPER 489 (¶21213 1990) (established past practice permitted unilateral increases of pupil-contact time).

CWA has demanded arbitration. Consistent with our deferral ruling concerning the teacher 2/teacher 1 issue, we will defer the EOWO issue to arbitration.

III. Vacation Days

A. Facts

The charge alleges that the employer requires DHS employees to use vacation days around State holidays.

The DHS Employee Relations Coordinator makes these allegations. Day training facilities provide academic programs and operate on an academic calendar. That calendar establishes school recesses during which non-residential facilities are closed and residential facilities provide only non-academic services. The DHS Commissioner has directed employees at certain facilities to take vacations consistent with the academic calendar.

Grievances contesting that directive were consolidated and denied. CWA has sought arbitration.

The OER Employee Relations Coordinator asserts that State of New Jersey (Dept. of Ed.)., P.E.R.C. No. 88-72, 14 NJPER 137, 139 (¶19055 1988), aff'd NJPER Supp.2d 209 (¶184 1989), resolved the same contractual issues and held that the employer could direct vacations for unclassified employees in 12 month assignments. He also asserts that CWA filed a similar grievance in 1985.

Article XXII, Section G of the professional unit contract covers career service employees. Employees receive a number of vacation days based on their years of service. That section then provides:

> It is understood that the current program to schedule vacation time in effect at each institution or agency will be continued. Conflicts concerning the choice of dates when scheduling vacations will be resolved within the work unit on the basis of State seniority. Specific requests for vacation utilization which do not conflict with operational considerations shall not be unreasonably denied.

The section also provides:

> Vacation allowance must be taken during the current calendar year at such time as permitted or directed by the Department Head unless the Department Head determines it cannot be taken because of pressure of work; except an employee may request a maximum of one (1) year of earned vacation allowance be carried forward into the next succeeding year.

Article XXIII of the professional unit contract covers

unclassified employees. Teachers with 12-month assignments are subject to this provision:

> The schedule as to utilization of this vacation and holiday leave shall be consistent with the academic calendar. However, requests for use and the balance of leave days, not determined by the academic calendar, shall be honored where practicable and operationally non-disruptive, and special attention shall be given to requests for such time off in the summer months.

CWA's Area Director asserts that the contracts do not empower the employer to determine when all employees shall take vacations. He further asserts that the contractual use of the "academic calendar" refers to a September to June school year with summer vacations; he does not believe these references permit the employer to require employees to take vacation one day at a time during the school year or to dock the pay of new employees who have not yet accrued vacation days.

B. Analysis

We grant summary judgment to the extent that paragraph 3C and 5 allege a repudiation. The contractual provisions do not give CWA a clear right to block the alleged changes.

We next consider whether the employer has a clear and unequivocal contractual right to make the alleged changes. The employer argues that it does given State of New Jersey (Dept. of Ed.), the 1985 grievance, and other contractual language.

In State of New Jersey (Dept. of Ed.), we dismissed a charge alleging that the employer unilaterally reduced the number

of vacation days for unclassified teachers at the Center for Occupational Education and Demonstration ("COED"). These teachers did not have a right to receive the 22 vacation days granted other Department of Education employees because the contractual provision allowing unclassified employees to choose the number of days granted career service employees did not apply to employees whose schedules are governed by the academic calendar. That case does not address the different issue of whether DHS employees can be required to take vacation days before or after State holidays, but does conclude that teacher work schedules are governed by the academic calendar.

The employer also cites a Commissioner of Education decision sustaining CWA's 1985 grievance. That grievance contested a policy requiring COED staff to use vacation days during school recesses. The Commissioner adopted a Hearing Officer's report finding that the academic calendar was controlling with respect to unclassified teaching staff and that the COED Director had the contractual right to schedule vacation for those employees consistent with that calendar. The Commissioner, however, also found that the Director could not compel classified staff to take leave at specified times; the academic calendar was not controlling for classified staff; and only the department head (the Commissioner of Education) could compel leave for classified employees.

The employer relies upon the part of Article XII providing that vacation leave for career service employees "must be taken during the current calendar year at such time as permitted or directed by the Department Head unless the Department Head determines it cannot be taken because of pressure of work...." CWA points out, however, that this article also provides that "it is understood that the current program to schedule vacation time in effect at each institution or agency will be continued."

