SPECIAL BARGAINING ISSUES OF SUPPORT STAFF EMPLOYEES

It is not uncommon for support staff employees (such as secretaries, custodians, maintenance personnel, aides, cafeteria workers, and bus drivers) to be organized into a bargaining unit. These support staff bargaining units can consist of the individual category of support staff (i.e., secretaries only) or be a combination of many different categories (secretaries and custodians/ maintenance workers). In some cases, these support staff have joined with the teachers' unit to form what is commonly referred to as "mixed" or "wall-to-wall" units.

It is important to note the unionization of support staff employees is reflected in the NJEA's current Sample Agreement. The latest version of that document contains new and special provisions affecting the terms and conditions of a large variety of non-instructional job classifications. (A clause-by-clause analysis of the NJEA document can be found in the section "An Analysis of Sample Agreements" of *The Negotiations Advisor.)* Although the NJEA's Sample Agreement appears to contemplate a "wall-to-wall" unit, its provisions are applicable to all bargaining units of non-certificated employees. Although the make-up of each bargaining unit may create different circumstances and problems at the bargaining table, a board of education's legal responsibility under *N.J.S.A.* 34:13A-5.4 is identical in each case: to negotiate in good faith over terms and conditions of employment with the majority representative.

This article will identify and examine the major bargaining issues which are uniquely important to support staff employees, regardless of the structure of any bargaining unit. Since these issues are likely to arise at the bargaining table, the implications of support staff concerns to a district's operations will also be addressed.

Further, this article has been divided into two categories, economic issues and non-economic issues. Economic issues represent a direct cost to the district that can be easily calculated, such as work year, holidays and vacations, and overtime. Conversely, non-economic issues include "language" items such as the basic job security issues of tenure, "just cause," seniority, and binding grievance arbitration.

Although divided in this article, these categories are not really distinct and separate. While the dollar cost of agreement to economic issues can be predicted, poorly drafted contract language on "non-economic" issues typically involve major economic and operational implications. Therefore, when negotiating all support staff issues, boards of education should be keenly aware of the district's economic resources as well as its operational needs, keeping in mind the veteran negotiators' saying that "money is sometimes cheaper than words."

Economic Issues

Understand the traditional economic issues raised by teachers' associations, such as salary, insurance benefits, and paid leaves, are also of interest and importance to support staff employees. However, the very nature of support staff duties and responsibilities create other concerns for custodians, secretaries and non-certificated employees. While most teachers are ten month employees, whose services are primarily needed when students are in attendance, many support staff groups are contracted for a full year and work independently of the school calendar. As a result, a board's 12 month employees will seek to establish a defined work year which includes specified paid holidays and vacations and a workday which addresses overtime and, possibly, differentiated shifts.

Work Year

The length of the work year is a mandatory topic of negotiations and cannot be unilaterally determined by the employer. Once the work year has been addressed in the negotiated agreement, or through the district's binding past practice,[1] it cannot be modified unilaterally by a board. To ensure the board is receiving the maximum benefit in exchange for the salary paid, board members and administrators must carefully consider a number of issues affecting their employees' contractual work year.

Employees' Functions A board cannot properly begin to negotiate the length of any support staff work year unless if fully understands the functions and purpose of the support staff position. The board's employment needs for certain job classifications lead to clear parameters that are established in job descriptions and/or in contractual classifications. It is not surprising to find different work years set forth in the contract for different groups of employees.

One union tactic to guarantee higher annual salaries

1 For a full discussion of past practice, please turn to the article "The Meaning and Relevance of Past Practice" in the Selected Topics Affecting Negotiations section in *The Negotiations Advisor.*

is to seek a minimum number of workdays or work hours for their ten month hourly employees. However, a district's negotiated work year provisions should be clearly linked to your employees' specific functions in the district and your need for their services. The district must be careful of contract language or union proposals guaranteeing a specified minimum work year, workday, or work hours. This is especially true for employees who are only needed when students are in attendance, such as cafeteria staff or playground aides. Such language can often result in increased costs of employment for work not needed and not performed.

When faced with a proposal or existing contract language, a board must first consider its local needs and whether there is any benefit to the district. For example, if faced with a Union proposal for a minimum number of days for cafeteria or playground workers, the board should consider whether such workers are really needed on days when the cafeteria is not operational. Keep in mind these union tactics may appear innocuous at first glance, but when looked at more closely provide no benefit to the district, only added expense.

School Calendar A board of education can unilaterally adopt and modify the school calendar and change the days of required student attendance. However, a unilateral change in the school calendar cannot result in a non-negotiated increase in the length of the work year.

While the teachers' work year is rarely affected by a change in the school calendar because it is generally defined in terms of a specific number of days tied to the legal student attendance requirement, the work year for support staff is often independent of the student calendar. When the support staff work year is defined by or tied to the student year, there can be unintended consequences. For example, it is not uncommon for negotiated agreements (or past practices) to provide support staff with all or some student holidays/vacations in addition to any other vacation leave or holidays provided. As a result, a reduction in the number of student vacation days will have an unintended effect on the number of days worked by support staff.[2]

Similarly, a board's right to modify the school calendar to make up days lost to inclement weather can hold special implications for support staff. While the decision to reschedule the calendar is not negotiable, if the rescheduled calendar results in an increased the length of support staff's work year, then it is a negotiable issue of compensation for work performed in excess of a negotiated work year.[3] Thus, boards must always be careful to review the potential impact of rescheduled school days on support staff work year.

In short, changes in the school calendar can trigger an obligation for mid-contract negotiations. The only exceptions to this general rule occur when there is clear contract language or an unchallenged past practice. If there is not already clear contract language, the board should consider a negotiations proposal which authorizes annual modifications based on the school calendar. An example of this possible sought after language is the following:

> *The board shall annually designate the bargaining unit work that will be required to be performed when school is in recess; qualified employees shall be assigned to these duties on a rotational basis. Employees who are not assigned to recess assignments will not be required to report to work on those days. The number of school recess days will be determined by the school calendar and a change in their number shall not be considered a modification of the employees' work year.*

In the give-and-take of negotiations, this concept may need to be modified further to include additional language providing:

> *Under no circumstances shall the work year exceed _____ days.*
>
> and/or
>
> *Under no circumstances shall the number of paid days off, including vacation and holidays, be less than ____ days.*

Often, the union will seek a guarantee the board will not abuse its discretion to schedule increases in the work year. The board should be willing to consider any counter-proposals that improve scheduling flexibility and eliminates or narrows the possibility of mid-contract negotiations.

