

P.E.R.C. NO. 91-118

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ENGLEWOOD BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-91-36

ENGLEWOOD TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of two grievances filed by the Englewood Teachers Association against the Englewood Board of Education. One grievance challenges eight memoranda sent to child study team members alleging that they did not follow New Jersey Administrative Code requirements and departmental procedures. The other grievance challenges a memoranda issued to a team member concerning allegations of insubordination. The Commission restrains arbitration of a third grievance contesting the annual performance evaluations of team members.

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Appearances:

For the Petitioner, Gutfleish & Davis, attorneys
(Suzanne E. Raymond, of counsel)

For the Respondent, Bucceri and Pincus, attorneys
(Gregory T. Syrek, of counsel)

DECISION AND ORDER

On November 30, 1990, the Englewood Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of three grievances filed by the Englewood Teachers Association. The first grievance contests eight allegedly unjust letters/reprimands issued to the high school child study team members. The second contests a letter charging David Lampron with being insubordinate to his supervisor, a subsequent letter from the superintendent and the supervisor's follow-up memorandum. The third contests allegedly unjust reprimands (annual summary evaluations) given high school and middle school child study team members.

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

The Association represents the Board's non-supervisory professional employees. The parties entered into a collective negotiations agreement effective July 1, 1989 through June 30, 1992. Binding arbitration is the terminal step with respect to disputes concerning the imposition of reprimands and discipline. See N.J.S.A. 34:13A-29.

On February 5, 1990, Silvia Elias, the Board's director of pupil services, issued a memorandum to Julian Bash, Maude Brunson and Lorna Grant, three high school child study team members.^{1/} The memorandum pointed out an inaccuracy in a pupil's IEP and stated that the team members are expected to follow all Administrative Code^{2/} and departmental procedures. On February 7, Elias issued a memorandum to the team members concerning two violations of departmental procedures. Copies were placed in their personnel files. On February 8, Elias issued two memoranda to the team members citing violations of code and departmental procedures addressing appropriate signatures, parental notice, and timing of

^{1/} N.J.S.A. 18A:46-5.1 requires that each board of education provide for basic child study team services. The basic child study team consists of a school psychologist, a learning disability teacher consultant and a school social worker. The team evaluates, after parental consent for initial evaluation has been received, and participates in the determination of eligibility of pupils for special education and/or related services. N.J.A.C. 6:28-3.1. It also coordinates, monitors and evaluates individualized education programs ("IEP"). Ibid.

^{2/} N.J.A.C. 6:28-1.1 et seq. governs special education and regulates the responsibilities of child study teams.

pupil evaluations. The memoranda again stated that team members are expected to adhere to code and departmental guidelines. Copies were placed in their personnel files. Also on February 8, Elias issued a memorandum to the team members concerning placing a pupil in a classification that does not exist in the Code. Elias stated that the "lack of appropriate decision making regarding classifications is baffling." Copies were placed in their personnel files. On February 13, Elias issued a memorandum to the team members stating that it was the third time that she had returned a pupil's file and that they had given her the file with three different classifications. She stated that the approach to classification and to students is somewhat casual and inappropriate. Also on February 13, Elias issued a memorandum to the team members pointing out violations of code and departmental procedures concerning parental notice and supervisory review of files. On February 20, Elias issued a memorandum to the team members returning a file for the fourth time in one week and pointing out four alleged problems in the file: the determination of eligibility did not have the classification stated; reading was listed as a related service despite the absence of such a listing in the Code; the learning evaluation did not include a descriptive statement as the suggested format had discussed; and the structured observation did not include any descriptive information. On March 8, the Association filed a grievance alleging that the memoranda were improper and unjust reprimands.

On June 5, 1990, Elias issued a memorandum to David Lampron citing him for insubordination for failing to carry out responsibilities in a case. The Association filed a grievance and consequently the Board's superintendent, Larry Leverett, directed that the portions of the letter citing Lampron for insubordination be withdrawn because there was no supporting data in the memorandum detailing the insubordination. He directed Elias to prepare a new memorandum setting forth all the facts and reasons for concluding that Lampron was insubordinate. The follow-up letter from Elias states that Lampron was asked orally and in writing to review and correct a student's file and was again instructed at a staff meeting to correct the file. The letter states that despite these and other instructions, Lampron failed to correct the file and that the file had to be returned to him twice more. The letter concludes, "[w]hether this behavior is called insubordination or not, Dr. Lampron did not follow through on requirements when told to do so." On June 28, 1990, the Association filed a grievance contesting the letters and memorandum.

On June 8, 1990, Elias issued annual performance evaluation reports and professional improvement/development plans to five child study team members and recommended that Lampron, Bash, Brunson and Grant have their increments withheld.^{3/} The improvement

^{3/} A sixth employee received a similar evaluation report, but that report was removed from the employee's file and is not in dispute.

objectives in each evaluation are similar and include, among others, specific recommendations to follow Code and departmental guidelines in the areas addressed by the eight memoranda that are the subject of the first grievance. The evaluations do not refer to any specific instances of alleged misconduct. On June 8, 1990, the Association filed a grievance alleging that the evaluations were improper and unjust reprimands.

