NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of Arbitration Between:

PATERSON SCHOOL DISTRICT

- and -

PATERSON EDUCATION ASSOCIATION

OPINION
AND
AWARD

Grievance No. 17-16
(Hard-to-Fill Positions)

Before
James W. Mastriani
Arbitrator

Appearances:

For the District:
Robert E. Murray, Esq.
Robert E. Murray, LLC

For the Association:
Sasha Wolf, Esq., UniServe Field Representative
New Jersey Education Association

On October 31, 2017, the Paterson Education Association [the "Association"] filed a grievance against the Paterson School District [the "District"] claiming that the District violated the parties' collective negotiations agreement [the "Agreement"], and Article 24.5 in particular, by not properly compensating Natalia Cappello [the "Grievant"] and similarly situated employees assigned to Hard To Fill positions. The grievance was unresolved and submitted to binding arbitration by the Association pursuant to the terms of the parties' collective negotiations agreement [the "Agreement"]. Thereafter, I was designated to serve as arbitrator.

Arbitration hearings were held in Paterson, New Jersey on May 30, July 16, September 20, October 3 and October 19, 2018. At the hearings, the Board and the Association argued orally, examined and cross-examined witnesses and submitted documentary evidence into the record. Testimony was received from Charles Ferrer, PEA First Vice President, Luis Rojas, Assistant Supervisor, Human Resources, John Ropars, NJEA Field Representative and Natalia Cappello, math teacher at New Roberto Clemente Middle School. Both parties submitted post-hearing briefs and reply briefs, the last of which was received on or about January 2, 2019.

ISSUES

At the hearing, the parties were unable to agree on the framing of the issues to be heard and decided. The Association proposed to frame the issues as follows:

1. Whether the District violated Article 24:5 when it failed to award the hard-to-fill stipend to eligible employees? If so, what shall the remedy be?

2. Whether the District violated Article 3:3-4.3 when it failed to disclose the names of its witnesses in the present matter? If so, what shall the remedy be?

The District proposed to frame the issues as follows:

1. Whether the grievance is barred from arbitration under Article 3:3-1?

2. Whether the grievance is barred from arbitration under Article 3:3-4.1-3?

3. If arbitrable, whether the District violated Article 24:5 by not awarding the Hard-to-Fill Position stipends to eligible employees? If so, what shall the remedy be?

CITED CONTRACT PROVISIONS

ARTICLE 3 – GRIEVANCE PROCEDURE

3.3 Procedure

3:3-1 Time Limits

Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process. The time limits specified may, however, be extended by mutual agreement.

The parties agree, however, that any claim or grievance must be filed in writing at the most appropriate level within thirty-five (35) calendar days of the occurrence of the event.

3:3-4 Level Three

3:3-4.1-3 Participants

Whenever possible, the Association shall provide the names, positions, worksites of any unit member it intends to call to testify during these hearings at least three (3) working days prior to a Level Three hearing. Upon request, the Association will be provided with such similar list from the District at least three (3) working days prior to such hearing.

ARTICLE 24 – SITE BASED MANAGEMENT/SHARED DECISION MAKING

24:5 Hard-to-Fill Positions

24:5-1 The District agrees to pay certificated employees on the Universal Salary Guide with a summative rating of effective or highly effective who teach in designated "hard-to-fill" positions, subjects, schools and/or grade levels in any district school other than Turnaround Schools under Article 24:6 a one-time payment that shall not be considered base salary as follows:

Year 1 = $1,500 Year 2 = $750 Year 3 = $750

24:5-2.1 The Year 1 stipend will be given at the beginning of the school year to the employee on the Universal Salary Guide who received a rating of effective or highly effective in the prior year and is employed in the designated hard-to-fill position. The three (3) year stipend is used as a recruiting tool, thus only new/recruited employees entering the School will qualify for the Hard to Fill three (3) year extra compensation.

24:5-2.2 For Year 2 and Year 3 stipends, or in Year 1 if a teacher in a hard-to-fill position is new to the District and did not receive a summative rating the year before, the District shall pay the new certificated employee once he or she has received a rating of effective or highly effective for one year working in a designated hard-to-fill position.