Change in District Needs The needs of a school district are not stagnant and are constantly changing. To this end, the law provides boards of education with some flexibility in addressing the changes when it comes to the delivery of support staff services. For example, the law permits boards to subcontract support services at any time, without the need to negotiate over the decision.[4] Further, boards of education are permitted to reduce the size of their work force for reasons of economy or efficiency, meaning the board may reduce the number of employees without prior negotiations. However, changing a 12 month position to a 10 month position involves a change in the length of the

2 See for example, *Somerville Board of Education v. Somerville Supervisors Ass'n, et al.*, PERC No. 87-128, 13 NJPER 18134 (Feb. 13, 1987). PERC held that while the board did not have to negotiate the change in the district's calendar, it did have to negotiate over the severable issue of compensation for the increase in the length of secretaries' work year due to the elimination of 5 student holidays which was designed to provide greater instructional continuity during the school year.

3 Piscataway Township Education Association, 307 *N.J. Super* 263 (1998), cert den. 156 N.J. 385 (1998).

4 *Local 195*, 88 N.J. 393 (1982); *Ridgewood Board of Education*, PERC No. 93-81, 19 NJPER 24098, *aff'd* App. Div., April 4, 1994, *cert. den.* 137 N.J. 312 (1994). However, procedures surrounding subcontracting and severance pay are severable negotiable issues. For more information on this topic, please turn to the References section of The Negotiations Advisor for the "Labor Relations Issue Summary: Subcontracting."

work year that requires negotiations.[5]

It is indisputable that any change in the length of a work year established through negotiations or a binding past practice can trigger a negotiations obligation. For example, consider the situation where a board of education determined to close all its school buildings during the winter student recess to save on energy costs, resulting in a six-day reduction in the work year of 12 month support employees. Although the Board offered staff various options to account for the cut in days (such as: a salary cut; an increase in working hours on other days, without overtime; or an involuntary vacation to be charged to their contractual vacation entitlement), PERC found an unfair labor practice had been committed. In rejecting the board's argument, PERC held the solution to the problem which affected employees work year could not be made unilaterally by an employer but could occur only through negotiation.[6]

Board members and administrators often assert there has been a "change in circumstances" that should allow a unilateral change. However, PERC has consistently held the change in circumstances is immaterial to overcome the obligation to bargain in good faith regarding the length of the work year. For example, believing its operational needs required an earlier than negotiated shift at the high school to assure coverage before the school opened and coverage after school to address the community's increased use of school buildings, a board of education unilaterally restructured the shifts that had been negotiated. However, in disallowing the changes and finding an unfair labor practice had been committed, PERC held the negotiated shifts did not present undue interference with the board's ability to determine governmental policy since custodial coverage had traditionally been provided to cover those very same hours through volunteers or through the assignment of overtime.[7]

In short, absent clear contract language authorizing the board to make the change without negotiations, the parties will be required to negotiate any mid-contract proposed change brought about by the district's needs. For the contract language to be viewed as authorizing a change in the length of employees' work year, the contract language must be clear and unambiguous and must expressly and directly authorize the change. Understand circumstantial evidence of authorization may not be sufficient.[8] Therefore, boards of education seeking to avoid an additional negotiations obligation may wish to consider obtaining contractual language such as:

> *The board reserves the right to establish and to modify the length of employees' work year and to adjust compensation accordingly.*

Again, if movement becomes necessary to gain union acceptance, this approach can be modified to provide guarantees to allay the union's fear of extensive changes in work year and compensation. Be ready to consider modifications, including: limitations on the minimum and/or maximum length of the work year; limitations on the amount of the decreased compensation; and appropriate notice of the change in employees' work year.

In sum, it is indisputable a negotiated work year can impose limits on a board of education's flexibility to schedule and can create a mid-contract negotiation obligation. Therefore, boards of education must carefully assess the district's needs, its contract provisions, and any union proposal on support staff work year. Before agreeing to any proposal, the board must consider its economic impact and need for operational flexibility, as well as the realistic possibilities of union agreement.

Holidays and Vacations

The number of paid days off is an important part of support staff negotiations, and can have significant impact on the operations of a school district. Most support staff contracts provide twelve month employees with 11 to 15 paid holidays per year and one to four weeks vacation, depending upon the employee's years of service with the district. The specifics of these provisions can have significant implications on a district's ability to control employees' time off opportunities.

Holidays It is not uncommon for contracts to spell out what holidays support staff employees receive. These paid holidays typically include: New Year's Day, Martin- Luther King Day, Presidents' Day, Good Friday, Memorial Day, Independence Day, Labor Day, Columbus Day, Election Day, Veterans' Day, Thanksgiving Day, the Friday after Thanksgiving and Christmas Day. While *N.J.S.A.* 36:1-1 lists certain statutory holidays and provides whenever a statutory proscribed holiday falls on a Sunday, the "Monday next following shall...be deemed a public holiday," no similar statutory provision for school employees applies for official observance of statutory holidays which fall on a Saturday. These provisions may therefore be negotiated and the observation of these holidays is negotiable for support staff employees.

The concern with holidays is the potential impact from the student calendar. While the board of education has a non-negotiable managerial right to set the school calendar, if there is a contractual provision providing for holiday on a particular day, this may cause the board unnecessary difficulty and added costs associated with scheduling students for that day as certain support staff will be needed. For example, if the contract provides Columbus Day is a

5 See, for example, *Piscataway Board of Education*, 164 N.J. Super. 98 (1978).

6 *East Brunswick Board of Education*, PERC No. 82-76, 8 NJPER 13054.

