

I.R. NO. 88-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OLD BRIDGE TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-88-22

OLD BRIDGE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

A Commission Designee temporarily restrains arbitration of a grievance pending a final decision on the negotiability issue by the Commission. The grievance arose when an employee of the Old Bridge Township Board of Education received a "D" rating on the attendance component of her annual evaluation. The grievance alleges that the Board had violated the parties' contract, past practice and Board policies concerning evaluations. Through its grievance, the Association seeks to have the Board apply a uniform attendance measurement standard, provide the documentary support used to arrive at grievant's attendance rating and upgrade the grievant's attendance rating, as appropriate. The Board argued that the establishment and application of evaluation criteria is a managerial prerogative. The Association contends that where evaluations can be interpreted as discipline, they are negotiable and arbitrable.

Based upon the record in this matter, the attendance rating does not appear to be disciplinary in nature. Accordingly, inasmuch as the Commission has held that the establishment and application of evaluation criteria are non-negotiable managerial prerogatives, the arbitration was temporarily restrained.

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Appearances:

For the Petitioner
Wilentz, Goldman & Spitzer, Esqs.
(Steven J. Tripp, of counsel)

For the Respondent
Oxford, Cohen, Blunda, Friedman, LeVine & Brooks, Esqs.
(Sanford R. Oxford, of counsel)

INTERLOCUTORY DECISION

On August 28, 1987, the Old Bridge Township Board of Education ("Board") filed a Petition for Scope of Negotiations Determination ("Petition") with the Public Employment Relations Commission ("Commission") seeking a determination as to whether certain matters in dispute between the Board and the Old Bridge Education Association ("Association") are within the scope of negotiations. Pursuant to N.J.A.C. 19:13-3.10, the Petition was accompanied by an Order to Show Cause which requested that the Association show cause why an order should not be issued staying an arbitration of this dispute pending a final determination of the negotiability issue by the Commission. The Order to Show Cause was

executed on September 3, 1987, and was made returnable on September 11, 1987. On that date, the undersigned Commission Designee conducted an Order to Show Cause Hearing, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. The Board submitted a brief and both parties argued orally at the hearing.

The facts in this matter appear as follows. The Association is the statutory majority representative of a collective negotiations unit comprised of teachers, special teachers, resource teachers, Title III specialists, guidance personnel, psychologists, social workers, supplementary teachers, nurses, learning disability teacher consultants, speech correctionists, home-school coordinators, librarians, coordinator of Title III programs, secretaries, substitutes, substitute caller, para-professional aides, custodians, fieldmen, maintenance men, attendance officers, and transportation personnel. Helen Widget is employed as a custodian by the Old Bridge Township Board of Education at Madison Central High School. On her year-end evaluation for the 1986-87 school year, employee Widget received a "D" rating ("below average, but acceptable") for attendance. On May 4, 1987, the Association filed a grievance with the Board concerning Widget's year-end evaluation. The grievance alleges that the Board's conduct in this matter was violative of the parties' contract, past practices and Board policies concerning evaluations. Through its grievance, the Association seeks to have the Board apply the same attendance

measurement standard to Widget as was applied to other custodians and to upgrade her attendance rating accordingly. The Association further seeks all documentary support which the Board relied upon to determine Widget's assigned attendance rating and one-thousand dollars in damages. Arbitration is currently scheduled in this matter before arbitrator Carl Kurtzman on September 22, 1987 (Old Bridge Education Association/Old Bridge Township Board of Education, Grievance No. 8719).

Pursuant to Englewood Bd. of Ed. v. Englewood Teachers Assn., 135 N.J. Super 120, 1 NJPER 34 (App. Div. 1975), the Commission has the authority to stay arbitrations in order to prevent unnecessary litigation where it reasonably appears that the subject matter of the petition may be non-arbitrable.

