
Recent Case Law & Policy Developments – 2002

Public Employment Relations Commission

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What follows is an overview of Commission case law since the April 2001 Annual Conference.

Discrimination and Protected Rights
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The New Jersey Employer-Employee Relations Act prohibits discrimination to encourage or discourage union activity protected by the Act, and interference with protected rights.

The Commission found illegal motivation in *State of New Jersey*, P.E.R.C. No. 2001-65, 27 *NJPER* 247 (¶32088 2001), and held that the employer had discriminatorily demoted a union president in retaliation for his protected activity. Even if the demotion had been based on lawful and unlawful motives, the employer did not show that it would have demoted the employee even absent his protected activity.

The Commission found no illegal motivation in *UMDNJ*, P.E.R.C. No. 2002-37, 28 *NJPER* 80 (¶33028 2001) (not enough credible evidence of hostility to warrant

conclusion that employer acted for anti-union reasons) and *Tinton Falls Bd. of Ed.*, P.E.R.C. No. 2001-78, 27 *NJPER* 293 (¶32107 2001), app. pending App. Div. Dkt. No. A-6458-00T2 (Association did not prove that grievance, rather than clerk's attendance problems and unwillingness to work the last five days of the school year, prompted termination).

In one unfair practice case consolidated with a disciplinary appeal filed with the Merit System Board, the Administrative Law Judge recommended that the Commission dismiss the unfair practice Complaint, but that the MSB rescind a resignation and reinstate the employee. *Ocean Cty.*, P.E.R.C. No. 2002-26, 28 *NJPER* 47 (¶33013 2001). The Commission adopted the ALJ's recommendation and transferred the remaining issues to the MSB.

In another consolidated matter, the Commission had found that the employee had engaged in some activity that was protected by the Act and other activity that was unprotected. *State of New Jersey (Dept. of*

Treasury), P.E.R.C. No. 2001-51, 27 *NJPER* 167 (¶32056 2001). The Commission then transferred the case to the MSB to determine whether the employee would have been terminated absent the protected activity based on legitimate business reasons and his unprotected activity. The MSB held that the employee was properly discharged based on his unprotected conduct and the employer's business reasons. The case was then returned to the Commission to dismiss the Complaint. *State of New Jersey (Dept. of Treasury)*, P.E.R.C. No. 2001-70, 27 *NJPER* 275 (¶32099 2001).

The Commission dismissed an unfair practice charge filed by a corrections officer against the State PBA and his local PBA. *PBA Local 152 and New Jersey State PBA*, P.E.R.C. No. 2001-73, 27 *NJPER* 284 (¶32102 2001). The officer's own improper or unprotected conduct led to his disciplinary charges and expulsion from the PBA.

Work Hours, Work Schedules and Shift Selection

Short of abolishing a position, an employer ordinarily has a duty to negotiate before reducing an employee's workday, workweek or work year. *See Pascack Valley*

Reg. H.S. Dist. Bd. of Ed, P.E.R.C. No. 99-104, 25 *NJPER* 295 (¶30124 1999) and cases cited therein. The Commission declined to restrain binding arbitration of a grievance contesting the replacement of a full-time cafeteria worker position with two three-hour positions. *Ocean Tp. Bd. of Ed*, P.E.R.C. No. 2001-61, 27 *NJPER* 241 (¶32085 2001). The employees' interests in seeking to enforce an alleged agreement to maintain work hours, salaries and health benefits outweighed the employer's interest in seeking to change those employment conditions unilaterally.

Where an employer did not file an Answer, the allegations in the unfair practice charge were deemed to be admitted to be true. An out-of-time request to have a statement of position be accepted as an Answer was denied; and summary judgment was granted finding that the employer violated the Act when it implemented a new work schedule for police aides. *City of Newark*, P.E.R.C. No. 2002-28, 28 *NJPER* 50 (¶33015 2001).

An interest arbitrator may consider an employer's arguments about the effect of a proposed work schedule on issues of holiday assignments, deputy captain

assignments, evening shift officer assignment, roll call procedures and training opportunities. *Township of Millburn*, P.E.R.C. No. 2002-30, 28 *NJPER* 53 (¶33017 2001).

