

P.E.R.C. NO. 2023-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TEANECK BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2023-035

TEANECK EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission partially grants, and partially denies, the Board's request for restraint of binding arbitration of the Association's grievance challenging a statement in a teacher's observation report as a reprimand, and alleging the Board violated the CNA by using a different evaluation rubric and forms than what the Board had notified the Association it would be using for the 2021-22 school year. Finding that the comment in the observation report was a non-punitive and benign suggestion for how the teacher could more efficiently utilize her paraprofessional, the Commission holds it was predominantly evaluative and not legally arbitrable. As for the alleged violation of evaluation procedures requiring notice of changes in evaluation/observation forms, copies of the forms to be used for the upcoming school year, and that the Board use those forms for all unit employees, the Commission finds they are legally arbitrable.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Weiner Law Group LLP, attorneys
(Mark A. Tabakin, of counsel; Dianna Santiago and
Christopher R. Welgos, on the brief)

For the Respondent, Springstead & Maurice, attorneys
(Alfred F. Maurice, of counsel)

DECISION

On March 17, 2023, the Teaneck Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Teaneck Education Association (Association). The grievance alleges that the Board violated the parties' collective negotiations agreement (CNA) by issuing a statement in the recommendation section of a teacher's observation report concerning the teacher's usage of the paraprofessional assigned to her classroom, and by evaluating the teacher based on a different teaching evaluation instrument than the one the Board had provided in its notification of evaluation rubric for the 2021-22 school year.

The Board filed briefs, exhibits, and the certification of Nina Odatalla, the Principal of Thomas Jefferson Middle School where the grievant works.^{1/} The Association filed a brief, exhibits, and the certification of George Lambert, the Association's NJEA field representative. These facts appear.

The Association represents a broad-based negotiations unit comprised of the Board's certificated employees, including teachers, special education teachers, librarians, nurses, and guidance counselors, as well as certain non-certificated and secretarial and clerical personnel. The Board and Association are parties to a CNA effective from July 1, 2019 through June 30, 2022. The grievance procedure ends in binding arbitration.

Article VII of the CNA is entitled "Employee Observation and Evaluation." Article VII, Section B is entitled "Classroom Observation and Evaluation." Article VII, Section B, Clauses 1-3 provide:

^{1/} The Board's scope of negotiations petition brief includes an argument seeking interim restraint of binding arbitration pending the Commission's final decision on its scope petition. Procedurally, the Board did not properly file an application for interim relief, as it did not file an "order to show cause" as required by N.J.A.C. 19:14-9.2(b). Furthermore, even if the Board had met the filing requirements, the application for interim relief was not ripe for consideration and would have been dismissed as the Association certified that the arbitration hearing is being held in abeyance pending the Commission's determination and the Board certified that "[t]here is currently no date pending for the arbitration." The Commission does not proceed with interim relief applications in scope cases where there is no arbitration hearing scheduled.

B. CLASSROOM OBSERVATION AND EVALUATION

1. The Superintendent of Schools or his/her/their designee shall consult with the T.T.E.A. concerning any contemplated changes in the forms to be used for observation and evaluation of staff; provided, however, that final decisions concerning the form and content of such evaluation and observation instruments shall rest in the sole discretion of management.
2. Each employee shall be provided, not later than November 1 of any school year, with a copy of the observation and evaluation form to be used during the course of that school year.
3. Forms promulgated pursuant to Sections B.1 and B.2 of this Article shall be used for the observation and evaluation of all negotiation unit members.

The grievant is a special education mathematics teacher employed by the Board at Thomas Jefferson Middle School. On December 8, 2021, Principal Odatalla conducted an unannounced observation of the grievant's Replacement Math 8 class, then prepared a Report which evaluated the grievant's teaching performance based on ten rubrics. Principal Odatalla rated the grievant "Effective" on nine rubrics and "Highly Effective" on one rubric. During a December 17 post observation conference in which the grievant, Principal Odatalla, and an Association representative were present, the grievant requested the removal of comments in the Report's "Recommendations" section regarding the use of her paraprofessional.