The Board seeks to enjoin the arbitration scheduled herein, contending that the subjects addressed by the grievance are non-negotiable, non-arbitrable managerial prerogatives -- specifically, the Board argues that establishment and application of work attendance as an evaluation criteria is a managerial prerogative. The Board contends that the substantive contents of an evaluation, the rating assigned to a specific employee, the evaluation criteria selected and the measurement of those criteria are all inherent managerial prerogatives which are non-negotiable and non-arbitrable.

The Association agrees that the criteria used to evaluate employees are non-negotiable and non-arbitrable. The Association

cites Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986) and Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 87-136, 13 NJPER 358 (¶18147 1987), for the proposition that an evaluation which can be interpreted as discipline of an employee is negotiable and, therefore, can be arbitrated. The Association argues that evaluations are generally held to be non-negotiable, non-arbitrable subjects of negotiations because they are generally subjective in nature. However, the criteria in dispute herein -- work attendance -- is quantifiable and may be objectively assessed. The Association further contends that grievant Widget received disparate treatment by the Board -- specifically, that another custodial employee with more absences than Widget received a higher attendance rating than Widget was given.

The Board responds that there was no discipline intended or meted out to employee Widget in this matter. The Board contends that there is no intention to discipline the employee in connection with the evaluation (i.e., there was no withholding of increment, no warning of discipline, etc.). The Board further argues that the evaluation criteria of work attendance is not a simple issue -- various factors may affect the employer's assessment of the total number of absences of a given employee.

In Montville Tp. Bd. of Ed., P.E.R.C. No. 84-10, 9 NJPER 537 (¶14221 1983), the Commission, citing Hazlet Tp. Bd. of Ed. and Hazlet Tp. Teach. Assn., P.E.R.C. No. 79-57, 5 NJPER 113 (¶10066 1979), rev'd App. Div. Dkt. No. A-2875-78 (3/27/80), determined that

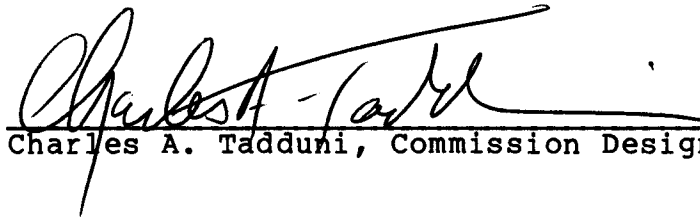
both the establishment and application of evaluation criteria are non-negotiable, non-arbitrable managerial prerogatives.^{1/} In Holland Tp. Bd. of Ed., supra, the Commission determined the negotiability/arbitrability of a grievance concerning two memoranda issued to an employee by the employee's supervisor. The memoranda concerned the employee's substantive evaluation and events which emanated from the evaluation process. Upon examination of all of the attendant circumstances, the Commission concluded that one memoranda was evaluative while the other was disciplinary in nature.

Based upon the facts, documents and arguments presently before me, and the foregoing discussion, it appears that the attendance rating of employee Widget is one part of her evaluation. The rating does not appear to be disciplinary in nature and, although the Association has argued that the rating is disciplinary, there is nothing in the record at this time which would support that contention. Holland Tp., supra.

Accordingly, as it appears that Montville and Hazlet govern the issue herein -- that the establishment and application of evaluation criteria are non-negotiable, non-arbitrable managerial prerogatives -- I hereby grant the Board's request for a temporary restraint of the arbitration scheduled in this matter and ORDER that

^{1/} See also Bethlehem Tp. Ed. Assn. v. Bethlehem Tp. Bd. of Ed., P.E.R.C. No. 80-5, 5 NJPER 290 (¶10159 1979), affm'd 177 N.J. Super 479 (App. Div. 1981), aff'd 91 N.J. 38 (1982) and Hoboken Bd. of Ed., P.E.R.C. No. 84-139, 10 NJPER 353 (¶15164 1984).

the arbitration of the instant grievance is restrained pending a final determination of the Board's scope of negotiations petition by the full Commission.


Charles A. Tadduni, Commission Designee

DATED: September 17, 1987
Trenton, New Jersey