24:5-2.3 The State District Superintendent will have the absolute authority when annually designating a position, subject, school (other than a Turnaround School) and/or grade levels as hard-to-fill. This decision is not grievable nor arbitrable. The parties agree that any employee filling a hard-to-fill, position, subject, school (other than a Turnaround School) and/or grade level and who has received compensation for filling said vacancy shall provide the District with a minimum of three (3) years of service.

Certificated Staff Stipend Schedule (payments not part of base salary):

Teachers	Year 1 = $1,500
- on the Universal Salary Guide	Year 2 = $750
- have effective/highly effective summative rating	Year 3 = $750
- employed in a hard-to-fill subject, school and/or grade level position in any school in the District other than a designated Turnaround School under Article 24:6.	

ARTICLE 30 – DURATION OF AGREEMENT

30:1 This Agreement shall be effective as of July 1, 2014, and shall continue in effect through June 30, 2017. Its provisions shall then be in effect except as hereinafter provided, subject to any amendments hereto made in writing and agreed to by both parties or subject to a successor Agreement negotiated and agreed upon by the parties.

BACKGROUND

This grievance alleges a violation of Article 24.5, a section that covers the subject of Hard to Fill Positions and includes several subsections, 24:5-1 and 24:5-2.1 through 24:5-2.3. Article 24.5 was newly negotiated and included in the parties' July 1, 2014 through June 30, 2017 Agreement. The purpose of Article 24.5 was

expressly stated in Section 5.1 to provide payments to certificated employees placed on the Universal Salary Guide who have summative ratings of "effective" or "highly effective" and who are assigned to teach in designated "hard to fill" positions, subjects, schools and/or grade levels in any district school other than Turnaround Schools. The Assistant Superintendent testified and the Association does not dispute, that math and science positions were often vacant in certain schools. Reference is made in the Agreement to the payments being used as a "recruiting tool." The payments are expressed in dollar amounts as $1,500 for Year 1, $750 for Year 2 and $750 for Year 3. The essence of the grievance is the Association's claim that the stipend was intended to be paid in each year that a teacher occupies a "hard to fill position" and thereafter absent negotiated change or, as the District contends, intended only to be paid once, and in the contract year specified for a newly assigned teacher, and not to be continued thereafter in any future year beyond the year in which the single payment was made.

The disagreement over interpretation focuses on the language in Article 24.5, testimony on the negotiations history over the topic and documents relating to the negotiations history and the purpose for the payments. In addition, the parties disagree on whether the grievance is procedurally and/or substantively arbitrable and also disagree on the Association's contention that the District violated the Agreement by failing to disclose the names of its witnesses.

The substantive issue arises in the context of payments made (or not made) to Natalia Cappello, a math teacher assigned to New Roberto Clemente School. According to the Association and Ms. Capello's testimony:

> She was hired for the 2015-2016 school year and was eligible for the stipend. (A-2). She only received $750 rather than $1500, despite the fact that the 2015-16 year was her first year in the District in a hard-to-fill position. Cappello did not receive a stipend for either the 2016-17 or the 2017-18 year despite the fact that this was her second and third year, respectively working in a hard-to-fill position. Cappello's experience was representative of the approximately 93 teachers who were hired in 2015-16 and 2016-17 to work in a hard-to-fill position. All received $750 and not $1500 for their first year of employment and received no further stipend for their subsequent years of employment in said positions.

The District asserts that Ms. Cappello was properly paid the singular $750 stipend that the Agreement requires in 2015-16, that the District had no obligation to pay an additional stipend for 2016-17 and that her claim to a stipend for 2017-18 is without merit because that school year is not covered by Article 24.5 which it submits only provides payments through the 2016-17 school year and not beyond.

As an initial matter, the District contends that this grievance is not arbitrable on two separate grounds. The first, citing to Article 3:3-1 – Time Limits, is that the timing of the filing of the grievance on October 31, 2017 fell well beyond the requirement that it "must be filed in writing at the most appropriate level within thirty-five (35) calendar days of the occurrence of the event." According to the District, the minutes of the Board meeting on September 20, 2017 [A. Ex. #3] reflect payments only for those it deemed eligible and did not list those who it deemed not

eligible. This is said to have occurred well more than the thirty-five (35) days before the grievance was filed. Thus, in the absence of a contractually required extension of time limits, the grievance seeking payments for teachers who did not receive payments was filed out of time and must be dismissed.