On December 20, 2021, Principal Odatalla revised the Report. The revised Report included the following comment in the Recommendations section:

[The Grievant] has a paraprofessional assigned to this class period. Although this para has been included in the planning of lessons and is regularly asked to support students in specific ways, he was not meeting the expectations during the observed lesson. Additionally, the administration is aware and has addressed specific concerns regarding this para and will continue to work with the agency to ensure he receives necessary training. A suggestion for [the grievant] would be to maximize the usage of the para to support her procedurally rather than instructionally.

Principal Odatalla certifies that she did not advise the grievant of discipline or warn of future discipline.

On January 4, 2022, the grievant submitted an Observation Response and Acknowledgement form noting she had requested removal of the comment about her use of the paraprofessional. The grievant also stated that the Board's September 17, 2021 "Notification of Evaluation Rubric for the 2021-2022 school year" memo indicated that it had renewed the use of the "Danielson Framework for Teaching Evaluation Instrument, 2011 Edition." However, the grievant stated that Principal Odatalla claimed in a December 22, 2021 e-mail that the Board was now using the 2013 edition of the framework. The grievant noted that the 2011 edition renewed by the Board does not include teaching staff being evaluated based on the management of paraprofessionals.

Lambert certifies that whether or not the comments in the Report constitute a disciplinary reprimand, Principal Odatalla applied a different evaluation model (Danielson 2013) than the one the Board had adopted for current use by the district (Danielson 2011). Lambert certifies that because the Board violated the CNA by modifying the evaluation protocol without notifying the Association in advance, the references to the grievant's use of her paraprofessional were unauthorized and should be removed from the Report. Principal Odatalla's certification does not specifically address whether she applied the Danielsson 2011 or the Danielson 2013 evaluation model in her observation Report, and does not certify which model she believed the Board had approved and notified the Association it would be using for the 2021-22 school year. Principal Odatalla certifies generally that: "In performing the observation and preparing the Report, I complied with the mutually agreed upon evaluation procedures set forth in the Agreement."

On January 13, 2022, the Association filed a Level 1 grievance alleging that Principal Odatalla's revised recommendation in the December 20, 2021 observation report regarding the grievant's supervision/usage of her classroom paraprofessional was without "just cause" and violated "Article VII, Section B, Clause 2 and Article VII, Section B, Clause 3" of the CNA. Specifically, the grievance alleges:

The memo, Notification of Evaluation Rubric, for the 2021-2022 school year, which was provided to all staff by the district on 9/17/21 ascertains that the Framework for Teaching Evaluation Instrument, 2011 Edition is used by the district and not the 2013 edition. As such, teaching staff are not evaluated based on the management, use of, or supervision of classroom paraprofessionals.

The grievance seeks "removal of the statement from the member's observation report dated 12/20/21." Principal Odatalla denied the grievance. The Association advanced the grievance through the grievance procedure and the Board denied the grievance at every step. On September 30, the Association filed a request for binding arbitration. The request for arbitration identified the grievance to be arbitrated as: "Violation of the Danielson 2011 teacher evaluation model in [the grievant's] written observation." This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), states:

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

[Id. at 154.]

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the Board may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[Id. at 404-405.]

The Board asserts that the grievance is not arbitrable because the Report's comment concerning the grievant's use of her paraprofessional was part of an evaluation and observation and did not suggest the grievant was being disciplined. The Board argues that "review of the entire comment shows that it was actually the performance of the paraprofessional which was a problem, not [the grievant's] performance." It contends that even if the comment addressed non-teaching performance, it is

still not arbitrable because it is a neutral and non-punitive comment as to the grievant that suggests she try using the paraprofessional in a different capacity. The Board asserts that the Association's challenge to the observation and evaluation model used by Principal Odatalla is not arbitrable because it is not covered in the CNA. The Board contends that the Association's claims concerning the observation and evaluation forms are not arbitrable because they were not specifically raised in the grievance or demand for arbitration.

