P.E.R.C. NO. 77-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW MILFORD BOARD OF EDUCATION,
Petitioner,

-and-

Docket No. SN-76-43

NEW MILFORD EDUCATION ASSOCIATION,
Respondent.

SYNOPSIS

A board of education initiated a scope of negotiations proceeding seeking a determination as to whether two issues concerning the accuracy of marginal ratings received by a teacher in two categories in the evaluation report of her performance made by her building principal, which the education association seeks to submit to arbitration on her behalf, are within the scope of collective negotiations. Since the contract pursuant to which the grievance/arbitration arose is governed by Chapter 303 of the Public Laws of 1968, the Commission applies the standards developed in the Dunellen trilogy and determines that the first issue, which contests the factual accuracy of the statement in the evaluation report that the teacher was late on seven specified dates, does not involve any educational policy judgments and is appropriate for resolution by an impartial arbitrator. Applying the same standards to the second issue as presented in this case the Commission finds that the evaluation of the teacher's willingness to carry out certain professional responsibilities does involve educational policy judgments and cannot be submitted to arbitration pursuant to a Chapter 303 contract, particularly where, as here, the teacher has suffered no personal or financial loss as a result of the evaluation.

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Appearances:
For the Petitioner, Gerald L. Dorf, P.A.
(Mr. Thomas J. Savage, of Counsel, Mr. Richard M. Salsberg, on the Brief)

For the Respondent, Goldberg, Simon & Selikoff, Esqs.
(Mr. Theodore M. Simon, of Counsel, Mr. Louis P. Buccieri, on the Brief)

DECISION AND ORDER

On May 7, 1976 the New Milford Board of Education (the "Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission (the "Commission") seeking a determination as to whether a certain matter in dispute between the Board and the New Milford Education Association (the "Association") was within the scope of collective negotiations.[1/]

The dispute before the Commission originally arose as a matter which the Association sought to process through the grievance/arbitration process contained within the parties' collective negotiations agreement. That agreement covered the period

1/ The Commission's authority to render such determinations is set forth in N.J.S.A. 34:13A-5.4(d), which states: "The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court."

from July 1, 1974 to June 30, 1976. The grievance was filed on behalf of an individual teacher employed by the Board. It seeks to contest, and have removed from her permanent file, marginal ratings received by the teacher in two categories in two evaluation reports made by the teacher's building principal. These reports were made on March 10 and March 26, 1975. The grievance was denied by the Board at each step of the grievance procedure and the Association, representing the teacher, has now sought to invoke binding arbitration, which is the last step in the parties' grievance/arbitration procedure.

This matter has already been submitted to the arbitrator on the limited question of whether the grievance was procedurally and substantively arbitrable under the parties' agreement. The arbitrator, in a decision dated February 27, 1976, decided that the grievance was arbitrable. When the arbitration hearing on the merits was scheduled for May 10, 1976 the Board filed the within Petition along with a request for a temporary restraint of arbitration pending this Commission's final decision on the scope of negotiations question. The Board based its request for the restraint on the ground that the Association seeks to contest the substantive merits of the evaluation, which the Board argues involve educational policy judgments regarding the teacher's performance and are therefore neither mandatorily negotiable, nor arbitrable, under a contract governed by Chapter 303 of the Public Laws of 1968.[2/]

2/ There is no dispute that this contract is governed by Chapter 303 and not the amendments of Chapter 123 of the Public Laws (Continued)

The Executive Director,[3] acting on behalf of the Commission, issued an Interlocutory Decision and Order restraining the arbitration of the merits of this dispute during the pendency of the scope of negotiations proceeding. In re New Milford Board of Education, P.E.R.C. No. 76-38, 2 NJPER 135 (1976). He determined that, given the fact that this was a Chapter 303 contract, there was a reasonable basis for the Board's contention that the matter in dispute may not be found to be within the scope of mandatory collective negotiations and therefore would not be arbitrable.[4]

Following the Executive Director's decision, the parties both submitted briefs[5] along with a copy of their contract,

2/ (Continued) of 1974. It covers the period from July 1, 1974 to June 30, 1976 and was executed by the parties on June 21, 1974. See Board of Education of the Township of Ocean v. Township of Ocean Teachers Association, Docket No. A-3334-76 (Appellate Division decided May 4, 1976, unreported); In re Bridgewater-Raritan Regional Board of Education, P.E.R.C. No. 77-21, 2 NJPER ____ (1976).