7 *Bloomfield Board of Education*, PERC No. 98-84, 24 NJPER 29037.

8 For example, the existence of a 10 month salary guide, as well as a 12 month guide, will not, in and of itself, be seen as providing sufficiently clear authority for the board to unilaterally change a position's work year. *Sayreville Board of Education*, PERC No. 83-105, 9 NJPER 14066. Similarly, a schedule of hourly rates is not likely to be sufficient to authorize a board to unilaterally reduce the work year of hourly employees who have traditionally been employed for a specified number of days.

holiday and the board's calendar has students scheduled, it is probably necessary for custodians or secretaries to work that day as well. However, as the contract indicates Columbus Day is a paid holiday for support staff and the board may be contractually required to pay a premium rate for any time worked. (Note the concept of premium pay is a negotiable topic.) This can be quite costly and administratively burdensome.

As such, boards may want to consider a proposal which rotates paid holidays and guarantees coverage at the regular rate of pay. An example of possible language to protect the board's interests would be:

> *All 12 month custodians shall be entitled to 11 paid holidays during the year. Days designated as possible paid holidays are listed below; asterisked holidays shall be available on a rotating basis. Employees assigned to work on those days shall be paid at their regular rate.*

However, this language could represent an unacceptable and significant give-back to the union. This approach may be achievable in new contracts or may be an acceptable compromise to accommodate the union's search for additional paid holidays for the entire bargaining unit. It may also be an acceptable approach if the proposal is applied only to new hires, while current employees are "grandfathered" and continue to receive the traditional holidays (and perhaps, even overtime, if they are assigned to work a holiday). A board's willingness to modify its proposal will depend on the union's objections and the ability to accommodate board concerns to achieve additional control and flexibility.

Vacations The concept of vacation leave is not an uncommon provision found in support staff contacts. This entitlement typically increases after a certain number of years of employment. Understand the number of paid vacation days is a mandatory topic of negotiations and, as such, can be increased or even decreased through mutual agreement with the union.

From the board's prospective, the concern is always assuring adequate staff coverage and the right of management to approve use. Unfortunately, many contracts permit employees to schedule their own vacations without requiring administrative approval. This often results in key personnel being unavailable at times when their services are sorely needed.

Examples of problematic vacation leave language include situations where custodians and maintenance personnel take their vacations just before the opening of school, or a central office secretary being on vacation during a critical time. While these employees are not abusing the system and are simply exercising their contractual rights, the impact of the vacation on the operations of the school district can be profound, including increased overtime or substitute costs, and possible delays.

Therefore, boards of education and administrators must carefully and critically review their contracts' vacation provisions to assure the ability to manage and administer the district's operations is not undermined by insufficient procedural control. Procedures to schedule vacations, like the number of days, are matters for negotiations and inadvisable procedures that impede good personnel management must be changed through the bargaining process. Language beneficial to the board of education in achieving sought after control provides:

> *Employees shall be entitled to vacation according to the schedule set forth below. No more than one (1) employee of any job classification per building may utilize his vacation entitlement at the same time. All requests for vacations shall be submitted in writing at least four (4) weeks in advance and must receive prior approval of the superintendent. However, under all circumstances, the needs of the district shall prevail in the scheduling of said vacation.*

In sum, whenever the board of education is negotiating contractual provisions establishing holidays and vacation entitlement, it must remember the language which sets the conditions and circumstances surrounding these benefits are as essential as the actual number of allowable days. Once the language is agreed upon, even if the consequences are causing severe operational problems for the board, these provisions cannot be changed except through mutual agreement. For this reason, it is imperative for boards to develop precise contract language that clearly and unequivocally guarantees administrative control and flexibility.

Overtime

Another economic issue often set forth in the collective bargaining agreement, which is closely related to the matter of work time, is overtime. Overtime is typically defined as time beyond the regularly specified contractual work week spent at regular duties or other assigned tasks. Overtime generally involves additional premium pay.

Both the Federal Fair Labor Standards Act ("FLSA") and New Jersey's Wage and Hour laws require compensation at the rate of time & one-half after an employee has worked 40 hours, or the substitution of premium pay with compensatory time to a maximum of 240 compensatory hours, thereafter all additional overtime hours must be paid in monetary form. The key word in the FLSA and State law is "worked", meaning that sick, personal, and vacation days do not count towards the requirement of overtime under the law. However, this is a negotiable topic. How have these days been counted in the calculation of overtime for Deptford?

Keep in mind there is no automatic requirement to grant premium pay for *all* time above and beyond the work week, as the law only requires same after 40 hours. Furthermore, the law does not require premium pay for time worked beyond 8 hours on any one day or on Saturday, Sunday and holidays.

Although the law sets the minimum overtime requirements, this is merely the floor, meaning the parties can mutually agree to greater benefits. Since negotiations can provide benefits exceeding the law's requirements, it is not

surprising to find greater benefits have been successfully negotiated by many support staff unions and are sought by others. Some of the more generous provisions provide time and one-half pay at the end of the contractual work week of 35 hours. Further, many districts include "non-work" time (sick days, vacation leave, personal days, holidays) in the calculation of the workweek , and are initiating their premium pay obligation in excess of the statute's requirements. Moreover, many contracts provide for increase compensation (double time) for work performed on weekends or holidays, which is well above the law's requirements and are very costly to the board.

Clearly, these additional benefits increase the costs of overtime and the board's expenses. To minimize the costly effects of overtime, boards would be well served to seek limitations on its obligation by merely adhering to the standards set forth in the FLSA. If the board already has contract language or a past practice providing overtime benefits greater than legally required, it is obligated to negotiate any sought after changes with the Union. Unfortunately, these negotiations can often times require some other concession from the board, as the union does not typically relinquish its members ability to earn more compensation.