The Association asserts that the Report's comment concerning the grievant's use of a paraprofessional is an arbitrable disciplinary reprimand. The Association asserts that its contractual claim that the Board changed the observation and evaluation model and forms from that which it had adopted for the 2021-22 school year is legally arbitrable. It contends that changes in evaluation practices and models greatly impact staff, and that the Board's failure to give proper notice of a change in implementation of its evaluation model without notifying the Association is a clearly arbitrable. The Association asserts that its grievance does not challenge the Board's right to conduct evaluations, but seeks compliance with the evaluation procedures outlined in the CNA because use of the wrong evaluation forms led to evaluation of the grievant on criteria that were not authorized by the evaluation adopted by the Board.

A school board has a managerial prerogative to observe and evaluate employees. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982). Disciplinary reprimands, however, may be contested through binding arbitration. N.J.S.A. 34:13A-5.3. For school employees, grievance procedures "shall be deemed to require binding arbitration as the terminal step with respect to disputes concerning the imposition of reprimands." N.J.S.A. 34:13A-29(a).

In Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd, NJPER Supp.2d 183 (¶161 App. Div. 1987), we distinguished between evaluations of teaching performance and disciplinary reprimands. We set forth the following approach:

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 nonnegotiable. 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.]

In Delaware Valley Reg. Bd. of Ed., P.E.R.C. No. 2017-39, 43 NJPER 295, 298 (¶83 2017), the Commission explained that “[when] documents are challenged as constituting the imposition of discipline, then the subjects of the documents are not determinative,” but “rather, the content, language/tone, and context of the documents are all relevant in considering whether they, on balance, read more like benign forms of constructive criticism intended to improve teaching performance, or more like reprimands intended as a form of discipline.” See also Red Bank Reg. Bd. of Ed., P.E.R.C. No. 94-106, 20 NJPER 229 (¶25114 1994) (“the subject of the memorandum is only one factor among many that must be considered in determining whether the memorandum is disciplinary.”) In that respect, even “comments regarding . . . non-teaching performance concerns are not arbitrable if they are neutral and non-punitive.” Delaware Valley.

Here, we find that the Board’s recommendation in its December 20, 2021 observation that the grievant “maximize the usage of the para to support her procedurally rather than instructionally” predominantly relates to an evaluation of her

teaching performance and is not a disciplinary reprimand. First, the subject of the comment concerns teaching performance because it relates to how the grievant should be using her classroom resources (i.e., the paraprofessional) more effectively. See Hamilton Tp. Bd. of Ed., P.E.R.C. No. 2002-35, 28 NJPER 76 (¶33026 2001) (teacher's increment withholding based on letting her educational assistant leave the classroom early was not arbitrable because it impacted classroom management).

Furthermore, regardless of whether the comment concerned teaching performance, the language and tone used by Principal Odatalla was not punitive and did not warn of future discipline. Rather, the comment provided a specific suggestion to improve the grievant's teaching performance. See, e.g., Bergenfield Bd. of Ed., P.E.R.C. No. 2017-43, 43 NJPER 319 (¶90 2017) (arbitration restrained over memo that contained constructive criticism concerning teacher's verbal interactions with students); Delran Bd. of Ed., P.E.R.C. No. 2001-43, 27 NJPER 101 (¶32039 2001) (arbitration restrained over memos critiquing lesson plan because they focused on appropriate instruction for future classes, rather than punishing teacher for past behavior); and Somerdale Bd. of Ed., P.E.R.C. No. 98-40, 23 NJPER 562 (¶28280 1997) (arbitration restrained over memo critiquing teacher because it recounted facts, offered guidance, and did not warn of discipline). The overall context of the comment also supports

that it was not intended to be pejorative, but that the administration was aware of concerns with the paraprofessional. In light of the observed limitations of the paraprofessional during the grievant's class, Principal Odatalla made a non-punitive suggestion that the grievant could use her paraprofessional more efficiently for procedural support rather than instructional support. Accordingly, as the grievant comments here consist of a benign suggestion for improving the grievant's teaching performance and do not contain indicia of a disciplinary reprimand, we find they are predominantly evaluative and are not a reprimand that may be challenged through binding arbitration.