On October 25, 1991, the Association requested binding arbitration of the grievances. This petition ensued.

The Board contends that the grievances are not arbitrable under the standards set forth in Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt. No. A-2053-86T8 (10/23/87), because they contest evaluative rather than disciplinary comments. The Association asserts that the grievances are arbitrable because the documents are part of an overall pattern leading to the negative evaluations and, in most instances, a formal recommendation to withhold increments.

In Holland, we stated that the disciplinary amendments to N.J.S.A. 34:13A-5.3 were designed to permit negotiation and arbitration of allegedly unjust punitive action by a public employer, but not to permit binding arbitration where an employer has merely evaluated teaching performance. We also emphasized that the line separating evaluations from discipline is not always easy to draw.

We realize that there may not always be a precise demarcation between that which predominantly involves a reprimand and is therefore disciplinary within the amendments to

N.J.S.A. 34:13A-5.3 and that which pertains to the Board's managerial prerogative to observe and evaluate teachers and is therefore non-negotiable. We cannot be blind to the reality that a "reprimand" may involve combinations of an evaluation of teaching performance and a disciplinary sanction; and we recognize that under the circumstances of a particular case what appears on its face to be a reprimand may predominantly be an evaluation and vice-versa. Our task is to give meaning to both legitimate interests. Where there is a dispute we will review the facts of each case to determine, on balance, whether a disciplinary reprimand is at issue or whether the case merely involves an evaluation, observation or other benign form of constructive criticism intended to improve teaching performance. While we will not be bound by the label placed on the action taken, the context is relevant. Therefore, we will presume the substantive comments of an evaluation relating to teaching performance are not disciplinary, but that statements or actions which are not designed to enhance teaching performance are disciplinary. [Id. at 826]

We decline to restrain binding arbitration of the eight memoranda sent to Bash, Brunson and Grant. They predominately involve allegations that the employees failed to follow New Jersey Administrative Code requirements and departmental procedures. Rather than make subjective comments on the employees' professional performance or interaction with students, the memoranda mostly allege violations of objective standards such as the failure to: get appropriate signatures, provide proper notice to parents of meetings to discuss pupil evaluations, reevaluate pupils in a timely manner, provide files for supervisory review in a timely manner, place pupils in existing classifications, and fill out pupil evaluations properly. An arbitrator cannot interfere with the Board's right to set proper procedures and cannot second-guess

requirements set by the Administrative Code. But an arbitrator can determine whether in fact these employees failed to follow these procedures and requirements and determine the appropriateness of placing memoranda alleging that failure in the employees' personnel files.

The Board's reliance on Lincoln Park Bd. of Ed., P.E.R.C. No. 87-45, 12 NJPER 829 (¶17318 1986) is misplaced. There, the superintendent prepared a professional improvement plan pursuant to the Board's obligation under N.J.A.C. 6:3-1.21 to evaluate teachers periodically. The superintendent then issued a follow-up to the plan which emphasized how strongly he felt about the need for the teacher to change her techniques for disciplining students. We found that the follow-up contained suggestions designed to improve teaching performance. Here, the disputed memoranda allege specific instances of failing to follow proper procedures. The validity of those allegations can be reviewed by an arbitrator without interfering with any subjective evaluative judgments.

We also find that the memoranda issued to David Lampron may be reviewed by an arbitrator. Elias's June 5 memorandum accused Lampron of insubordination. The superintendent then directed Elias to prepare a new memorandum setting forth all the facts and reasons for believing he was insubordinate. Elias' July 18 letter accused Lampron of failing to correct a file after receiving instructions to do so and again raised the question of whether his conduct should be called insubordination. These documents are not simply evaluations of Lampron's past performance or suggestions on how to improve that

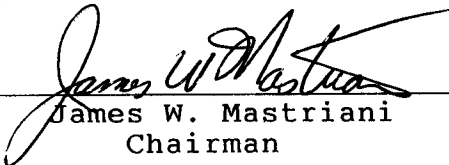
performance. As with the allegations in the first grievance, these allegations can be reviewed by an arbitrator without interfering with the employer's right to set professional performance standards.

We view the grievance contesting the annual performance evaluations differently. The evaluations were prepared as part of the formal evaluation process. They contain a number of specific improvement objectives and recommended procedures to assist in reaching those objectives. The fact that a recommendation to withhold an increment appears in an evaluation does not necessarily render that evaluation disciplinary. Should a teaching staff member's increment be withheld for predominately disciplinary reasons, a grievance contesting the withholding may be reviewed in binding arbitration. N.J.S.A. 34:13A-26. If the basis for the withholding is based predominately on a teaching staff member's teaching performance, an appeal may be filed with the Commissioner of Education. N.J.S.A. 34:13A-27(d). In the event of a dispute, we must determine the appropriate forum. N.J.S.A. 34:13A-27(a).

ORDER

The Board's request for a restraint of binding arbitration of the grievance contesting the annual performance evaluations is granted. The Board's request is otherwise denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: June 20, 1991
Trenton, New Jersey
ISSUED: June 21, 1991