

P.E.R.C. NO. 2024-52

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET HILLS BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2024-021

SOMERSET HILLS EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part and denies in part the Somerset Hills Board of Education's request to restrain binding arbitration of a grievance filed by the Somerset Hills Education Association. The grievance asserts that the Board violated the collective negotiations agreement (CNA) when it refused to provide the name of the person who made a complaint and the nature of the complaint after a teaching staff member was the subject of investigations by both the Division of Child Protection and Permanency (DCP&P) and the Board. The Commission finds that while the CNA provision at issue is a negotiable disciplinary procedure, N.J.S.A. 9:6-8.10(a) and N.J.A.C. 6A:16-11.1(a)(5)(iv)(1)(A) preempts disclosure to the extent the DCP&P investigation overlaps with the Board's investigation. However, to the extent the Board's investigation was not connected to the DCP&P investigation, disclosure is not preempted.

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, Busch Law Group, LLC, attorneys  
(Ari D. Schneider, of counsel)

For the Respondent, Oxfeld Cohen, P.C., attorneys  
(William Hannan, of counsel)

DECISION

On November 17, 2023, the Somerset Hills Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Somerset Hills Education Association (Association) on behalf of a teaching staff member, J.M. The grievance contends that the Board violated Article V.A.4 of the collective negotiations agreement (CNA) when, after a complaint was referred to the Division of Child Protection and Permanency (DCP&P), the Board refused to identify the complainant and the substance of the allegation.

The Board filed briefs, exhibits, and the certification of its Superintendent, Brian Brotschul. The Association filed a brief, exhibits, and the certification of its counsel, William P. Hannan. These facts appear.

The Association represents all certificated personnel, co-curricular personnel, support staff, and technology technicians employed by the Board. The Board and the Association are parties to a CNA in effect from July 1, 2022 through June 30, 2025. The grievance procedure ends in binding arbitration.

Article V.A.4 of the CNA, entitled "Disciplinary Meeting" provides: "No action will be taken against any district employee unless the identity of the complainant and specific issue are identified."

The Superintendent certifies to the following facts. For the 2022-2023 school year, J.M., a tenured Art teacher, was assigned to a teaching position at Bedwell Elementary School. In the Spring of 2023, J.M. was transferred to another building to develop and write a new Art curriculum. Around this same time period, a complaint was made involving J.M. to DCP&P, which opened an investigation through its Institutional Abuse Investigative Unit (IAIU). On March 15, the Board approved a transfer of J.M. from a classroom position at Bedwell Elementary to a non-classroom teaching position at the Olcott Building to

create the new Art curriculum. The current Superintendent certifies that the reason for the transfer was exclusively for business and educational policy reasons.

The Association filed the following grievance that was received by the Board on April 26, 2023:

Statement of Grievance:

Names and issues of complaint have not been released regarding [J.M.'s] transfer from Bedwell to the Olcott Building. Article 5.A.4 states "No action will be taken against any district employee unless the identity of the complainant and specific issue are identified."

Relief Sought

SHEA requests the names and issues of complainants be released, or [J.S.'s] immediate transfer back to his teaching position as Bedwell Art Teacher.

Following the filing of the grievance and before May 24, 2023, the IAIU investigation was completed and the complaints were deemed to be "unfounded" and the records sealed. The Association continued to process its grievance and specifically requested the names and issues of the complainants be revealed pursuant to the CNA and the Board's independent investigation undertaken pursuant to Board Policy 3281.

In its denial of the grievance, the Board relied on DCP&P regulations which it avers prohibited the disclosure of the requested information. However, the Superintendent at the time also referenced a meeting on March 20, 2023 where the Association

was informed that “[t]he decision to transfer [J.M.] falls under Policy and Regulation 3281.” (emphasis added). This policy, entitled “Inappropriate Staff Conduct” requires reporting of any inappropriate conduct towards students and permits anonymous reports. The policy also requires:

[T]he staff member designated to complete the investigation will investigate all reports with a final report to the Superintendent of Schools. The staff member designated to complete the investigation or the Superintendent may, at any time after receiving a report, take such appropriate action as necessary and as provided for in the law. This may include, but is not limited to, notifying law enforcement, notifying the New Jersey Department of Children and Families in accordance with N.J.A.C. 6A:16-11.1 and/or any other measure provided for in the law.

On June 6, 2023, the Board of Education denied the grievance. On September 28, 2023, the Association filed a request for a panel of arbitrators with the Commission. This petition 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.]

Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it speaks in the imperative and fixes a term and condition of employment expressly, specifically and comprehensively. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The Board argues that to the extent the grievance seeks to

challenge J.M.'s transfer, it is not arbitrable because the transfer was for the purpose of furthering educational policy. Separately, the Board avers that the release of the name of the person who initiated the complaint against J.M. and the nature of the complaint is preempted by N.J.A.C. 6A:16-11.1(a)(5)(iv)(1). That regulations prohibits the disclosure of certain investigatory information reported to, or discovered by, DCP&P except to the extent it is required by the investigation.

In opposition, the Association explains that the grievance is not contesting J.M.'s transfer. The Association contends that a rescission of the transfer was only part of the requested remedy, which is now moot as J.M. was transferred back to his original position. Instead, the Association avers that the grievance seeks the name of the person who filed the complaint against J.M. and the nature of the complaint pursuant to the CNA. The Association asserts that DCP&P regulations do not preempt the disclosure of an internal report conducted pursuant to Policy 3281 and only serves to shield reports conducted or received by law enforcement and that the disciplinary procedure is arbitrable.

The Board replies by arguing that it had no obligation to consider the Association's clarification of its grievance during the grievance process where it limited its request to information from the Policy 3281 report. Further, the Board alleges that

since J.M. was never disciplined and the involuntary transfer was a matter of educational policy, the petition should be granted.

The nature of the Association's grievance has changed since its initial filing of the grievance. As made clear by the Association, it does not contest the grievant's transfer, but only seeks the name of the complainant and the nature of the complaint that led to the transfer.<sup>1/</sup> Thus, the question before us is whether the grievance seeking that information is legally arbitrable under these facts.

It is well established that disciplinary procedures are legally arbitrable. N.J.S.A. 34:13A-5.3, see also Rutgers University, P.E.R.C. No. 2017-17, 43 NJPER 117 (¶35 2016), aff'd, 2018 N.J. Super. Unpub. LEXIS 1811 (App. Div. 2018) (pre-disciplinary investigation procedures were arbitrable); City of Newark, P.E.R.C. No. 2012-19, 38 NJPER 191 (¶64 2011) (disciplinary procedures arbitrable); UMDNJ, P.E.R.C. No. 2010-45, 35 NJPER 461 (¶152 2009) (procedural protections such as reason for the action, opportunity to respond, and written charges prior to being placed on administrative leave do not significantly interfere with ability to impose major discipline)

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<sup>1/</sup> To contest the transfer of a teacher, a party must file a contested transfer petition asserting that the transfer was made for disciplinary and not operational reasons. The remedy for transfers that are found to be disciplinary are to return the teacher to his/her initial teaching assignment, which has already occurred here. N.J.A.C. 19:18-1.1 et seq.



Newark, P.E.R.C. No. 2022-47, 49 NJPER (¶4 2022) (some citations omitted), aff'd 2023 N.J. Super. Unpub. LEXIS 1627 (App. Div. 2023). We find that the Article V.4.A., which requires the disclosure of the identity of a complainant and the specific issue of the complaint prior to the Board's imposition of discipline to be akin to notice and generally legally arbitrable.

However, we must analyze the CNA's notice provision in the context of the facts presented. N.J.S.A. 9:6-8.10a(a)-(b) provides:

a. All records of child abuse reports made pursuant to section 3 of P.L.1971, c.437 (C.9:6-8.10), all information obtained by the Department of Children and Families in investigating such reports including reports received pursuant to section 20 of P.L.1974, c.119 (C.9:6-8.40), and all reports of findings forwarded to the child abuse registry pursuant to section 4 of P.L.1971, c.437 (C.9:6-8.11) shall be kept confidential and may be disclosed only under the circumstances expressly authorized under subsections b., c., d., e., f., and g. herein. The department shall disclose information only as authorized under subsections b., c., d., e., f., and g. of this section that is relevant to the purpose for which the information is required, provided, however, that nothing may be disclosed which would likely endanger the life, safety, or physical or emotional well-being of a child or the life or safety of any other person or which may compromise the integrity of a department investigation or a civil or criminal investigation or judicial proceeding. If the department denies access to specific information on this basis, the requesting entity may seek disclosure through the Chancery Division of the Superior Court. This section shall not be construed to

prohibit disclosure pursuant to paragraphs (2) and (7) of subsection b. of this section.

