

P.E.R.C. NO. 2024-31

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ASBURY PARK BOARD OF EDUCATION,

Petitioner,

-and-

Docket Nos. SN-2024-010
SN-2024-011
(Consolidated)

ASBURY PARK EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Asbury Park Board of Education's requests for a restraint of binding arbitration filed by the Asbury Park Education Association. The grievances contend that the Board violated the CNA when it neglected to train teacher evaluators on a newly adopted evaluation method prior to conducting the evaluations. The Commission finds that this training requirement is a mandatorily negotiable procedural aspect to the evaluation process and therefore 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, The Busch Law Group, LLC, attorneys
(Ari D. Schneider, of counsel)

For the Respondent, Selikoff & Cohen, P.A., attorneys
(Keith Waldman, of counsel)

DECISION

On August 31, 2023, the Asbury Park Board of Education (Board) filed scope of negotiations petitions seeking restraint of binding arbitration of grievances filed by the Asbury Park Education Association (Association) on behalf of two teaching staff members employed by the Board: S.A. (AR-2024-043) and J.S. (AR-2024-045). The grievances contest alleged procedural violations of the collective negotiations agreement (CNA) and a related settlement agreement that preceded the increment withholdings of the grievants.

The Board filed briefs, exhibits, and the certification of its Superintendent of Schools, Dr. RaShawn M. Adams. The Association filed briefs, exhibits and the certification of its

President, John P. Napolitani. These facts appear.

The Association represents a broad-based negotiations unit, including all certificated members of the professional staff, including teachers, and nine (9) categories of non-certificated employees. The Board and Association are parties to a CNA with a duration of July 1, 2020 through June 30, 2025. Article III of the CNA, entitled "Grievance Procedure," details a process that ends in binding arbitration.

The Superintendent certifies to the following facts. S.A. and J.S. are tenured teaching staff members employed by the Board and were assigned to a teaching position at Asbury Park High School during the 2022-2023 school year. Among his duties as Superintendent is the annual determination of whether to recommend an increase in salary for the teaching staff members employed throughout the District, based upon satisfactory job performance.

During the spring of 2023, Adams received and reviewed the annual performance reviews of S.A. and J.S. which contained the recommendation of the High School Principal to withhold their salary adjustments and employment increments due to performance deficiencies.

S.A. and J.S. were notified of the Principal's recommendation by letter dated May 4, 2023. More specifically, the Principal determined that the grievants demonstrated

partially ineffective performance with their instructional roles.

After completing his review of S.A. and J.S.' annual performance reviews, the Superintendent concluded that the Principal's recommendations were justified based upon their deficient evaluation ratings. He then recommended that the Board proceed to withhold their increments.

The President of the Association certifies to the following facts. The grievances arise from the Board's failure to honor the negotiated procedures for conducting evaluations. On April 27, 2022, the Board passed a resolution to withhold the increments of several employees for the 2022-2023 school year, one of whom was S.A. The Association grieved those increment withholdings. On February 27, 2023, the Association and Board entered into a settlement agreement that settled the 2022-2023 increment withholding grievances.

The Association President certifies that in the agreement, the Board promised to "hire an independent Certified Danielson Trainer to conduct annual training in the Evaluation Rubric for the Administration." The Board agreed to permit District Evaluation Advisory Committee (DEAC) members to attend the annual Danielson training. In the agreement, the Board also promised that they would restore the 2022-2023 increments of the employees whose withholdings served as a basis for the underlying grievances. The Board and Association ratified the agreement.

The Association President certifies that the Board did not honor the settlement by dealying the training of the Administration and DEAC members in the Danielson method until after it had conducted the 2022-2023 year-end evaluations. For the 2023-2024 school year, and on the basis of those 2022-2023 evaluations, the Board once again withheld increments from several teachers, including S.A. and J.S., without first adequately training evaluators and DEAC members.

The Association President further certifies that contrary to the agreed to Danielson model of evaluation, J.S. did not receive any Corrective Action Plan (CAP) at all for the 2022-2023 school year. Also contrary to the agreed to Danielson model of evaluation, neither A.S. nor J.S. received a collaborative CAP for the 2023-2024 school year, depriving them of a meaningful opportunity to understand and improve upon any alleged shortcomings.

The Board voted to withhold the increments on May 8, 2023, and the Superintendent notified S.A. and J.S. of that decision by letter dated May 12. On May 14, the Association filed two grievances in response to the increment withholdings that stated:

Grievance Statement: On May 8, 2023 [S.A. or J.S.] was approved for [his or her] increment to be withheld for the 2023-2024 school year based on evaluation performance. [S.A. or J.S.], staff, and administration have not been properly trained in the Danielson Evaluation rubrics.

Violation: The Asbury Park Education Association (APEA) contends that staff and administration were not provided the correct training for the chosen commissioner-approved rubric.

We Seek as Remedy:

1. Reinstate [his or her] increment for the 2023-2024 school year.
2. All administration and staff are trained in Danielson by a certified Danielson Instructor.
3. Any other measures deemed appropriate to make our member whole.