3/ Now Chairman of the Commission, Jeffrey B. Tener.

4/ As a Chapter 303 contract the grievance/arbitration clause of the parties' agreement must be interpreted in a manner consistent with Dunellen Board of Education v. Dunellen Education Association, 64 N.J. 17 (1973). In that case, the New Jersey Supreme Court held that disputes concerning matters which are predominantly educational policy judgments cannot be submitted to arbitration; instead they are to be resolved by the Commissioner of Education as a dispute or controversy arising under the Education Law. See N.J.S.A. 18A:6-9. Therefore, only disputes involving a mandatorily negotiable term or condition of employment may be submitted to arbitration under a Chapter 303 contract. But see In re Bridgewater-Raritan Regional Board of Education, supra, footnote 2, for the changes brought about by the amendments of Chapter 123 of the Public Laws of 1974.

5/ The Board had submitted an initial brief with its Petition and request for a temporary restraint of arbitration, but pursuant to the Commission's Rules, it also chose to submit a brief in reply to the Association's brief. N.J.A.C. 19:13-3.3.

the evaluations in dispute, the demand for arbitration, and the arbitrator's preliminary decision on the Board's objections to the arbitrability of the dispute. The facts essential to a determination of the scope issues can be easily gleaned from these submissions and are not contested.[6/]

On March 10, 1975 the teacher in question was evaluated by her building principal as to her "staff responsibilities." This apparently was part of a routine evaluation made of all teachers in that school. There were ten (10) criteria listed on the evaluation form and the individual received a standard rating in eight (8) areas and a marginal rating in two (2).[7/] The form was shown to the teacher and a meeting took place between her and the principal who made the evaluation on March 14, 1975 at which the evaluation was discussed.

On March 26, 1975 the same principal completed another evaluation of this teacher.[8/] This evaluation was based on both her "instructional performance" and "overall professional qualities". With regard to instructional performance she received an above-standard rating in one (1) category and a standard

6/ Neither party has requested an evidentiary hearing or oral argument before the Commission. See N.J.A.C. 19:13-3.4 and 19:13-3.6.

7/ There were three possible ratings with the best being "above-standard", then "standard" and the lowest being "marginal".

8/ This was apparently part of a required annual evaluation completed on all teachers. Neither party has commented upon or drawn any inference from the proximity of the two evaluations and it is apparently not relevant to this proceeding.

rating on the other ten (10) criteria. In "overall professional qualities" she received standard ratings in eight (8) areas and marginal ratings in the other two (2). The two marginal ratings were on criteria identical to the March 10, 1975 report.

In both the March 10th and March 26th evaluations, the two specific marginal ratings were with regard to "Promptness to Responsibilities" and "Willingness to Extend Oneself Professionally". The comments accompanying these marginal evaluations were also similar in both reports and are quoted herein in their entirety:

> "Promptness to Responsibilities - Rating is due to lateness to school on at least seven (7) occasions thus far this year (12/16/74, 1/13/75, 1/20/75, 1/21,75, 1/29/75, 2/7/75, 2/14/75).
>
> Willingness to Extend Oneself - Resistance has been shown in carrying out basic responsibilities in testing students for reading, adding reading students to the program, accepting study hall assignments". 9/

The teacher received an overall rating of standard and did not receive any derogatory recommendations. She is a tenured teacher and as of the date of the receipt of the final submission of the parties, August 31, 1975, there is no assertion that she had in any way been penalized or suffered any loss as a result of these evaluations.