One method which boards of education may use to minimize, or at least defer, the cost of overtime is negotiating the availability of compensatory time off in lieu of overtime compensation. Before pursuing this option, boards should be aware it may hold several administrative difficulties. First, under the law, an employee who requests the use of accrued comp time must be permitted to use the time off within a reasonable period of time. The only reason the request can be denied is if it would result in "undue disruption" to the employer's operation. However, "undue disruption" is not well-defined and the only guidelines appear to be that the circumstances for denial must rise above "mere inconvenience" and cannot be based on the costs of obtaining a substitute. Thus, comp time agreements may give rise to disputes over the scheduling of the leave and, more significantly, may complicate districts' ability to control the scheduling of employees' leaves.

Assignment of Qualified Employees A final issue in the consideration of the overtime involves the assignment of qualified employees. For the most part, unions tend to favor contract provisions which govern the assignment of overtime on the basis of seniority or rotation. While procedures for assigning overtime are legally negotiable and found in many support staff contracts, these procedures may not interfere with a board's non-negotiable, managerial prerogative to determine the need for overtime. The right to assign qualified employees to overtime cannot be negotiated away.[9] However, once the board determines that qualifications are equal, then the procedural aspects (i.e., rotation, seniority, etc.) are negotiable. For example, if a Black Seal license is necessary for an overtime assignment, a contractual provision which provides first preference to the most senior employee cannot be used to require a board to assign an employee who does not hold the requisite license, notwithstanding the fact that said employee may have the most seniority in the position.

Contractual clauses which severely restrict a board's right to make overtime assignments are illegal, if the language prevents a board from accomplishing the mission of the district. Therefore, boards of education should avoid agreements to illegal contractual limitations on their ability to determine the need to schedule overtime and the selection of the most qualified employee for the assignment. While such agreements are unenforceable and could not be used to prevent the board from exercising its legal authority, their inclusion in the contract sets false expectations and can damage the board's ongoing labor relationship.

In sum, overtime is a negotiable term and condition of employment which is important to both a board of education and its employees. For this reason, a board considering such a proposal must insist upon the inclusion of contract language which clearly establishes its authority to assign and regulate overtime.

Incremental Structure of Salary Guides

It is well understood the salary guide rates often control and define the cost of employing unionized school employees, including a district's support staff. However, what may be less understood is the significant impact of the built in differences in salaries on adjacent steps of the same column of a guide, commonly referred to as the guide's incremental pattern. While incremental patterns of salary guides hold implications for the employment of all classifications of school employees,[10] case law establishes special conditions and considerations for support staff employees.

The Obligation to Pay Increments Public employers in New Jersey are generally required to maintain the *status quo* of an expired agreement, including the payment of increments that are automatically linked to an additional year of experience. The only exceptions to this general rule are if a statute clearly precludes the payment of increment, or there is clear contract language. Thus, board members and administrators must be aware of how and when the exceptions come into play

Statutory Exception In *Neptune Township Board of Education*,[11] the New Jersey Supreme Court held school law prohibited boards of education from paying increments to teaching staff members upon the expiration of a three-year agreement. Subsequent PERC decisions have held this same restriction applies to support staff included in a teachers' bargaining unit.[12] Therefore, boards are also prohibited from paying increments to support staff included

9 *City of Long Branch*, PERC No. 83-15, 8 NJPER 13211; *Pequannock Township Board of Education*, PERC No. 91-116, 17 NJPER 22151.

10 For a full discussion of salary guide structure, please see the "Understanding Salary Guides" articles in the Salary Guides section of *The Negotiations Advisor*.

11 *Neptune Township Board of Education*, 144 N.J. 16 (1996).

12 *East Hanover Board of Education*, PERC No. 99-71, 25 NJPER 30052, *aff'd* App. Div. Docket No. A-4226-98T3 (April 10, 2000).

in a teachers' unit upon the expiration of a three-year contract.

However, it must be kept in mind that the legal prohibition against the payment of increments to support staff employees applies only when support staff are included in a teachers' unit that has negotiated a three-year contract. It does not apply to contracts of one or two year's duration which cover teachers and support staff. Further, the prohibition does not apply to any contracts with bargaining units comprised only of support staff. Thus, except for situations which involve a three-year contract with a unit composed of teachers and support staff, boards of education remain legally obligated to pay increments to their support staff, unless the obligation is modified by specific and clear negotiated provisions.

Contractual Exceptions Boards of education can negotiate modifications of the legal expectation of maintaining the *status quo* of expired agreements for contracts not covered by *Neptune* or *East Hanover* exemptions. Many boards have contract language redefining its obligation to maintain the status quo of one or two-year contracts of mixed teachers' units or in contracts covering only support staff. These provisions achieve this through the use of clear and unequivocal written statements that increments are not automatically based on years of experience and/or that all employees will remain on the same step of the guide until a new contract is ratified. To ensure the language will be found to waive the obligation to pay increments, it is essential that the contract language be clear, specific and unequivocal and not contradicted or weakened by other provisions.

Negotiations Implications for Boards of Education Boards of education can never ignore incremental patterns. Given the limited circumstances which relieve boards of their obligation to pay automatic increments to support staff, boards must be particularly alert to the past practice, contract language and incremental patterns existing in their support staff guides.

The obligation to pay support staff increments can create a number of difficulties for boards of education and increase the cost of employment. Agreements with an all support staff unit can result in an obligation to award potentially hefty increases to some employees at the start of their new work year while negotiations are still ongoing. Payment of the increment can have a significant impact on the board's ability to reach its desired salary settlement for numerous reasons.

First, in situations where the paid out increment exceed the settlement rate, if the recipients of these increases are tenured employees, the new agreement could not simply reduce the compensation they are receiving due to the paid out increment. Second, even if the employees are not tenured, the amount they are receiving is setting high expectations for even greater increases upon the ratification of the new contract. Finally, an automatic increase to a potentially large number of bargaining unit members during ongoing negotiations can reduce the pressure on the union to reach a settlement, particularly if the new agreement is expected to reduce other benefits, such as health insurance coverage.

Obviously, before negotiations begin, boards must carefully and accurately calculate the cost of increment before the initiation of negotiations. This may lead to the realization that the expiring contract does not contain clear modifications of the obligation to pay increments and the cost of paying the increment will hold negative implications during the negotiations in reaching a settlement. If this does occur, the board can seek the union's agreement to suspend the obligation to payout the increment before a new agreement is reached. Occasionally the union may not be adverse to such agreements (or to some form of modified payment) if the payment of increment to eligible unit members will result in disputes and conflicts within the bargaining unit.