The District's second arbitrability claim is the Association's alleged failure to comply with Article 3:3-4.1-3. This provides in pertinent part that "In **no** case will a grievance be scheduled for a Level Three hearing . . . (arbitration) . . . more than three (3) arbitration sessions following the date upon which it would have been scheduled." In its post-hearing submission, the District offers argument in support of the second arbitrability claim:

> Mr. Rojas testified that the Association maintained exclusive, unilateral control of the scheduling of grievances for arbitration.
>
> As testified by the Association Vice-President, the first arbitration hearing when this case could have been heard was November 29, 2017 which Mr. Rojas identified as a "panel date" for arbitration.
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> According to Exhibit B-11 and Mr. Rojas' testimony, the next date and second opportunity for Grievance 17-16 to be heard was December 12, 2017, also a "panel date." This date had been scheduled for September 28, 2017 (See A-6) and per Mr. Rojas was rescheduled to December 12, 2017.
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> The third date for Grievance 17-16 to possibly be heard was December 21, 2017 (See also A-6 confirms this date). The Association could have scheduled this date for Grievance 17-16 in November but did not do so. While the date was not used, the PEA could have scheduled and then used but did not; thus, the third unscheduled arbitration hearing date.
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> The fourth date that could have been used to schedule this grievance was January 17, 2018 (B-1) which Mr. Rojas identified as a panel

arbitration date with Arbitrator Weisblatt. Thus, this is now the fourth unscheduled arbitration case for this case.

The fifth date that could have been used to schedule grievance 17-16 was January 30, 2018 (See Association A-6 and District B-1) and was not scheduled. Mr. Rojas identified this as a "panel date." Thus, this is now the fifth unscheduled arbitration date for this case.

The sixth opportunity to schedule grievance 17-16 for arbitration was February 27, 2018 (See A-6 and B-1). Also, this was a "panel arbitration" date.

Grievance 17-16 was scheduled for arbitration hearing on March 28, 2018, a "panel date." (See A-6 and B-1) Thus, after six (6) previous possible arbitration dates, the Association scheduled this case for arbitration hearing. (A-8(b))

Mr. Rojas testified that he personally prepared Exhibit B-1 and researched the actual schedule of dates for arbitration hearing.

Therefore, based on the record testimony of Mr. Rojas and Exhibit B-1, the Association failed to schedule Grievance 17-16 for six (6) dates and it was the seventh date before the case was scheduled for March 28, 2018.

Additionally, Mr. Rojas testified that the Association had and exercised unilateral control for scheduling arbitration hearing dates and the Association unilaterally selected which case would be heard and on what date the case would be heard by an Arbitrator.

The Association arbitration Exhibit A-6 appears to be prepared at the start of a year and was not updated to reflect changes such as the reschedule of hearing for September 28 to December 12, 2017 and any other such change. In fact, Mr. Ferrer testified he prepared A-6 in the summer, likely July, for 2017-18. He acknowledged changes may have been made after July 2017.

Mr. Rojas testified that the District never agreed to any extension of timelines set forth in the Agreement; and, the Association never claimed the District did.

Mr. Ferrer testified the District never answered Grievance 17-16 at any level.

While the District believes that the scheduled hearing date of December 21, 2017 should be included in the consideration of the

> time requirements and scheduling requirements of Article 3:3-4.1-3, the factual record of this case proves that the Association had at least five (5) arbitration sessions before PEA scheduled Grievance 17-16 for March 28, 2018.
>
> The contract in clear language "**no case**" "**will be scheduled**" "**for a Level Three Hearing more than three (3) arbitration sessions after the date upon which it would have been scheduled**".
>
> The Association witness testified the first date was November 29, 2017 and was not scheduled until after at least five (5) arbitration sessions (six (6) counting the adjourned date of December 21, 2017).