9/ The wording in the second comment differed very slightly on the two reports but did in no way change the content. The quoted language is taken from the March 26, 1975 report. The wording was identical in both with respect to the Promptness comment.

Both parties rely on the Commission's decision in In re Englewood Board of Education, P.E.R.C. No. 76-23, 2 NJPER 72 (1976), appeal pending (Appellate Division Docket No. A-3018-75) as supportive of their respective positions. In that decision we held that fair dismissal procedures and teacher evaluation procedures relate to terms and conditions of employment and are thus proper and required subjects of collective negotiations. We distinguished between these procedures and the criteria used in the procedures and the judgments and decisions which are made as a result of these procedures.[10/] The Board argues that the marginal ratings are the merits of the decision itself and involve educational policy judgments which cannot be mandatorily negotiable.[11/] The Association argues that the ratings are "erroneous" and "false". It claims that the teacher does not question the Board's discretion to use these criteria in evaluating personnel but instead argues that the ratings are based on "false" and "erroneous" facts. The grievant denies the accuracy of the facts underlying the ratings.

10/ See also In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976); In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976); In re Plainfield Patrolmen's Benevolent Association, P.E.R.C. No. 76-42, 2 NJPER 168 (1976). In all these decisions we have distinguished between the procedures for evaluation, promotion and selection on the one hand and the qualifications and criteria used in making these decisions and the decisions themselves on the other.

11/ The Board also argued that arbitration was not the proper method to challenge the accuracy of the evaluations under the contract. It alleged that the agreement required the aggrieved teacher to note his or her comment on the evaluation form which then became part of the teacher's permanent file along with the evaluation form. As we have commented on numerous other occasions, agreements such as these go to contract arbitrability and not scope of negotiations and should be made to the arbitrator.

The Association claims that the factual accuracy of the evaluations is part of the evaluation procedure and is thus mandatorily negotiable and arbitrable.[12/]

In a recent Commission decision dealing with a Chapter 123 contract, we dealt with the distinction between the merits of a decision not to renew a non-tenured teacher's contract and the procedures utilized in reaching that decision. In re Bridgewater-Raritan Board of Education, P.E.R.C. No. 77-21, 2 NJPER ____ (1976). We held, in reliance on Englewood, supra, that the merits of the decision were an educational policy judgment and were not a mandatory subject of negotiations.[13/]

12/ The Association relies heavily on one particular portion of the Englewood decision, which was not part of the holding. In that portion of the decision we stated that "the giving of inaccurate reasons" could constitute a breach of the parties' fair dismissal procedure and therefore relate to the grievants' terms and conditions of employment. We went on to say that our comment was equally applicable to teacher evaluation procedures. P.E.R.C. No. 76-23 at pg. 11, 2 NJPER at 74.

Our reference in that section of the decision was not meant to say that a party could contest the accuracy of the judgment made at the conclusion of either a fair dismissal procedure or an evaluation procedure, but rather was intended to refer to the giving of false reasons to effectuate a dismissal or poor evaluation when the real reason for the poor rating might be due to union animus or some other protected activity. By "inaccurate reasons" we meant misrepresentations of fact, not disagreements over judgments or conclusions. We were alluding to the motive for the bad rating, not its correctness. American Association of University Professors v. Bloomfield College, 136 N.J. Super 442 at 447 (App. Div. 1975) for a somewhat similar discussion relating to a private university situation.

13/ We did state that there was nothing to preclude a board of education from negotiating the criteria for such decisions if it chose to do so and thus the merits were a permissive subject of negotiations.