However, under all circumstances, boards should not forget to calculate the potential cost of increments for the future guides and to seek language in the new contract eliminating or reducing future obligations to pay increment in successor contracts.

Non-economic Issues

In addition to the economic issues discussed above, support staff employees will put numerous non-economic proposals on the bargaining table. As is the case with economic issues, not all non-economic issues are uniquely-important to support staff employees. Such matters as association rights, representation fee, statutory savings, past practice, vacancies/assignments and duration of agreement tend to be of equal value to both professional and support staff units alike. These mutually important non-economic matters shall not be considered further in this article. On the other hand, non-economic matters which relate to job security, as well as the issue of just cause, are especially important to organized support staff employees and thus shall be discussed more fully below.

Since most classifications of support staff employees do not enjoy the same types of statutory job security protection as professional staff members, a support staff unit will have a strong interest in achieving contractually guaranteed protection on such issues as tenure, just cause, seniority, and withholding of increments.

Tenure

There is a distinction between various job classifications of support staff employees regarding tenure. These differences affect the scope of negotiability of the tenure issue for each group of employees.

Secretaries Secretaries, like teachers, are statutorily eligible for tenure. Under *N.J.S.A.* 18A:17-2, a secretarial employee shall receive tenure if the individual is re-employed either (1) "three consecutive calendar years in the district or such shorter period as may be fixed by the board…" or (2) "three consecutive academic years, together with employment at the beginning of the next

succeeding academic year." Because the law speaks in the imperative, secretarial tenure rights may not be altered by contract. In other words, secretarial tenure is automatic. Once the legislative criteria have been met, a board may neither deny tenure nor abrogate through negotiations its managerial prerogative to reduce the time period for tenure eligibility.

Custodians Although custodians are eligible for tenure protection, the statute establishes conditions for tenure eligibility which can be controlled by the board. If a board issues an open-ended contract to a custodian, the custodian attains tenure immediately upon initial employment. On the other hand, if the board hires a custodial employee for a "fixed term," the custodian is not eligible for statutory tenure. However, these "fixed term" custodians may negotiate job security provisions known as contractual tenure and any alleged improper termination, or non-renewal, may be reviewed through binding arbitration. [13] (See discussion of *Contractual Tenure*, below.)

Other Support Staff Statutes are silent on tenure rights of other support staff employees, such as: bus drivers, cafeteria workers, instructional or noninstructional aides, security personnel, and so on. In the absence of preemptive statutory conditions, all these support staff employees may legally negotiate tenure or other forms of contractual job security.

Contractual Tenure In addition to statutory tenure associated with open-ended appointments, contractual tenure can also be obtained when a negotiated provision guarantees continued employment after a defined number of consecutive annual employment contracts. Therefore, custodians who achieve contractual tenure also obtain an indefinite appointment and are covered by tenure statutes.[14] As such, the termination of a custodian who has indisputably achieved tenure may occur only by pursuing the procedures established in the Tenure Employees Hearing Act, *N.J.S.A.* 18A:17-3.

However, non-certificated employees who are not eligible for statutory tenure (e.g., bus drivers, cafeteria workers, aides, etc.) but who claim contractual tenure, or a contractual guarantee of continued employment, can appeal their terminations through the contract's grievance procedure. Even when their locally negotiated grievance procedure ends with advisory arbitration or with the board's resolution of the grievance, support staff employees who claim tenure under the contract have a legal right to binding arbitration under the PERC Law's mandated process to appeal disciplinary decisions. (See discussion on "Binding Arbitration" later in this article.)

Implications of Contractual Tenure Once included in a negotiated agreement, contractual tenure provisions like other negotiable terms and conditions of employment must be honored by the board and cannot be changed without prior negotiations. Boards that already have agreed to contractual job security provisions are faced with potentially significant limitations on their ability to make employment decisions based upon the needs of the district and their assessment of these employees' performance. If tenure has been granted (either statutorily or contractually), the Board will have a more difficult time dismissing a deficient employee. On the other hand, when the employee is not tenured, the ability to terminate the employee is limited only to the contractual language and whether the employee is non-renewed or a mid-contract termination is sought. (Both topics will be discussed later in this article.)

Approaching Negotiations of Job Security Clearly, the most productive approach for boards of education is to avoid and strongly resist any agreement to a new contractual guarantee of reemployment. Unfortunately some boards will find that their contracts already contain a negotiated tenure provision. While these boards may have a strong commitment to delete this clause from their contracts, they must be prepared for the reality that their unions are not likely to agree to diminish or eliminate existing negotiated provisions providing valuable protection to current bargaining unit members who have no other source of guaranteed job security. However, under certain circumstances and skillful board negotiations, unions may be persuaded to eliminate or modify contractual tenure protection for future employees, as long as the benefits of its current membership are retained.

On the other hand, if the board has not already included union sought after protections in their contracts, the board should continue to reject inclusion of these types of clauses in their future contracts. Yet, in spite of their best intent, some boards may find some form of job security is of the highest priority to their support staff employees' unions. If the board is inclined to agree to this union goal, it must keep in mind that it is free to negotiate levels of job security and need not automatically provide rights similar to statutory tenure.

For example, if the category of employee is not granted statutory tenure rights, the "pre-tenure" contractual period can exceed the three years set by statute and establish a five year period of annual employment contracts before attaining contractual tenure. Further, contractually defined tenure does not need to provide lifetime job security but can consist of the issuance of another, but longer, fixed-term contract (for example 2 or 3 years), and the understanding the employee's performance during that time will determine the length of the subsequent employment contract.

What cannot be overlooked is the agreement on the union's contractual job security demand will grant a significant gain to the union and a major benefit to its members. Therefore, the board must insist any concession in this area is dependent upon the union's concurrent agreement to an equally important board proposal. Before boards consider any concessions to some form of contractual job security, they must carefully assess the restrictions these

13 *Wright v. Board of Education of City of East Orange*, 99 N.J. 112 (1985).