The Association, while also seeking dismissal of the District's two claims of non-arbitrability, raises objection to the District's alleged failure to comply with Article 3:3-4.3-1 that is said to require the exchange of witness lists prior to arbitration. It points to having made four separate written inquiries without receiving a response or an explanation. In respect to the District's claims of non-arbitrability the Association, in its post-hearing submission, offers the following arguments urging rejection of the District claim:

> The grievance in this present matter was filed on October 31, 2017. It was discussed at the Level II meeting on November 14. The District did not submit a response to the grievance in the days and weeks following its submission at Level II as is required pursuant to article 3:2-3.7. Indeed, as Ferrer testified, the District never submitted to the Association *any* written response setting forth its position regarding either the merits of the grievance or any of its affirmative defenses.
>
> The Association did not bring the instant grievance to arbitration on November 29 with Joel Weisblatt. The Association was unable to bring the grievance to arbitration on December 21 with Martin Scheinman because Scheinman never confirmed the date; no hearing was actually held on that date. The Association did not bring the case to arbitration on January 30, 2018 with James Mastriani. On February 21, 2018, the Association sent a letter to the District scheduling cases for February 27 (with Tim Hundley) and March 28

> (with Joel Weisblatt). (A-7). The Association scheduled this grievance for hearing with Weisblatt on March 28. The Association received no objection to the scheduling of the instant matter on March 28. Unfortunately, Weisblatt cancelled the March 28 hearing due to his pending appointment as PERC Chairman. Thereafter, by letter dated May 17, the Association rescheduled the hearing for the next panel date, May 30 with Mastriani. The Association received no objection to the scheduling of the instant matter on May 30 until the day of the hearing itself.

At hearing, and with consent of the parties, I deferred judgment on the parties' procedural claims and developed a full record on the substantive merits of the grievance without prejudice to the parties' positions on arbitrability.

The Association contends that the language in Article 24.5 is clear and unambiguous and supported by the parties' bargaining history. It points to language referring to the payments as a "three (3) year stipend" reflecting, in its view, that the plain meaning of the language is that the employee's stipend is to continue for a period of three years.

In support of its belief as to the clarity of the language, the Association cites to the testimony of NJEA UniServ Representative John Ropars who testified to being the Association's lead negotiator in 2014, having taken over during fact-finding. He testified that Association President Pete Tirri also participated as a lead negotiator. Mr. Tirri did not testify. According to Mr. Ropars, the District proposed the inclusion of Article 24.5 based on its desire to "recruit and retain" teachers to work in hart to fill positions. In respect to the compensation, he testified that each stipend amount was not meant to be tied to a specific calendar or school

year and was meant to be paid out over a three year period, the first being $1,500, the second $750 and the third $750. He acknowledged that the Association had a partial objection to the Board's proposals and pointed to a draft summary of negotiations that only provided for $500 in Year 2 and $500 in Year 3 which, at the Association's urging, was increased to $750 in each of the two years in the final Agreement. Because the final language was drafted by the District, the Association argues that the language must be construed against the drafter.

The Association, in its reply brief, contends that a new agreement covering 2017 through 2022 was negotiated without modifying or deleting 24.5 thus reflecting, pursuant to Article 30, that Article 24.5 must continue in effect as a carry forward of the language in the 2014-2017 Agreement. It supports this view by noting the October 17, 2018 Board Minutes reflecting the payment of a $750 stipend to a teacher "for his effective/highly effective rating in a hard to fill position during the 2017-2018 school year." This, it submits, is evidence of the District's intent to continue paying teachers the stipend for a school year after the 2014-2017 Agreement expired. I take notice that the language in the 2014-2017 Agreement at Article 24.5 was included in the 2017-2022 Agreement without modification.

The District disagrees with the Association on both the interpretation of the relevant history that led to its inclusion in the 2014-2017 Agreement. On these points, the District relies on the testimony of Assistant Superintendent Rojas.

According to Mr. Rojas, he participated in negotiations and drafted the language that appears in Article 24.5. He testified that Association President Tirri objected to the District's proposal because he did not want to have a more favorable compensation scheme for a newly assigned teacher than for teachers who already work in the eligible schools. He recounted a meeting held in Superintendent Eileen Schafer's office when Mr. Tirri again raised this objection. This is said to be inconsistent with the Association's contention that the payment be continuing beyond the year in which the teacher was assigned. The District points to the language stating that the compensation is a "one time payment," to be used as a "recruiting tool" and to be given to "only new/recruited employees entering the school." It further notes, contrary to Mr. Ropar's testimony that Article 24.5 only speaks to the stipend as a recruiting tool and not "recruiting and retention." The District also submits that the reference in Article 24.5 to Year One, Year Two and Year Three was a clear reference to only the years of the contract that the sole payment was to be made and not to the years of service rendered during the contract by the newly assigned teacher that would yield more than the one year payment.