The Commission held in two cases that work hour provisions that include an overlap between shifts were mandatorily negotiable. *State of New Jersey*, P.E.R.C. No. 2001-71, 27 *NJPER* 276 (¶32100 2001); *State of New Jersey*, P.E.R.C. No. 2001-72, 27 *NJPER* 281 (¶32101 2001).

Seniority can be a factor in shift selection where all qualifications are equal and managerial prerogatives are not otherwise compromised. *See, e.g., Camden Cty. Sheriff*, P.E.R.C. No. 2000-25, 25 *NJPER* 431 (¶30190 1999), *aff'd* 27 *NJPER* 357 (¶32128 App. Div. 2001). The Commission denied, in part, a request for a restraint of binding arbitration of a grievance challenging a maintenance employee's involuntary transfer from the first to the second shift. The union could challenge the failure to return the employee to the first shift after the completion of a special assignment. The arbitrator could consider whether the employee had a contractual right to work on the first shift. The Commission

retained jurisdiction so that, should the arbitrator find a contractual violation, it could determine whether the employer had a prerogative to deviate from a shift bidding system.

The Commission restrained binding arbitration to the extent a grievance sought to enforce a tour exchange policy that would result in the Juvenile Bureau not being staffed by a detective regularly assigned to that bureau. *Borough of Paramus*, P.E.R.C. No. 2002-19, 28 *NJPER* 13 (¶33002 2001). The employer had a prerogative to supervise tour or shift swaps to ensure that qualified personnel were assigned.

A union could not contest the deputy warden's decision to designate as female-only a post in the female housing unit of a corrections facility. *Burlington Cty.*, P.E.R.C. No. 2002-52, 28 *NJPER* ____ (¶____ 2002). The County showed a history of operational problems and governmental policy reasons for the female-only designation that was consistent with gender restrictions approved by the courts.

Discipline

A police officer cannot contest a major disciplinary action through binding

arbitration. *New Jersey Institute of Technology*, P.E.R.C. No. 2001-69, 27 *NJPER* 239 (¶32083 2001). That is so, even if there is a claim that the termination was discriminatorily motivated. *UMDNJ*, P.E.R.C. No. 2002-38, 28 *NJPER* 126 (¶33038 2001). A procedural claim that charges were untimely was found legally arbitrable. *Ibid.*

Police officers cannot arbitrate shift transfers, even if they are disciplinary. *West Orange Tp.*, P.E.R.C. No. 2001-62, 27 *NJPER* 243 (¶32086 2001).

A layoff made in good faith cannot be set aside in arbitration, but the Commission declined to restrain arbitration where there was a factual dispute as to whether a termination was a good faith layoff or a termination for disciplinary reasons. *Borough of Paramus*, P.E.R.C. No. 2002-42, __ *NJPER* __ (¶_____ 2001). The Commission retained jurisdiction so that if the arbitrator found that the layoff/termination was made without just cause, it could review the arbitrator's factual findings and determine whether the Township was exercising a managerial prerogative to engage in a good faith layoff for reasons of economy.

The Commission restrained binding arbitration of a grievance challenging a school board's selection of an evaluator and contending that a summer evaluation was unjust discipline. *Greater Egg Harbor Reg. Bd. of Ed.*, P.E.R.C. No. 2002-6, *NJPER* (¶ 2001).

Increment Withholdings

Withholding an increment is generally a form of discipline, but not all increment withholdings can go to binding arbitration. Since the 1990 amendments to the PERC Act, *N.J.S.A. 34:13A-22 et seq.*, the Commission has been empowered to determine the proper forum for reviewing increment withholding disputes involving teaching staff members. *Scotch Plains-Fanwood Bd. of Ed.*, P.E.R.C. No. 91-67, 17 *NJPER* 144 (¶22057 1991), sets out the analysis the Commission uses in making such determinations.

Withholdings based predominately on the evaluation of teaching performance cannot be reviewed by an arbitrator and can only be reviewed by the Commissioner of Education. *Willingboro Bd. of Ed.*, P.E.R.C. No. 2001-68, 27 *NJPER* 236 (¶32082 2001) (allegedly inappropriate statements made to

students in class); *North Caldwell Bd. of Ed.*, P.E.R.C. No. 2001-76, 27 *NJPER* 290 (¶32105 2001) (alleged deficiencies in teaching performance, instructional planning, and classroom environment); *Montclair Bd. of Ed.*, P.E.R.C. No. 2002-3, 27 *NJPER* 321 (¶32114 2001) (teacher allegedly acted unprofessionally with her students in the classroom); *Hamilton Tp. Bd. of Ed.*, P.E.R.C. No. 2002-35, 28 *NJPER* 76 (¶33026 2001) (alleged negligence in classroom supervision of students).