The employer also relies upon the part of Article XIII providing that the schedule for vacations of unclassified teachers "shall be consistent with the academic calendar." CWA responds that this article also provides that the department policy shall not be changed without notice or negotiations and that vacation requests "shall be honored where practicable and operationally non-disruptive, and special attention shall be given to requests for such time off in the summer months."

We distinguish between unclassified teachers in 12-month assignments and other DHS employees. Given Article XIII and its earlier interpretations, we will grant summary judgment on the allegations that the employer committed an unfair practice with respect to the vacation days of unclassified teachers in 12-month assignments. But the vacation schedules of classified employees are not tied to the academic calendar; Article XII contains competing provisions that need to be reconciled; and no earlier

decision has established that the employer has a right to require classified employees to take vacations when the employer rather than the employee wants. We therefore decline to grant summary judgment on those allegations. Consistent with our piror deferral rulings, we will defer these allegations to arbitration.

IV. Verification of Emergency Leave Requests

The charge alleges that in a May 15, 1995 letter, the employer changed contractual procedures by requiring proof of an emergency when administrative leave is used for that purpose. This change allegedly constitutes both a repudiation of a negotiated agreement and a unilateral change.

The May 15 letter enclosed a memorandum to employees stating:

> The contracts state that administrative leave may be used for certain specified reasons.... If a leave is granted based on an emergency, management has the right to require proof of the emergency. Absent such proof the leave may be denied.

According to the OER Employee Relations Coordinator, the memorandum reiterated contractual requirements and Civil Service regulations and did not impose any new rules. CWA's Area Director responds that the memorandum changed procedures for requesting vacation, administrative, and sick leave; DHS decided it would determine when and what verification was necessary; and an employee would presumably bear the cost of providing verification.

Article XXII of the professional unit contract grants career service employees up to three administrative leave days a

year. Such leave may be used only for emergencies, religious observances, personal business, or other personal affairs.

We grant summary judgment and dismiss paragraph 4 of the charge. The only specific change alleged is that the employer now requires proof of emergencies when employees seek to take administrative leaves for emergencies. That requirement falls within the employer's prerogative to verify that a type of leave is being used for a designated purpose. Barnegat Tp. Bd. of Ed., P.E.R.C. No. 84-123, 10 NJPER 269 (¶15133 1984)(prerogative to require proof of designated reason for taking personal leave, including emergencies). Contrast Wood-Ridge Bd. of Ed., P.E.R.C. No. 92-7, 17 NJPER 380 (¶22179 1991) (union claimed that use of personal leave was contractually unrestricted). The charge does not allege a refusal to negotiate over any severable issues. City of Elizabeth v. Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985).

Finally, we grant summary judgment and dismiss the alleged violations of subsection 5.4(a)(3) and any alleged independent violations of subsection 5.4(a)(1). Neither the charge nor the parties' submissions specify any facts supporting such allegations. Since we have dismissed or deferred all the Complaint's allegations, we also vacate the order to hold a hearing.

ORDER

The request for a restraint of binding arbitration of the grievance concerning Pamela Umbrello and Arlene Shaplow is denied.

The following allegations in the Complaint are dismissed:

1. The allegations in paragraph 3a concerning automatic pay upgrades for nurses.

2. The allegation in paragraph 3c concerning vacation leave for unclassified teachers holding 12-month assignments.

3. The allegations in paragraph 4.

4. The allegations in paragraph 5 that the employer repudiated any negotiated employment conditions, violated subsection 5.4(a)(3), or independently violated subsection 5.4(a)(1).

The following allegations are deferred to arbitration:

1. The allegation in paragraph 3a concerning automatic pay upgrades for teachers.

2. The allegations in paragraph 3b.

3. The allegations in paragraph 3c concerning employees who are not unclassified teachers holding 12-month assignments.

The order to hold a hearing is vacated and the case is remanded to the Director of Unfair Practices for the purpose of carrying out the deferral to arbitration rulings and retaining

jurisdiction of the deferral allegations pending submission to and completion of the grievance arbitration process.

BY ORDER OF THE COMMISSION

John T. Klagholz
Acting Chair

Acting Chair Klagholz, Commissioners Boose, Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. None opposed. Chair Wasell abstained from consideration.

DATED: February 27, 1997
Trenton, New Jersey
ISSUED: February 28, 1997