We specifically withheld ruling on the factual accuracy of the allegations which form the basis for a board's decision, and left that question unanswered. In a footnote we attempted to illustrate our point by using the example of tardiness. We pointed out that the use of tardiness as a standard for evaluating performance was an educational policy judgment but that the finding that a particular teacher was in fact late on a given date did not involve any educational expertise but was merely a fact question. However, since that question was not before us in that case we did not pass upon whether that finding was part of the procedure or the substance of the dismissal.

We are now confronted with that question. However, it arises in the context of a Chapter 303, not 123, agreement and we must therefore apply the standards and analysis appropriate to such a contract.[14/] In the Dunellen trilogy of cases[15/] the New Jersey Supreme Court determined that only those items which are not predominantly educational policies and which directly affect the financial and personal welfare of employees may be submitted to arbitration. Applying that standard first to the marginal evaluation, "promptness to responsibilities", we

14/ By this we do not mean to imply that the result would necessarily be different but only that we are bound to analyze the dispute as we believe it would have been done by the Courts prior to the passage of Chapter 123 of the Public Laws of 1974.

15/ Dunellen Board of Education v. Dunellen Education Association, supra; Board of Education of the City of Englewood and Englewood Teachers Association, 64 N.J. 1 (1973); Burlington County College Faculty Association and Board of Trustees, Burlington County College, 64 N.J. 10 (1973).

believe that the question of whether the grievant was in fact late on the dates specified may be submitted to arbitration. As the comment on this category on the evaluation report indicates, it is based entirely on the allegation of seven latenesses on specified dates. We see no educational policy judgment involved in this question,[16/] and feel it is appropriate for resolution by an impartial arbitrator, assuming that the parties have agreed to submit such disputes to arbitration.

The second marginal rating, "willingness to extend oneself professionally", is not so straight forward. We believe that a court utilizing the standards set forth in the Dunellen trilogy would not have permitted the accuracy of this rating to be submitted to arbitration. The evaluation of the teacher's attitude toward additional duties is much more subjective and presumably involves the use of the principal's expertise and experience as an administrator and educator in arriving at the conclusion that the teacher's performance in this area was not satisfactory or was marginal. We therefore conclude that this second evaluation involves more educational judgment than does the first and, given the additional fact that the teacher has apparently suffered no personal or financial detriment from the judgment made, we conclude that arbitration of the accuracy

16/ We distinguish this from both the use of lateness as a criteria, which we have previously indicated is an educational policy judgment and the question of how many latenesses are too many. This, too, we feel involves educational judgment and managerial prerogative. The only issue which we feel involves mandatorily negotiable areas and thus arbitrable areas under a Chapter 303 contract is the fact question of whether the individual was late on the dates specified.

of the second rating would not have been permitted.

Therefore, since the arbitrator has already determined that the grievance is arbitrable under the parties' agreement, we hold that that part of the grievance contesting the factual accuracy of the alleged latenesses may be submitted to arbitration, but we restrain the parties from arbitrating that part of the dispute contesting the accuracy of the marginal rating in the category denominated "Willingness to Extend Oneself Professionally".

ORDER

Pursuant to N.J.S.A. 34:13A-5.4(d) and the foregoing discussion, the Public Employment Relations Commission hereby orders that the New Milford Education Association is permanently restrained from arbitrating that part of the instant dispute which contests the accuracy of the marginal rating in the March 10, 1975 and March 26, 1975 evaluation reports which are designated "Willingness to Extend Oneself Professionally".

It is further ordered that the temporary restraint of arbitration previously entered herein which prohibited the arbitration of the accuracy of the allegations of lateness contained in the marginal ratings of the March 10 and March 26, 1975 evaluation reports, which is designated "Promptness to

Responsibilities" is hereby dissolved and that limited matter may be submitted to arbitration in conformity to the discussion contained in this decision.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Commissioners Hipp and Hurwitz did not participate in this decision.
Chairman Tener, Commissioners Forst and Parcells voted for this decision.
Commissioner Hartnett voted against this decision.

DATED: Trenton, New Jersey
November 23, 1976
ISSUED: November 24, 1976