Nothing in P.L.1977, c.102 (C.9:6-8.10a et seq.) shall be construed to permit the disclosure of any information deemed confidential by federal or State law.

b. The department may and upon written request, shall release the records and reports referred to in subsection a., or parts thereof, consistent with the provisions of P.L.1997, c.175 (C.9:6-8.83 et al.) to:

(1) A public or private child protective agency authorized to investigate a report of child abuse or neglect;

(2) A police or other law enforcement agency investigating a report of child abuse or neglect;

(3) A physician who has before him a child whom he reasonably suspects may be abused or neglected or an authorized member of the staff of a duly designated regional child abuse diagnostic and treatment center which is involved with a particular child who is the subject of the request;

(4) A physician, a hospital director or his designate, a police officer, or other person authorized to place a child in protective custody when such person has before him a child whom he reasonably suspects may be abused or neglected and requires the information in order to determine whether to place the child in protective custody;

(5) An agency, whether public or private, including any division or unit in the Department of Human Services or the Department of Children and Families, authorized to care for, treat, assess, evaluate, or supervise a child who is the subject of a child abuse report, or a parent, guardian, resource family parent, or other person who is responsible for the child's

welfare, or both, when the information is needed in connection with the provision of care, treatment, assessment, evaluation, or supervision to such child or such parent, guardian, resource family parent, or other person and the provision of information is in the best interests of the child as determined by the Division of Child Protection and Permanency;

(6) A court or the Office of Administrative Law, upon its finding that access to such records may be necessary for determination of an issue before it, and such records may be disclosed by the court or the Office of Administrative Law in whole or in part to the law guardian, attorney, or other appropriate person upon a finding that such further disclosure is necessary for determination of an issue before the court or the Office of Administrative Law;

(7) A grand jury upon its determination that access to such records is necessary in the conduct of its official business;

(8) Any appropriate State legislative committee acting in the course of its official functions, provided, however, that no names or other information identifying persons named in the report shall be made available to the legislative committee unless it is absolutely essential to the legislative purpose;

(9) (Deleted by amendment, P.L.1997, c.175).

(10) A family day care sponsoring organization for the purpose of providing information on child abuse or neglect allegations involving prospective or current providers or household members pursuant to P.L.1993, c.350 (C.30:5B-25.1 et seq.) and as necessary, for use in administrative appeals related to information obtained through a child abuse registry search;

(11) The Victims of Crime Compensation Board,

for the purpose of providing services available pursuant to the "Criminal Injuries Compensation Act of 1971," P.L.1971, c.317 (C.52:4B-1 et seq.) to a child victim who is the subject of such report;

(12) Any person appealing a department service or status action or a substantiated finding of child abuse or neglect and his attorney or authorized lay representative upon a determination by the department or the presiding Administrative Law Judge that such disclosure is necessary for a determination of the issue on appeal;

(13) Any person or entity mandated by statute to consider child abuse or neglect information when conducting a background check or employment-related screening of an individual employed by or seeking employment with an agency or organization providing services to children;

(14) Any person or entity conducting a disciplinary, administrative, or judicial proceeding to determine terms of employment or continued employment of an officer, employee, or volunteer with an agency or organization providing services for children. The information may be disclosed in whole or in part to the appellant or other appropriate person only upon a determination by the person or entity conducting the proceeding that the disclosure is necessary to make a determination;

(15) The members of a county multi-disciplinary team, established in accordance with State guidelines, for the purpose of coordinating the activities of agencies handling alleged cases of child abuse and neglect;

(16) A person being evaluated by the department or the court as a potential care-giver to determine whether that person is willing and able to provide the care and support required by the child;

(17) The legal counsel of a child, parent, or guardian, whether court-appointed or retained, when information is needed to discuss the case with the department in order to make decisions relating to or concerning the child;

(18) A person who has filed a report of suspected child abuse or neglect for the purpose of providing that person with only the disposition of the investigation;

(19) A parent, resource family parent, or legal guardian when the information is needed in a department matter in which that parent, resource family parent, or legal guardian is directly involved. The information may be released only to the extent necessary for the requesting parent, resource family parent, or legal guardian to discuss services or the basis for the department's involvement or to develop, discuss, or implement a case plan for the child;

(20) A federal, State, or local government entity, to the extent necessary for such entity to carry out its responsibilities under law to protect children from abuse and neglect;

(21) Citizen review panels designated by the State in compliance with the federal "Child Abuse Prevention and Treatment Act Amendments of 1996," Pub.L.104-235;

(22) The Child Fatality and Near Fatality Review Board established pursuant to P.L.1997, c.175 (C.9:6-8.83 et al.); or

(23) Members of a family team or other case planning group formed by the Division of Child Protection and Permanency and established in accordance with regulations adopted by the Commissioner of Children and Families for the purpose of addressing the child's safety, permanency, or well-being, when the provision of such information is in

the best interests of the child as determined by the Division of Child Protection and Permanency.