We next turn to the Association's allegation that the Board violated contractual evaluation procedures by observing and evaluating the grievant using a different evaluation rubric and different forms than what the Board notified the Association it would be using for the 2021-22 school year. While a school board has a managerial prerogative to observe and evaluate employees, evaluation procedures that are consistent with statutes and regulations and do not impair a board's ability to evaluate staff performance are mandatorily negotiable. Bethlehem, 91 N.J. 38, supra; Ocean Tp. Bd. of Ed., NJPER Supp.2d 164 (¶144 App. Div. 1986), aff'g P.E.R.C. No. 85-123, 11 NJPER 378 (¶16137 1985), certif. den. 105 N.J. 547 (1986); and Matawan-Aberdeen Reg. Sch.

Dist. Bd. of Ed., NJPER Supp.2d 257 (¶213 App. Div. 1991), aff'g P.E.R.C. No. 90-98, 16 NJPER 300 (¶21123 1990).

Alleged violations of such negotiable evaluation procedures are enforceable through binding arbitration. Lacey Tp. Bd. of Ed. v. Lacey Tp Ed. Ass'n, 130 N.J. 312 (1992) (Court upheld arbitration award vacating evaluation because teacher had not been provided with copy of document prior to conference); E. Brunswick Bd. of Ed., 25 NJPER 306 (¶30128 App. Div. 1999), aff'g P.E.R.C. No. 98-150, 24 NJPER 319 (¶29152 1998) (requirement that evaluator confine written comments to the lesson chosen for observation does not significantly interfere with right to evaluate other lessons).

Here, the Association does not seek to arbitrate over the Board's right to substantively determine the evaluation protocol, including criteria and forms used, in any given school year. Rather, the Association seeks to arbitrate over alleged procedural requirements set forth in the CNA concerning notice of changes in observation and evaluation forms, timely provision of copies of the forms that will be used for the upcoming school year, and requiring that the Board use those same forms for every unit employee. The Commission has often held that evaluation procedures involving such notice and timeliness issues are legally arbitrable. See, e.g., Willingboro Bd. of Ed., P.E.R.C. No. 2020-48, 46 NJPER 450 (¶102 2020) (requirement to provide

annual notification of evaluation policies was arbitrable); North Hunterdon-Voorhees Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 2015-81, 42 NJPER 48 (¶14 2015) (requirement to disclose documents used in evaluations was legally arbitrable); and Paterson State Op. Sch. Dist., P.E.R.C. No. 2011-57, 37 NJPER 9 (¶4 2011) (requirement to provide teacher with copy of evaluation report at least one day prior to conference was legally arbitrable). Consistent with this precedent, we find that arbitration over the Association's grievance would not significantly interfere with the Board's prerogative to evaluate the grievant.

Finally, we address the Board's argument that the Association did not adequately raise its alleged procedural violations earlier in the grievance procedure. The Commission determines scope of negotiations petitions based on the totality of the certified facts and arguments raised by the parties. We have often acknowledged that a dispute becomes more sharply focused as the grievance proceeds and professional assistance is received at higher levels of the grievance process. See, e.g., Ho-Ho-Kus Bor., P.E.R.C. No. 2022-39, 48 NJPER 400 (¶91 2022); and Montclair Tp., P.E.R.C. No. 2022-16, 48 NJPER 215 (¶48 2021). In this case, the Association's grievance specifically alleged that the Board violated Article VII, Section B, Clauses 2 and 3 of the CNA, which concern notice of the observation and evaluation forms to be used in the upcoming school year. The

grievance also alleged the Board did not use the evaluation rubric that it notified the Association it would be using for the 2021-22 school year. Moreover, the Association's brief explained how its claim of an unannounced change in the evaluation model is intertwined with its claim that the approved observation forms were not used. Accordingly, we reject the Board's assertion that the procedural issues sought to be arbitrated by the Association were not adequately raised.

ORDER

The request of the Teaneck Board of Education for a restraint of binding arbitration is denied to the extent that the Association's grievance alleges violations of contractual evaluation and observation procedures. The Board's request for a restraint of binding arbitration is granted to the extent that the Association's grievance challenges the comments in the recommendations section of Principal Odatalla's December 20, 2021 observation report of the grievant as a disciplinary reprimand.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: May 25, 2023

Trenton, New Jersey