14 *Board of Education of the Township of Old Bridge v. Old Bridge Ed. Ass'n and Supervisors Ass'n.*, Commissioner decision, 1993 SLD (Aug. 4).

contractual agreements can place on the district's current and future personnel decisions as well as the potential interaction of the proposed provision on other contractual clauses, including a just cause clause.

Just Cause

A just cause clause establishes a standard for employers' imposition of discipline. It has traditionally been seen by unions and employees as providing an all-purpose strong form of due process protection against all arbitrary and unreasonable personnel decisions. However, the protection offered by just cause is not without limits. Case law has long held that adverse evaluative judgments of performance cannot be subjected to the just cause standard[15] and the just cause protection does not extend beyond the fixed-term of an employment contract.[16] Even with these restrictions, a just cause provision is still perceived by unions and their members as an important and valuable aspect of job security.

The Meaning of Just Cause A just cause clause establishes a contractual standard by which an arbitrator will review an employer's imposition of discipline. Keep in mind all discipline is subject to mandatory binding arbitration.[17] Although the precise wording of a just cause provision can vary, the clause typically provides that:

> *No employee shall be disciplined, discharged, reduced in rank or compensation, or deprived of any professional services without just cause. Any such action shall be subject to the grievance procedure set forth in this agreement.*

This standard used for review of discipline imposition is particularly important to employees who do not have job protection under school law.

From an employer's perspective, the "just cause" standard undermines the authority and flexibility to monitor staff conduct and impose discipline. The standard imposes a burdensome administrative procedure that can limit management's ability to react swiftly and effectively to employee misconduct. Further, an arbitrator's determination that the board failed to comply with the strict dictates of the negotiated "just cause" standard will often result in a binding award rescinding or modifying the penalty deemed appropriate by the employer.

The Negotiability of the Just Cause Standard Keep in mind the "just cause" standard is not the legally required standard to review disciplinary determinations.[18] Inclusion of this standard in a contract results from the parties' mutual agreement. A board could avoid the procedural obligations imposed by a just cause provision by rejecting the union proposal and reaching agreement on a different standard. However, in the absence of a contractual standard for the review of discipline, many arbitrators simply incorporate the just cause standard.[19] Therefore, negotiating a defined standard for the imposition of discipline is the board's best defense against an automatic application of the arbitral just cause standard.

Although just cause is the most prevalent standard for reviewing discipline, it is not the only standard that can be applied. A number of districts have successfully negotiated different standards, such as:

> *No employee shall be disciplined without reason or basis;*
>
> *No employee shall be disciplined arbitrarily or capriciously;*
>
> or
>
> *No employee shall be disciplined without cause.*

While not all arbitrators will accept the premise that a clear distinction exists between "just cause" and these other standards, a number of respected arbitrators have held a difference does exist and, bound by the language of the contract, applied the parties' less stringent standard.

Modifications of Just Cause The traditional just cause standard can be modified through negotiations. One modification is to have the standard apply only to limited specific determinations, such as mid-contract terminations and suspensions, rather than all discipline.

While proposals to alter the existing just cause provision will be met with immediate and emotional objections, thereby becoming difficult to achieve, the board should hold firm in its resolve to not have the standard apply to probationary employees. Keep in mind a contract clause extending just cause protection to "employees" without distinguishing between probationary and permanent employees, can (and has) superseded the common and logical assumption that employees serving a probationary period were never intended to have the same job security as permanent employees. An arbitrator reading this type of contract language, particularly when other contractual provisions distinguish between permanent and probationary staff, is likely to conclude the parties did not intend to create a differentiation in this area of the contract. Thus, the following clauses can be most helpful to boards of education having a just cause standard:

> *The board retains its full discretion to terminate probationary employees at any time during the probationary period and to determine whether to grant permanent status at the end of the probationary period.*

15 *Middlesex County Board of Social Services*, PERC No. 92-93, 18 NJPER 23065.

16 *Wayne Township Board of Education*, App. Div. Docket No., A-2749-97T5, cert. den. 160 N.J. 91 (1999).

17 *N.J.S.A.* 34:13A-29 mandates binding arbitration over grievances challenging disciplinary determinations.

18 *Montclair Board of Education*, PERC No. 92-62, 18 NJPER 23018.

19 *See Scotch Plains-Fanwood v. Scotch Plains-Fanwood Ed. Ass'n.*, 139 *N.J.* 141 (1995) (affirming the "reasonableness" of an arbitrator's reliance on just cause when the contract did not contain a negotiated standard of review).

or

No probationary employee shall be terminated or not granted permanent status without reason or basis.

Negotiating standards for imposing discipline less stringent than the traditional just cause provision can result in contractual clauses that offer a degree of protection to both employees and boards of education. Boards should resist any union proposal to include a traditional just cause provision in the support staff contract as well as proposals to extend the teachers' existing provision to cover all the new non-certificated members of the bargaining unit. However, given arbitrators' use of just cause when contracts do not contain a specific standard of review, boards would be well served to negotiate alternative criteria for the imposition of discipline. Board should be prepared to respond to a just cause proposal by offering its own proposal and creating an avenue where both parties can gain something: the union will succeed in extending job security protection to all unit members while the board can successfully minimize the negative impact of a traditional just cause provision on its ability to monitor staff performance.

Seniority

Another non-economic matter which is uniquely important to support staff personnel is seniority. Most commonly defined as the length of time an individual employee works for a particular employer, in reality, seniority is extremely complex. It may take numerous forms and may apply to a wide variety of issues including promotions, overtime, scheduling, layoffs, and recalls. Although all of these issues are important to support staff employees, seniority provisions related to layoff and recall seem to be of most concern to this employee group.