After post-hearing briefs were transmitted to the parties, each opted to file a reply brief as contemplated in the mutually agreed upon briefing schedule. The Association argued that Article 24.5 was continued into the next Agreement (2017-2022) and that the District's own conduct by paying a stipend to a teacher for work performed in 2017-2018 is inconsistent with any argument it may have that the

District did not intend to continue compensating employees after the 2014-2017 Agreement expired. The District observes that Association President Tirri, who personally negotiated contracts with the District, did not testify. The District also argues that Mr. Ropar's handwritten notes are entitled to no weight in the absence of evidence as to who wrote them or when the notes were made. It rejects the Association's claim that the purpose of Article 24.5 was to retain as well as recruit given the absence of any reference to "retain" in Article 24.5 and the presence of language requiring an employee subject to Article 24.5 to work in Paterson for three (3) years. The District further argues that the arbitration decisions submitted by the Association in support of its position on arbitrability are not applicable to the instant case based on the Agreement's express different contract language, different facts and different parties.

DISCUSSION

I have carefully reviewed and thoroughly considered the arguments and evidence submitted into the record by the Association and the District in support of their respective positions. This is a case where each party shoulders a burden of proof on the various issues in dispute. Each party has a burden to prove its procedural claims while the Association bears the burden to prove the merits of its compensation claim subject to that burden shifting to the District in the event the Association achieves a prima facie case subject to the District's rebuttal.

I first note that the presentations of the District and Association are extensive, well articulated and forcefully argued. The evidence offered is extensive and has been subject to thorough review and consideration.

Initially, I observe that at hearing, each party raised serious procedural issues against each other. Each was supported by legal argument which, if sustained, could potentially have resulted in either dismissal of the grievance or the granting of the grievance without deciding the merits of the grievance. After I reserved judgment on the procedural issues, the hearing proceeded to develop evidence on the merits of the grievance. Because of the Award I have issued below, I need not decide the procedural issues.

On the merits of this case, I am compelled to conclude that the language in Article 24:5 of the Agreement, as it concerns compensation, is ambiguous and subject to differing interpretation. While this is often the case in grievances involving contract interpretation, the arbitrator's responsibility is, to the extent possible, to determine the mutual intent of the parties in order to provide clarity and definition reflecting mutual intent when the language was negotiated. Here, however, the ambiguity as to whether the parties intended to confine compensation to a one year payment or more reflects more than there is simply an ambiguity which the record can resolve. Instead, I find that the record evidence requires the conclusion that the District and the Association, in their efforts to achieve mutual intent, constructed an unintentional ambiguity flowing from their failure to reach a

"meeting of the minds." This conclusion is based upon record evidence including testimony, negotiations history, notes of negotiations sessions, minutes of Board meetings and the clearly stated purpose of Article 24:5 to provide financial incentive at the time to teachers hired or assigned to "hard to fill positions." The extensive nature of the parties' presentations on both procedural and substantive issues has contributed to the undue delay in the issuance of this Award.

This conclusion stated above does not undermine or eliminate the stated purpose of the contract language. Both parties acknowledge that a special type of compensation was negotiated. Clearly, the teachers affected did receive additional compensation and benefitted from the financial incentive the District and Association agreed to provide. The sole question is whether the parties intended to provide additional compensation beyond that which the District paid to the teachers.

Based on the finding that the ambiguity was a result of a failure to reach a meeting of the minds on the key issue, there is only one action to be directed to satisfy the question of whether additional consideration should be provided beyond that which has already been given. That action is the issuance of an award directing the District and Association to return to negotiations to engage in a good faith attempt to reach a full and complete agreement to finalize the issue by reaching a meeting of the minds on compensation, any other consideration, and

duration of the program to eliminate the unintentional ambiguities present in the existing language.

Accordingly, I respectfully enter the following Award.

AWARD

The District and the Association shall meet in reasonably prompt fashion to negotiate in good faith and conclude in precise fashion the issues in dispute raised in this proceeding.

Dated: April 5, 2022
Lincroft, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth }ss:

On this 5th day of April, 2022, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Gretchen L Boone
Notary Public
New Jersey
My Commission Expires 8-24-2022
No. 50066778