Withholdings not based predominately on the evaluation of teaching performance may be reviewed by an arbitrator. *Franklin Tp. Bd. of Ed.*, P.E.R.C. No. 2001-64, 27 *NJPER* 389 (¶32144 2001) (alleged violation of board policy prohibiting teachers from leaving students alone and general directives and policies concerning student supervision); *Pleasantville Bd. of Ed.*, P.E.R.C. No. 2002-21, 28 *NJPER* 17 (¶33004 2001) (one unscheduled parent meeting and, perhaps, the teacher's response triggered withholding); *Vernon Tp. Bd. of Ed.*, P.E.R.C. No. 2002-36, 28 *NJPER* 78 (¶33027 2001) (withholding prompted by

hallway incident where a teacher allegedly initiated physical contact with a student).

Transfers

N.J.S.A. 34:13A-25 prohibits binding arbitration over all transfers of school board employees between work sites. *Hamilton Tp. Bd. of Ed.*, P.E.R.C. No. 2001-39, 27 *NJPER* 94 (¶32035 2001). Disciplinary transfers between work sites are prohibited and can be contested by filing a petition with the Commission.

The Commission found that a school board transferred a teacher between work sites for disciplinary reasons where the only documented explanation for the transfer was the principal's letter referencing a previous letter from a parent who was unhappy with the teacher's classroom techniques. *Hamilton Tp. Bd. of Ed.*, P.E.R.C. No. 2001-74, 27 *NJPER* 287 (¶32103 2001).

The Commission found that another school board transferred a switchboard operator from the board offices to a clerical position at an elementary school for disciplinary reasons. *North Bergen Tp. Bd. of Ed.*, P.E.R.C. No. 2002-12, 27 *NJPER* 370 (¶32135 2001), req. for stay den. P.E.R.C. No. 2002-31, 28 *NJPER* 55

(¶33018 2001), app. pending App. Div. Dkt. No. A-0972-01T2. The transfer occurred in the middle of the school year, immediately after the employee filed a grievance and received a disciplinary reprimand; and without any evidence of operational problems.

The Commission dismissed a transfer petition finding that several middle school teachers were transferred to enhance student achievement, not for disciplinary reasons. *East Orange Bd. of Ed.*, P.E.R.C. No. 2002-49, ___ *NJPER* ___ (¶_____ 2002).

Health Benefits

The Commission reaffirmed that *N.J.A.C.* 17:9-4.6(a) does not preempt an employer's obligation to negotiate over the number of hours which shall be considered "full-time" for purposes of State Health Benefits Program eligibility. *Paterson State-Operated School Dist.*, P.E.R.C. No. 2002-2, 27 *NJPER* 319 (¶32113 2001).

A union filed an unfair practice charge alleging that the employer unilaterally changed the prescription card plan from one where employees presented a card and paid 20% of the cost of the prescription to one where employees had to

pay the full cost of the prescription up front and then be reimbursed within eight business days for 80 or 90% of the cost. In reviewing an interim relief decision, the Commission ordered the employer to create an interim program that guarantees that employees have funds available to them to pay the up-front costs of prescription drugs during the pendency of unfair practice litigation. *Borough of Closter*, P.E.R.C. No. 2001-75, 27 *NJPER* 289 (¶32104 2001).

The Commission denied a motion to supplement the record and cross-motions to reconsider an interim relief decision in an unfair practice case alleging a unilateral change in health insurance carriers. *Union Tp.*, P.E.R.C. No. 2002-55, 28 *NJPER* ___ (¶_____ 2001). A Commission designee found that a change in the number of network providers constituted a change in benefits. She did not restrain the employer from changing carriers but ordered it to create an interim program that maintains the level of benefits pending final consideration of whether the unilateral change in carriers was unauthorized. Even if the record were supplemented to include evidence that the new network was larger than the designee found, no extraordinary circumstances

warranted reconsideration of the determination that benefits had changed. In addition, given its case law and the designee's findings that the change in carriers changed benefits, the Commission assumed that the change in carriers was mandatorily negotiable. The interim program, however, maintained the level of benefits and there was no need to disturb the current status quo.

