

I.R. NO. 89-3

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LACEY TP. BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-88-75

LACEY TP. EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

A Commission designee temporarily restrains arbitration of one grievance and denies a request for temporary restraint of another grievance pending a final decision on the negotiability issue by the full Commission. To the extent that the grievance contests a change in an employee's evaluation rating from equivocal to negative -- allegedly due to a grievance filing -- it appears that the grievance is non-negotiable and non-arbitrable; accordingly, the Association is restrained from proceeding to arbitration on this issue. To the extent that the grievance alleges that the Board did not provide the grievant with a timely written evaluation, the issue is mandatorily negotiable and arbitrable; accordingly, the Board's request for a temporary restraint of arbitration of this issue is denied.

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Appearances:

For the Petitioner  
Curry & Stein, Esqs.  
(Mark Rogers, of counsel)

For the Respondent  
New Jersey Education Association  
(Charles Walker, UniServ Rep.)

INTERLOCUTORY DECISION AND ORDER

The Lacey Township Board of Education ("Board") filed a petition for scope of negotiations determination on May 25, 1988, with the Public Employment Relations Commission ("Commission") seeking a determination as to whether certain matters in dispute between the Board and the Lacey Township Education Association ("Association") are within the scope of negotiations. The petition was accompanied by an Order to Show Cause requesting that the Association show cause why an order should not be issued staying the arbitration of this dispute pending a final determination of the negotiability issue by the Commission. The Order to Show Cause was executed on June 8, 1988, and was made returnable on June 20, 1988,

before Commission designee Edmund Gerber. At the parties' request, hearings were adjourned in this matter several times. I conducted an Order to Show Cause hearing on August 11, 1988, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. The parties submitted briefs, reply briefs and other documents and both parties argued orally at the hearing.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered.<sup>1/</sup>

The Association seeks to arbitrate the timing of the receipt by a tenured teacher of a written observation/evaluation report; and (b) the change of a conditional rating on this written evaluation to a negative rating in retaliation for a grievance filing. The Board argues that this grievance involves the

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<sup>1/</sup> Crowe v. DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975). See also Englewood Bd. of Ed. v. Englewood Teachers Assn., 135 N.J. Super 120, 1 NJPER 34 (App. Div. 1975).

application of evaluation criteria which is a non-negotiable managerial prerogative and therefore, not arbitrable. It further argues that inasmuch as the Board of Education ruled in the Association's favor at the pre-arbitration step of the grievance procedure on the issue of the timing of the receipt of the evaluation report, the issue is moot and there is nothing left to arbitrate.

The facts in this matter appear as follows:

On September 23, 1987, grievant Maryann Mutter, a tenured English teacher employed by the Board, was observed (for the purpose of being evaluated) teaching an English class by department supervisor Robert Ranta. On September 24 and 25, 1987, Mutter and Ranta had conferences concerning this observation/evaluation. On October 1 and 2, 1987, Ranta gave Mutter a written evaluation based upon his September 23 observation. On page 4 of the evaluation, under the heading "Overall Rating," it was stated, "except as noted in summary, this is a satisfactory observation report." On October 19, 1987, Mutter signed the written evaluation and filed a ten-page rebuttal.

The Association alleges, and the Board contests, that on approximately October 21, 1987, Association building representative Edward Kaczmarek met with High School Principal Frank Cangelosi and discussed the equivocal overall rating given to Mutter.

On October 23, 1987, Cangelosi directed Ranta to give a definitive overall rating to Mutter in place of the initial

equivocal rating he had given her. On October 26, 1987, Ranta changed only the overall rating on Mutter's evaluation from a conditional satisfactory to unsatisfactory. On October 29, 1987, Mutter was given a revised evaluation. In early November 1987, Mutter, appearing with Kaczmarek, declined Cangelosi's request to sign her revised evaluation. On November 24, 1987, Mutter and the Association filed a grievance concerning Mutter's revised rating.

The initial grievance states that the event precipitating the grievance occurred on October 29, 1987, the date Mutter received the revised evaluation. The grievance cites contract Articles 28 (Miscellaneous) and 20 (Grievance Procedure). The grievance alleges:

Changing Mrs. Mutter's rating of "except as noted in summary, this is a satisfactory observation report" to "this was an unsatisfactory observation" on her observation report dated September 23, 1987 represents a violation of her rights under contract and is contrary to law. (Mutter grievance dated 11/24/87).

The grievance requests that the grievant be made whole.

A level two grievance hearing was conducted on December 2, 1987; the grievance was denied. The Board conducted a level three hearing on December 22, 1987, and issued its decision on January 18, 1988. At this hearing, the grievant further alleged that the Board violated contract Article 21, which states that a teacher must be provided with a copy of any written classroom observation report/evaluation before the conference (between teacher and evaluator) wherein it is discussed.