Negotiability of Seniority Seniority for support staff is a negotiable subject, except for those areas that are specifically addressed in statute. Unlike teaching staff members, whose seniority rights are explicitly enumerated under *N.J.A.C.* 6:3-1.10, most support staff employees are not entitled to legislatively mandated seniority. Only custodial/janitorial employees under tenure have their seniority rights statutorily protected in the event of a reduction-in-force (RIF).[20] Although custodial and janitorial employees under tenure are granted specific seniority protection by law, such legislation does not preempt the negotiability of additional protection for those employees who are hired for "fixed terms."[21]

While Title 18A specifically provides statutory tenure rights for secretaries, the law is silent as to any seniority rights. As a result, secretaries and other classifications of support staff employees who are not covered by statutory seniority rights, including nontenured custodians and janitors, may negotiate seniority protection.

Impact on Boards Agreement to any seniority language will drastically reduce a board's ability to make managerial employment decisions. Conversely, if worded carefully, seniority provisions can provide an orderly and rational approach to dealing with a wide variety of issues ranging from layoff and recall to the selection of bus runs.

If a board decides to consider a seniority provision, especially as it applies to layoff and recall, three important matters should be addressed. First, it is not uncommon for certain categories of support staff employees to move from ten to twelve month positions or from part-time to full-time employment (or vice-versa). Because of this phenomenon, it is recommended a provision be included to address this situation. The best advice is to apply the basic principles of professional staff seniority. For example, a support staff employee who works ten months is entitled to credit equal to ten-twelfths (10/12) or .833% of his/her twelve month counterpart. In this way, prior seniority credit for ten month experience in an equivalent position may be adjusted by multiplying the number of years experience in that specific position by .833. In the latter case, a part-time support staff employee who moves to a full-time position should receive seniority on a pro rata basis. Consequently, a half-time, twelve month secretary who works four years and is then promoted or transferred to a full-time secretarial position would receive two full years credit as a twelve month secretary.

The second matter which should be included in any support staff seniority provision is an exclusionary clause for "probationary employees." Many boards have been successful in negotiating probationary periods for support staff employees which generally range from thirty days up to three years. Notwithstanding the length of your probationary period, it is suggested seniority not accrue during that established time frame, although it may become retro-active to the actual initial date of employment once an employee passes the established period of probation.

A final and crucial matter which must be addressed is that of equal qualifications. A board must retain the right to establish employee qualifications as a predominant factor in any clause which establishes seniority rights in the event of a RIF. If a board wishes to agree to the concept of seniority in the event of a layoff, it must ensure the seniority rights apply only to those employees who possess equal skills and qualifications to perform the assignment. Without this distinction, a district's special program, such as an in-house computerization of its payroll, could be seriously threatened, if not completely obliterated, if the employee responsible for operating the program were RIF'd, and the board's most senior secretarial employees did not possess the requisite skills to replace the RIF's employee.

Binding Arbitration

Unions representing support staff employees have traditionally been intent on obtaining boards' agreements to binding arbitration as a means of enforcing the contract, particularly in the areas of job security. The law mandates

20 *N.J.S.A.* 18A:17-4.

21 *Lyndhurst Board of Education*, PERC No. 87-111, 13 NJPER 18113.

binding arbitration for school employees' grievances over discipline.[22] However, binding arbitration for other disputes arising in the employment relationship remains a topic of negotiation.

Mandated Arbitration of Disciplinary Grievances It is indisputable that discipline of all staff employees is subject to binding arbitration. However, whether the matter is deemed discipline is often the issue, particularly in the context of mid-contract terminations.

The Supreme Court's decision in *Pascack Valley Regional*[23] was issued in 2007, and the repercussions continue to be felt. There, the Court held where the collective bargaining agreement broadly defines discipline and the board's mid-year terminations of an employee falls within that broad definition, the employee is entitled to the protections of arbitration. The decision in *Pascack* centered upon a custodian who was terminated by the board pursuant to the notice provision of his individual contract. The Supreme Court focused its decision upon the specific language of the contract regarding "just cause" which stated "any dismissal…shall be considered a disciplinary action and shall at the option of the custodian…be subject to the grievance procedure." The Court held this language meant the parties had specifically negotiated and agreed that such disciplinary actions would be grievable at the employee's option. Under these circumstances, the Court reasoned the protections of the collective bargaining agreement superseded the terms of the individual employment contract which allowed termination on notice.[24]

Subsequent to *Pascack*, the Supreme Court again addressed this issue in its June 2009 *Mount Holly*[25] decision. There, the Court held to the extent provisions in an individual employment contract conflict or interfere with rights provided by the collective bargaining agreement, the language in the individual contract must yield to the collective bargaining agreement. In *Mount Holly*, the language of the collective bargaining agreement broadly defined discipline and specifically provided the determination of whether just cause existed was a matter subject to the grievance procedure, which included binding arbitration as the final step. The Court reasoned requiring arbitration in this case is consistent with the Legislature's amendment to *N.J.S.A.* 34:13A-5.3, which reaffirmed the principle that "arbitration is a favored means of resolving labor disputes."[26]

The Appellate Division has given an even more expansive reading of the presumption of arbitration. In its unpublished decision involving *Medford Township Board of Education*,[27] the Appellate Division found a mid-contract termination was subject to binding arbitration, even though the agreement's just cause provision did not include a reference to "discharge" or "termination", which was included in *Mount Holly*. The Appellate Division rejected the Medford Board's contention the case was different from *Mount Holly*, and held discharge "constitutes a "claim" of loss or injury… as a result of the misinterpretation of misapplication of the terms of the Agreement." The Appellate Division reasoned since such a provision "of a collective bargaining agreement should be broadly construed… we conclude that the significance of the omission of 'discharge' or other comparable term in the just cause arbitration provision of the parties' agreement presents an issue of contract interpretation that is within the purview of the arbitrator to decide." In short, courts may now give arbitrator's even greater leeway in determining the scope of their authority.

Taken altogether, while there is no per se legal requirement to arbitrate mid-contract terminations of non-tenured personnel, case law has made it abundantly clear that whether arbitration will be required relies specifically on the language of the collective bargaining agreement. If there is any uncertainty or ambiguity as to whether the collective bargaining agreement provides for arbitration, in almost all cases arbitration will be required based upon the presumption afforded it by*J.S.A*. 34:13A-5.3. Binding arbitration is typically not required for grievances arising from a board's decision to not renew the employment of nontenured employees (unless the board clearly and explicitly agrees to binding arbitration in the labor contract). As such, boards would be well served to have clear unambiguous contract language which expressly eliminates and removes mid-contract discharge or terminations from the grievance process.