Leave, Staffing Levels and Compensation

Union leave is mandatorily negotiable and a union is not required to litigate as an unfair practice its otherwise arbitrable claim that an employer breached the parties' contract by denying union leave. *Borough of Ringwood*, P.E.R.C. No. 2002-29, 28 *NJPER* 52 (¶33016 2001).

A grievance arbitrator could determine whether a leave request was unreasonably denied given the employer's undisputed right to set staffing levels. *New Jersey Hwy. Auth.*, P.E.R.C. No. 2001-77, 27 *NJPER* 292 (¶32106 2001).

The Commission restrained arbitration of a grievance to the extent it implicated the employer's prerogative to

decide whether and when to fill a vacancy. *City of Trenton*, P.E.R.C. No. 2002-23, 28 *NJPER* 22 (¶33006 2001). The Commission declined to restrain arbitration of the claim that the City was contractually obligated to compensate officers who had been directed to fill in for a higher ranking officer.

The Commission restrained arbitration of a grievance to the extent it sought the hiring of a basic skills teacher and a directive that certain students have writing conferences. *Westfield Bd. of Ed.*, P.E.R.C. No. 2002-41, 28 *NJPER* 135 (¶33042 2002). The Commission declined to restrain arbitration over workload and compensation claims.

Employees may arbitrate the reasonableness of vacation denials. *City of Newark*, P.E.R.C. No. 2002-40, 28 *NJPER* 134 (¶33041 2002).

A contract proposal to increase compensation by creating a senior officer differential after 15 years of service was not preempted by pension statutes. *Gloucester Cty. Prosecutor*, P.E.R.C. No. 2002-44, 28 *NJPER* 141 (¶33045 2002). The proposal did not address whether such compensation is creditable for pension purposes. That question is for the Division of Pensions.

Compensation on retirement for unused vacation leave is a negotiable term and condition of employment and a grievance seeking payment at the current rate is legally arbitrable. *Somerset Cty. and Somerset Cty. Prosecutor*, P.E.R.C. No. 2002-14, 27 *NJPER* 375 (¶32137 2001).

The Commission declined to restrain binding arbitration of a grievance seeking compensation from the time corrections officers arrive at their institution. *State of New Jersey (Dept. of Corrections)*, P.E.R.C. No. 2002-7, 27 *NJPER* 330 (¶32118 2001). The defense that the union waived its right to seek additional compensation could be raised to the arbitrator.

The Commission concluded that it would be unfair to find that an employer violated the its obligation to negotiate in good faith, where it had every reason to believe, based on a union's lack of response to past actions of which it was notified, that it would not object to similar actions. *UMDNJ*, P.E.R.C. No. 2002-53, 28 *NJPER* ____ (¶____ 2002).

With respect to multiple assignments or workload issues, public employers have the prerogative to assign additional duties that are directly related to an employee's

normal responsibilities. *Town of Harrison*, P.E.R.C. No. 2002-54, 28 *NJPER* ____ (¶____ 2002). The Commission restrained arbitration over the assignment of multiple tasks to a firefighter, but not over any issues of employee health or safety that may be severable from the staffing and assignment decisions.

Promotions

An employer's decision to fill a vacancy through promotion from among current employees or to hire a qualified new employee is a managerial prerogative that cannot be challenged through binding arbitration. *Morris Cty. (Morris View Nursing Home)*, P.E.R.C. No. 2002-11, 27 *NJPER* 369 (¶32134 2001). A claim that a promotion denial violates an anti-discrimination clause must be made in a forum provided by state and federal anti-discrimination laws. *See Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n*, 94 *N.J.* 9 (1983).

An arbitrator's jurisdiction to hear the contractual merits of an alleged violation of contractual promotion procedures is not displaced because the Commission's unfair practice jurisdiction could be invoked to review an aspect of those claims. *Teaneck*

Tp., P.E.R.C. No. 2002-20, 28 *NJPER* 15 (¶33003 2001).