Any individual, agency, board, court, grand jury, legislative committee, or other entity which receives from the department the records and reports referred to in subsection a., shall keep the records and reports, or parts thereof, confidential and shall not disclose the records and reports or parts thereof except as authorized by law.

[N.J.S.A. 9:6-8.10a(a)-(b) (emphasis added)]

N.J.A.C. 6A:16-11.1(a)(5)(iv)(1)(A) provides, in pertinent part:

(a) The district board of education shall develop and adopt policies and procedures for school district employees, volunteers, or interns to provide for the early detection of missing, abused, or neglected children through notification of, reporting to, and cooperation with appropriate law enforcement and child welfare authorities pursuant to N.J.S.A. 18A:36-25 and 25.2 and 9:6-8.10 and N.J.A.C. 6A:22-4.1(d). At a minimum, the policies and procedures shall include:

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iv. The maintenance, security, and release of all confidential information about potential missing, abused, or neglected child situations in accordance with N.J.S.A. 18A:36-19, N.J.S.A. 9:6-8.40, and N.J.A.C. 6A:32-7;

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(1) All information regarding allegations of potentially missing, abused, or neglected children reported to authorities about an employee, volunteer, or intern working in the school district shall be considered confidential and may be disclosed only as

required to cooperate in investigations pursuant to (a)2 and 3 above or by virtue of a court order.

(A) Records pertaining to such information shall be maintained in a secure location separate from other employee personnel records and accessible only to the school district chief school administrator or the chief school administrator's designee;

[N.J.A.C. 6A:16-11.1 (emphasis added)]

The above statute and regulation prescribe strict confidentiality requirements for records generated by the IAIU investigation. N.J.S.A. 9:6-8.10 sets out that "all records of child abuse reports" and "all information obtained by the Department of Children and Families in investigating such reports" must be kept confidential. Ibid. (emphasis added). As described above, the statute sets out 23 authorized reasons for disclosure. These facts, involving an individual requesting investigation records where the complaint was determined by DCPD to be unfounded, do not qualify as an authorized reason for disclosure under the statute. Moreover, the statute states:

"[a]ny board, court, grand jury, legislative committee, or other entity which receives from the department the records and reports referred to in subsection a., shall keep the records and reports, or parts thereof, confidential and shall not disclose the records and reports or parts thereof except as authorized by law."

Thus, the statute confers upon the Board an explicit requirement not to release the records it receives from the IAIU

investigation outside of the boundaries of the law.

N.J.A.C. 6A:16-11.1(a) (5) (iv) (1) (a) provides that "all information regarding allegations of potentially missing, abused, or neglected children reported to authorities about an employee . . . shall be considered confidential and may be disclosed only as required to cooperate in investigations. . . or by virtue of a court order." Ibid. (emphasis added). Thus, the regulation only provides two grounds for the disclosure of information related to allegations of potentially missing abused or neglected children - as required to cooperate in investigations or by virtue of a court order.

The Association has made it clear that it seeks the identity of the complainant and the specific issues involved in the complaint, as established in the Board's separate investigation. However, if the Board's investigation was a parallel investigation to the IAIU investigation, the investigations would necessarily overlap and the information requested by the Association would not be authorized by law. This matter would then be preempted by the above statute and regulation, which "expressly, specifically and comprehensively" sets out that the Board is required to maintain the confidentiality of records from the IAIU investigation. However, the Association claims that the Board's investigation leading to the grievant's transfer was different from the IAIU



investigation. There is no information in the record as to the basis for the Board's investigation.

Thus, what remains unclear on this record was whether the Board's investigation was parallel to or not connected to the IAIU investigation. To the extent the Board's investigation was parallel to the IAIU investigation, the grievance is not legally arbitrable due to the confidentiality requirements in N.J.S.A. 9:6-8.10 and N.J.A.C. 6A:16-11.1(a)(5)(iv)(1)(a). However, if the Board's investigation was not connected to the IAIU investigation, the grievance is legally arbitrable. We leave the parties to their proofs at arbitration.

ORDER

The Somerset Hills Board of Education's request for a restraint of binding arbitration is granted to the extent the Board's investigation was a parallel investigation to the IAIU investigation, but denied to the extent that its investigation was not connected to the IAIU investigation.

BY ORDER OF THE COMMISSION

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

ISSUED: April 25, 2024

Trenton, New Jersey