In its decision, the Board concluded that Mutter was not given a copy of the written observation/evaluation report prior to the September 24 and September 25, 1987 conferences between Mutter and Ranta to discuss the report. The Board directed the administration to comply with Article 21(c) for all future observation/evaluation reports and conferences -- i.e., to give the written report to the teacher prior to the conference on the observation. The Board further concluded that the grievance involved evaluation criteria and therefore, was neither negotiable nor arbitrable.

On February 4, 1988, the Association submitted a demand for arbitration of this dispute to the American Arbitration Association. The statement of the grievance is as follows:

- 1) Changing from a satisfactory evaluation rating to an unsatisfactory rating.
- 2) Conference conducted prior to written report being distributed as set forth in contract.

The parties' most recent collective negotiations agreement covers the period from July 1, 1985 through June 30, 1988.

The Board asserts that this matter concerns the application of teacher evaluative criteria and argues that it is a managerial prerogative and therefore, neither negotiable nor arbitrable. The Board further asserts that because it found in grievant's favor on the procedural issue -- timing of the receipt of the written evaluation -- the grievant is not now able to arbitrate a matter on

which the Board has ruled in her favor. The Board finally notes that grievant could "make herself whole" by requesting, in accordance with contractual provisions, that additional observations of her teaching be made by other supervisory personnel.

The Association argues that it may arbitrate the change of rating from conditional satisfactory to unsatisfactory because it was a reprisal for the earlier referenced "oral grievance" on the equivocal rating. The Association further argues that because Mutter's supervisor, in violation of the contract, did not give her a written observation/evaluation report before conducting the observation conference, and because the Association was dissatisfied with the remedy which the Board proffered concerning this aspect of the grievance, it may submit this grievance to arbitration.

In Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), the Commission stated that in scope of negotiations matters it addresses only whether the disputed subject matter is within the scope of collective negotiations; contractual arbitrability and issues of fact in the grievance are for the arbitrator to resolve.

The Association has not claimed that Mutter's evaluation was disciplinary in nature. Cf. Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986) and State of New Jersey, P.E.R.C. No. 89-8, 14 NJPER 512 (¶19216 1988). Rather, the Association claims that Mutter's unsatisfactory evaluation rating was issued in retaliation for a grievance filing. The essence of the claim involves evaluation criteria and their application, a

non-negotiable subject. While such claims may be appropriately addressed to other forums -- a court or administrative agency -- it appears that they may not be addressed in arbitration. Teaneck Bd. of Ed. v. Teaneck Teachers' Assn., 94 N.J. 9 (1983); In re Wayne Tp., 220 N.J. Super 340 (App. Div. 1987); Perth Amboy Bd. of Ed., P.E.R.C. No. 88-140, 14 NJPER 460 (¶19191 1988) (Commission determined non-arbitrable a grievance alleging, in part, that negative comments in evaluation were reprisal for grieving prior year's evaluation); Neptune Bd. of Ed., P.E.R.C. No. 88-114, 14 NJPER 349 (¶19134 1988); and Englewood Bd. of Ed., P.E.R.C. No. 88-141, 14 NJPER 461 (¶19192 1988).

Whether the Board gave Mutter a timely written evaluation is a procedural issue in the evaluation process. Because it involves evaluation procedures and not criteria, the Association's grievance concerning the timeliness of Mutter's receipt of her written evaluation is negotiable and arbitrable.<sup>2/</sup> Bethlehem Tp. Ed. Assn. v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982) and Greater Egg Harbor Reg. H.S. Dist., P.E.R.C. No. 88-37, 13 NJPER 813 (¶18312 1987).

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<sup>2/</sup> However, the Board argues that because it ruled in the Association's favor on this issue at the level three grievance hearing, the Association is estopped from proceeding with the arbitration on this issue. The Association counters that the Board's remedy was inadequate. This issue concerns contractual arbitrability and grievance facts which I need not address. See Hillside Bd. of Ed.



To the extent that the grievance alleges that the change of evaluation rating from equivocal to negative was done in reprisal for a grievance filing, the grievance is non-negotiable and non-arbitrable. Accordingly, the Association is restrained from proceeding with the arbitration on this issue pending a decision by the full Commission.

To the extent that the grievance alleges that the Board did not provide grievant Mutter with a timely written evaluation, the issue is mandatorily negotiable and arbitrable. Accordingly, the Board's request for a temporary restraint of arbitration of this issue is denied.



Charles A. Tadduni  
Commission Designee

DATED: September 1, 1988  
Trenton, New Jersey