An employer may normally agree to promote employees in the order they are listed on a promotional list developed by applying the employer's own unilaterally-set criteria to the eligible candidates. *Wall Tp.*, P.E.R.C. No. 2002-22, 28 *NJPER* 19 (¶33005 2001), app. pending App. Div. Dkt. No. A-1640-01T2. A union's claim that the employer deviated from its announced promotional list is therefore legally arbitrable.

Sick Leave and Tardiness

N.J.A.C. 4A:6-1.22(f) authorizes local Civil Service employers to establish donated leave programs after consulting with negotiations representatives and securing Department of Personnel approval. The Commission restrained arbitration to the extent a grievance sought to have an arbitrator order a school board to reimburse an employee for sick bank days without a sick bank program having been approved by DOP. *City of Rahway*, P.E.R.C. No. 2001-60, 27 *NJPER* 240 (¶32084 2001).

An employer has the non-negotiable discretion to decide whether it wants to

maintain a light duty policy. A claim that an employer's current light duty policy is discriminatory under the Americans With Disabilities Act, or the New Jersey Law Against Discrimination, does not transform the decision to provide light duty into a mandatorily negotiable subject. *Union Cty.*, P.E.R.C. No. 2002-5, 27 *NJPER* 325 (¶32116 2001). The non-negotiable proposal, on its face, required the County to provide light or modified duty for pregnant officers, even if light duty is not provided to other correction officers.

An arbitrator could consider a claim that an employer violated the contract by requiring a police officer to charge sick time despite his claim that his absence was job-related. *Burlington Tp.*, P.E.R.C. No. 2001-63, 27 *NJPER* 244 (¶32087 2001). The arbitrator could also consider the employee's claim that the employer discriminated by changing his work hours during a light duty assignment while allowing another employee to work her regular hours while on light duty.

An employer violated the Act when it unilaterally adopted a new Family/Medical Leave Policy that required employees to use certain accumulated paid leave

simultaneously with unpaid FMLA leave. *Lumberton Bd. of Ed.*, P.E.R.C. No. 2002-13, 27 *NJPER* 372 (¶32136 2001), app. pending App. Div. Dkt. No. A-1328-01T5. No statute or regulation comprehensively eliminates the employer's discretion to allow leave allowances to run consecutively.

The rationale behind the non-negotiability of sick leave verification is that employers have a governmental policy interest in verifying that employees are, in fact, sick. *Morris Cty. and Morris Cty. Sheriff*, P.E.R.C. No. 2002-33, 28 *NJPER* 58 (¶33020 2001). Monitoring employee absences after a set number of sick days falls within that prerogative. The issue is different when dealing with leave that must be approved in advance, such as convention leave or discretionary leave. Verification that the leave is being used in accordance with negotiated restrictions may be a prerogative, but the employer has no interest in monitoring the attendance of employees who take leave approved by the employer.

An employer did not have a managerial prerogative to deny an employee an opportunity to offer an excuse for tardiness before a sanction was imposed. *Essex Cty. (Dept. of Citizens Services)*,

P.E.R.C. No. 2002-24, 28 *NJPER* 25 (¶2001). The supervisor's union, however, could not challenge application of the tardiness policy to non-unit employees.

Representation

The New Jersey Public Transportation Act, *N.J.S.A. 27:25-14 et seq.*, empowers the Commission to enforce the rights of employees of New Jersey Transit Bus Operations, and directs that the Commission be guided by the labor law and practices developed under the the National Labor Relations Act. The Commission concluded that full-time regional supervisors employed by New Jersey Transit are supervisors within the meaning of the NLRA because they exercise independent judgment in suspending bus drivers; responsibly directing their work; and disciplining them. *New Jersey Transit*, P.E.R.C. No. 2002-9, 27 *NJPER* 363 (¶32132 2001).

Procedural

An employer sought a determination that establishing call-in procedures for sick leave is a managerial prerogative not subject

to negotiations. However, there was no demand to arbitrate, no proposal in dispute during negotiations for a successor agreement, and no special circumstances warranting the exercise of the Commission's scope of negotiations jurisdiction. *Camden Cty. Health Services*, P.E.R.C. No. 2002-39, 28 *NJPER* 133 (¶33040 2002).

The full Commission will not reconsider an interim relief decision absent extraordinary circumstances. *N.J.A.C.* 19:14-8.4; *City of Trenton*, P.E.R.C. No. 2001-66, 27 *NJPER* 233 (¶32080 2001) (reconsideration denied); *Union Cty.*, P.E.R.C. No. 2002-17, 27 *NJPER* 381 (¶32140 2001) (reconsideration denied).