Non-renewals In *Camden Board of Education,*[28] the New Jersey Supreme Court held boards have a statutory right to decide whether or not to renew the employment contracts of non-certificated staff because those employees are not protected by tenure rights and are hired on fixed-term contracts. The Court held unless the negotiated contract includes a clear and unmistakable waiver of this board right, non-renewals cannot be reviewed by an arbitrator. The Court further held that disputes over the arbitrability of these issues should be resolved by judicial interpretation of contractual provisions. This ruling applied to *all* renewals, whether or not the decision was alleged to be a fundamentally disciplinary action.

However, boards must not assume their decisions to not renew a support staff employee will, as a matter of law, be exempted from arbitration. Determining the arbitrability of local non-renewal decisions must be done on a case-by-case basis, and requires a close reading of the district's negotiated agreement and consultation with your board attorney and labor relations resources. Even the slightest ambiguity or misunderstanding will result in PERC finding the matter arbitrable in light of the presumption set forth in *N.J.S.A.* 34:13A-5.3.

22 *N.J.S.A.* 34:13A-29.

23 *Pascack Valley Regional High School Board of Education v. Pascack Valley Regional Support Staff Ass'n.*, 192 N.J. 489 (2007).

24 *Pascack Valley,* supra.

25 *Mount Holly, supra*, 199 N.J. 310.

26 *Mount Holly, supra*, 199 N.J. at 333.

27 *Medford Township Board of Education v. Medford Education Association and James Baptiste*, A-5580-05 (May 18, 2010).

28 *Camden Board of Education v. Alexander,* 181 N.J. 187 (2004).

In negotiating contracts with support staff, boards will be well-advised to avoid both contractual commitments to continued employment and specific language authorizing binding arbitration of non-renewals. Boards must strongly resist and reject union proposals which would limit in anyway a board's authority and discretion to issue contract renewals. Boards whose contracts already contain these damaging provisions should raise their own proposals seeking the elimination, or modification, of their current language. While unions may reject the board's proposals, the union may be willing to consider language which "sunsets" or "grandfathers" the protection to only current members but eliminates or reduces protection of future employees. Boards should thoroughly consider all possible avenues.

Withholding of Increments For predominately evaluative withholdings, non-certified staff may appeal through the grievance procedure of the collective negotiations agreement, which might include binding arbitration. Whether this type of withholding is subject to binding arbitration depends entirely on the language of the collective negotiations agreement. (The benefits and detriments associated with binding arbitration will be discussed in the next section of this article.)

While a board may negotiate an enforceable appeal mechanism other than binding arbitration for the review of non-certificated staff's predominantly evaluative withholdings, the same is not true for disciplinary based increment withholdings. The law is clear and unchallenged; a withholding which is based predominately on disciplinary reasons is subject to mandatory binding arbitration.[29]

Arbitration of Other Grievances Although the law mandates binding arbitration of minor discipline, the final step of the grievance procedure for other types of grievances remains a mandatory topic of negotiations. Thus, boards are free to reject union proposals seeking to achieve binding arbitration over seniority, procedures for allocating overtime, scheduling of holidays and vacations, evaluative increment withholding, or any other contractual provision or administrative decision that does not involve the imposition of discipline. In responding to union proposals to provide binding arbitration for all employee grievances, boards should keep in mind the distinction between the negotiable and non-negotiable aspects of the issue.

A support staff unit's desire for binding arbitration of all grievances does not require a board to agree to the union's demand. The decision to accept or reject a union proposal for comprehensive binding arbitration is a philosophical issue which must be addressed by each board of education on an individual basis. Understand a board that has not agreed to binding arbitration retains a greater degree of latitude and discretion in administering the contract than it would if it agreed to a third party's binding review of its decisions.

Boards must remember any new agreement to grant binding arbitration is a new and extremely valuable benefit for the union. Any board concession in this area, no matter how modest, should be linked to a union concession to an extremely valuable board proposal.

Support Staff Unit Merger with Teacher's Unit One critical issue in the binding arbitration context is when a support staff unit is merged with an existing teacher's unit. It must be kept in mind at all times during negotiations that support staff are not automatically entitled to an extension of the teachers' existing binding arbitration clause (or any other clause). Unless prior support staff contracts already contained binding arbitration, extension of this benefit to new unit members is a negotiable topic which can be resolved in any manner which is acceptable to both the board and the union. That said, from the Board's prospective, it cannot be forgotten that binding arbitration is not to its benefit.

Summary

The purpose of this article has been to identify and examine the major bargaining issues, both economic and non-economic, which are uniquely important to unionized support staff employees. Without a doubt, the topics discussed by no means address the total universe of possible issues which might be raised by unionized support staff employees at the bargaining table. However, those topics which have been addressed clearly represent the key concerns that a board will most likely encounter. Furthermore, although several issues which are of equal importance to both support staff and professional employees alike (i.e., salary, benefits, agency fee, etc…) have been omitted from this analysis, one must not erroneously assume these items will not be important in support staff negotiations.

In approaching bargaining with non-certificated support staff, boards must always keep in mind the differences which exist between the employment conditions of teaching staff and support staff members. However, as in all negotiations, boards must remain keenly aware of their economic resources and their need for administrative flexibility in order to successfully protect their districts' interests.

Finally, it is important to remember both economic and non-economic issues have monetary consequences. The primary difference is it is possible to determine the actual cost of economic items in advance, while in the case of non-economic issues, it is impossible to predict the potential future cost of poorly written or ambiguous contract language which will be there years after the language is agreed upon. As such, boards would be well served by going into negotiations with support staff armed with as much information and detail as possible, and prepare well in advance. The long term consequences to the board, its finances, and the impact upon student achievement by poorly conceived contract language with support staff is simply too great to ignore or minimize.

29 *N.J.S.A.* 34:13A-27c.