The Principal denied the grievances on May 16. A Danielson training was conducted for administrators and DEAC members in August 2023 - months after S.A. and J.S.' increments were withheld. On August 1, the Association filed a Request for Submission of a Panel of Arbitrators for S.A. and J.S. contesting that the increment withholdings were "without just cause." These petitions ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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.

Thus, we do not consider the merits of the grievance or any contractual defenses the employer 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 makes the same arguments for both S.A. and J.S., contending that the increment withholdings of both grievants were not just predominantly evaluative, but were entirely evaluative as opposed to disciplinary. The Board avers that in both cases, the Board withheld increments based on the results of the grievants' yearly performance reports, which documented ineffective or partially effective teaching abilities described in the Superintendent's certification. For this reason, the Board seeks an order restraining both arbitrations pursuant to

its authority to withhold salary increments for performance reasons.

The Association responds that the issue it seeks to arbitrate is not whether the Board had just cause to withhold the grievants' salary increment, but whether the Board violated evaluation procedures included in the CNA and the settlement agreement of prior grievances. Specifically, the Association alleges that the Board neglected to properly train the evaluators and DEAC members on the Danielson method of teacher evaluation which was newly implemented in the 2021-2022 school year. The Association argues that Commission precedent permits arbitration over the severable procedural issues related to how evaluations are conducted, with the arbitrator empowered to issue an appropriate remedy which may include the reversal of an increment withholding.

The Board replies that the language of the settlement agreement contains no restrictions on the Board's ability to withhold salary increments and did not even require the Board to hire an independent Certified Danielson Trainer before the 2023-2024 school year. Because the Board documented deficient teaching performance of the grievants, and the settlement agreement at issue, by its own terms, did not require a training until the following school year, the Board contends that the Association's argument is without any factual support.

Since the Association authored the grievance, we accept the issue in dispute as it has framed it in its brief. See, e.g., Burlington City Bd. of Ed., P.E.R.C. No. 2019-27, 45 NJPER 242 (¶64 2019) (recognition that union determines nature of issue in dispute); see also Hackensack Bd. of Ed., P.E.R.C. No. 81-138, 7 NJPER 341 (¶12154 1981), rev'd on other grounds, 184 N.J. Super. 311 (App. Div. 1982). The Association explicitly states in its brief that it is not making a substantive challenge to the increment withholdings, but is solely challenging the Board's alleged failure to provide training on the new evaluation method and standards. Thus, the only question before us is narrow: Does the grievance implicate a procedural challenge to the Board's evaluations in the 2022-2023 school year? In accordance with longstanding precedent requiring negotiations over procedural aspects to teacher evaluations, we find that the grievance is legally arbitrable.

Substantive aspects of teacher evaluations are not legally arbitrable because they involve sensitive educational policy decisions. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Assn., 91 N.J. 38, 46 (1982). However, procedural aspects of the evaluation process that are not subject to a preemptive statute or regulation are legally arbitrable. Id. at 47; Willingboro Bd. of Ed., P.E.R.C. No. 2020-048, 46 NJPER 450 (¶102 2020); Ocean Tp. Bd. of Ed. and Ocean Tp. Ed. Ass'n, 1986 N.J. Super. Unpub.

LEXIS 3 (App. Div. 1986); Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed. and Matawan-Aberdeen Reg. Teach. Ass'n, 1991 N.J. Super. Unpub. LEXIS 13 (App. Div. 1991).

In Lacey Tp. Bd. of Ed., 259 N.J. Super. 397 (App Div. 1991), aff'd, 130 N.J. 312 (1992), the Court upheld the expungement of a teacher's evaluation report because the teacher had not been provided with a copy of the document before a conference as required by the CNA. The Court found that expungement was an appropriate remedy for the procedural violation and did not preclude subsequent evaluation of the teacher. See also Willingboro Bd. of Ed., supra, (teacher observer and evaluator training mandatorily negotiable); E. Brunswick Bd. of Ed. and E. Brunswick Ed. Ass'n, 1999 N.J. Super. Unpub. LEXIS 18 (App. Div. 1999) (requirement that evaluator confine his/her written comments to the lesson chosen for observation does not significantly interfere with the right to evaluate other lessons).

Here, the Association is alleging that the Board violated evaluation procedures by not providing training on a new evaluation method and standards. We find that this claim is more akin to an evaluation procedure rather than substantive aspects of the evaluation process. This claim is analogous to notice because it provides information to teachers on how the evaluation method and standards are to be applied. See e.g., Trenton Bd. of

Ed., P.E.R.C. No. 2019-46, 45 NJPER 403 (¶109 2019) (notice before placing complaint in teacher's personnel file mandatorily negotiable); Woodbury Bd. of Ed., P.E.R.C. No. 2000-108, 26 NJPER 313 (¶31127 2000) (notice of provisions governing and adopting provisions and criteria for placement of teacher on performance improvement plan are negotiable). Thus, the Association's grievance challenging the Board's alleged failure to provide training on the new evaluation method and standards involves an evaluation procedure and is legally arbitrable.

ORDER

The Asbury Park Board of Education's request for a restraint of arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hennessy-Shotter, Commissioners Bolandi, Eaton, Ford, Higgins, Kushnir and Papero voted in favor of this decision. None opposed.

ISSUED: January 25, 2024

Trenton, New Jersey