An otherwise untimely amendment to an unfair practice charge may be considered timely when it relates back to the original charge. *Willingboro Tp. Bd. of Ed.*, P.E.R.C. No. 2002-43, 28 *NJPER* 139 (¶33044 2002).

Miscellaneous

An employer's educational policy interest in determining student grading policy outweighs any employee interest in negotiating over final grade authority.

Union Tp. Bd. of Ed., P.E.R.C. No. 2002-34, 28 *NJPER* 75 (¶33025 2001).

A police union's contract proposal concerning replacements was found to be not mandatorily negotiable unless it was modified to state that the clause is subject to the employer's right to civilianize for demonstrated governmental policy reasons. *Somerset Cty. and Somerset Cty. Sheriff*, P.E.R.C. No. 2002-15, 27 *NJPER* 377 (¶32138 2001). Similarly, an article concerning notice of a shift change was found not mandatorily negotiable unless modified to include language that recognizes the employer's right to deviate from seniority when necessary to preserve its managerial prerogatives.

The Commission restrained binding arbitration of a grievance contesting a directive that teachers sign in and sign out during their lunch hour. *City of Pleasantville Bd. of Ed.*, P.E.R.C. No. 2002-16, 27 *NJPER* 380 (¶32139 2001). A school board has a significant interest in knowing the whereabouts of its teachers and that interest was not outweighed by any inconvenience to teachers having to sign in and sign out.

The Commission restrained binding arbitration of a grievance contesting the employer's right to assign medical chart review duties to floor nurses. *Essex Cty. (Dept. of Health and Rehabilitation)*, P.E.R.C. No. 2002-18, 28 *NJPER* 10 (¶33001 2001). Whether nurses are contractually entitled to additional compensation for these duties and how duties are assigned could be pursued through arbitration.

A union could not use a no-replacements clause to challenge a decision to hire civilian dispatchers. *Borough of Fairview*, P.E.R.C. No. 2002-27, 28 *NJPER* 47 (¶33014 2001), recon. den. P.E.R.C. No. 2002-50, 28 *NJPER* __ (¶_____ 2002). The Commission rejected the PBA's argument that the arbitrator could consider a grievance under the no-replacement clause because there may be remedies for a violation that do not impair the employer's managerial prerogative to civilianize.

The State of New Jersey violated the Act when it refused to provide a union representative, upon request, to employees who could have reasonably believed that they might be subject to discipline as a result of interviews conducted as part of an EEO

investigation covering periods when they had supervisory responsibilities. *State of New Jersey (Dept. of Law and Public Safety, Div. Of State Police)*, P.E.R.C. No. 2002-8, 27 *NJPER* 332 (¶32119 2001). The employer did not violate the Act when it denied a representative to an employee who was interviewed as part of a licensing investigation of alleged citizen misconduct, and not as part of an investigatory interview of alleged employee misconduct.

A majority representative may negotiate for the right to use a school board's facilities and equipment to produce and distribute a flyer endorsing school board candidates. *Dennis Tp. Bd. of Ed.*, P.E.R.C. No. 2002-48, __ *NJPER* __ (¶_____ 2002).

A grievance challenging an alleged uneven application of an exemption to a residency ordinance was found legally arbitrable. *City of Trenton*, P.E.R.C. No. 2001-67, 27 *NJPER* 234 (¶32081 2001), app. pending App. Div. Dkt. No. A-6157-00T3. No statute or regulation eliminated the employer's discretion to apply the exemption uniformly and the employees' interest in avoiding disparate treatment outweighed the employer's interest in not

being bound to apply its exemption uniformly.

The Commission held mandatorily negotiable a portion of a “Non-teaching Duties” article that prevents the board from regularly requiring teachers to duplicate instructional materials and file any records or materials in a pupil’s permanent record. *Holland Tp. Bd. of Ed.*, P.E.R.C. No. 2002-47, __ *NJPER* __ (¶____ 2002). The Commission held not mandatorily negotiable a portion of the article that provides that teachers shall not regularly be required to maintain attendance registers and a portion of the article requiring teachers to grade standardized tests.