P.E.R.C. NO. 94-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MANVILLE BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-93-68

MANVILLE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Manville Education Association against the Manville Board of Education to the extent the grievance challenges a teacher's performance evaluation, the contents of a memorandum from the principal to the teacher, and the superintendent's directive that the teacher's proficiency on the Apple computer be reevaluated. The Commission declines to restrain arbitration over a memorandum stating that the teacher's refusal to attend a meeting without an Association representative was insubordination. The Commission also declines to restrain arbitration over a challenge to the late delivery of a memorandum. The Commission rejects the Board's claim that arbitration of any disputes otherwise within the scope of negotiations is nevertheless preempted given the Association's allegation of anti-union animus. Finally, the Commission notes that it has no power to grant the Board's request for litigation costs.

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Appearances:

For the Petitioner, Cassetta, Taylor and Whalen, consultants (Garry M. Whalen, on the brief)

For the Respondent, John A. Thornton, Jr., NJEA Representative

DECISION AND ORDER

On February 8, 1993, the Manville Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Manville Education Association. The grievance asserts that comments on a teacher's annual evaluation and additional memoranda and events, some of which relate to those comments, constituted harassment and discipline without just cause in violation of the parties' collective negotiations agreement.

The parties have filed exhibits and briefs. These facts appear.

The Association represents the Board's teachers. On October 20, 1992, the parties entered into a collective negotiations

agreement effective from July 1, 1991 to June 30, 1994. The grievance procedure ends in binding arbitration of contractual disputes.

Dorothy Story teaches business classes. She is also an Association building representative and a member of its negotiations team. During the spring of 1992, an impasse had been reached in negotiations for what turned out to be the current agreement. Faculty members were apparently leaving classroom bulletin boards blank as a protest to support the Association's collective negotiations position.

In March 1992, Story received an evaluation from her supervisor. The supervisor's only negative comment was the following:

> Based upon Dorothy's oral and written responses to a classroom observation, there is a definite need for a more positive attitude toward suggestions that are clearly intended to improve instruction.

However, Barbara Feldman, the high school principal, added these comments to the evaluation:

> Dottie is to be commended for facilitating the transition of our business classes to state-of-the-art technological equipment and curriculum. There is no doubt that our students will be better prepared for their future endeavors, whether in the business world or college, as a result of this transition and Dottie's enthusiastic support of the change.
>
> To improve performance it is suggested that Dottie concentrate more on communicating the positive aspects of our school community such as these fine improvements in her department. At times, she is very negative, sending out signals

> that are damaging to the self esteem and morale of her fellow colleagues. This isn't good for anybody, including Dottie. It is also poor role modeling for our students.
>
> I would also like to suggest that Dottie use her curriculum and instruction expertise in business education to explore ways to provide additional educational experiences for our students such as establishing an FBLE and/or COE program in her department.[1/]

Feldman had not formally observed Story in class.

After meeting with Feldman several times, Story added the following rebuttal to her evaluation:

> After receiving the summative on March 30, I met with Ms. Feldman on three occasions for clarification of her intent (3/31, 4/1, 4/2). I specifically requested that the second paragraph be eliminated, particularly the sentence that begins "At times..." and the sentence that begins "It is also poor..." The reason for the request is that the paragraph has no basis in fact as noted by my department head's rating on Section II.
>
> At the first conference meeting (3/31), Ms. Feldman offered no evidence to support her charge. She, instead, referred to third and fourth party staff members innuendos. It was time for my class and so we agreed to meet the next day.
>
> At the second post conference meeting (4/1), Ms. Feldman again referred to innuendos of staff members and now added innuendos attributed to students. She also informed me that she kept a list of students who have discussed me with her but I was not allowed to know who they were.

1/ The Association claims that Story had an evaluation conference on March 5 and did not receive a written evaluation until after the principal added her comments. Resolving this factual dispute is not essential to resolving the legal issues.

> At the end of this meeting, she agreed to remove the last two sentences of the second paragraph but not the entire paragraph as requested. I agreed to this compromise since I could rebut the remainder. However, Ms. Feldman then startled me by ordering me not to talk negatively about the school or the program here or in public. She actually attempted to abridge my First Amendment rights. I asked her to clarify and she repeated what amounts to be a "gag order" abridging my First Amendment rights.
>
> In the hallway the next morning (4/2), Ms. Feldman told me she would remove the last two sentences only if I submitted my teacher comments first; i.e., she wanted to see what I had written before she would honor our agreement.
>
> That afternoon at our third post conference meeting (4/2), she changed our agreement yet again. Ms. Feldman now said she would only honor our agreement if I wrote no teacher comments and no rebuttal at all.
>
> She then mentioned by name two high school administrators whom she claimed had complained about me to her. At this point, the meeting terminated. I later approached both named administrators and ascertained that Ms. Feldman's statement about them was false.
>
> I also feel that Ms. Feldman is out of line for imposing the pet name "Dottie" on me and by referring to me in this manner in my summative evaluation. My given name -- the name to which I am referred to professionally -- is Dorothy.
>
> Finally, I find that Ms. Feldman's actions in this matter were extremely unprofessional and demeaning, and I find her comments in this summative to have had a profoundly negative impact on me in that they are greatly damaging to my self-esteem and morale.

On April 2, 1992, Feldman saw Story in a corridor and asked her to supervise a study hall so that the students could use the computers. Story allegedly responded that she couldn't help the

students because she knew only how to turn on the computers and boot them up.

On April 6, 1992, Story was summoned to meet with Feldman. Story arrived accompanied by the Association president. Feldman refused to allow the president to attend the meeting because she said it was not investigatory. The meeting was not held because Story would not attend without representation. That same day Feldman wrote a memorandum accusing Story of insubordination. Over the next few days Feldman and Story exchanged memoranda concerning Story's refusal to attend and the reasons she wanted representation.

On April 9, 1993, Feldman prepared a memorandum concerning the study hall conversation. Copies were sent to the superintendent and the Association's president. Story received the memorandum on April 16, the day before vacation. The memorandum noted that the curriculum to be taught by Story during the 1989-1990 and 1990-1991 school years had included the Appleworks computer program used by study hall students. Feldman said that the conversation caused her to doubt Story's ability to have taught the curriculum and her competency as a business teacher and former business department supervisor. Story responded to Feldman the same day with a short memorandum stating that Feldman's memorandum was untrue and that she had no idea what Feldman was talking about.

On April 30, 1992, the Association filed a grievance. Paragraph a alleges that the administration harassed Story because she had filed a sex discrimination charge, because of events related

to comments placed on her evaluation form, and "because of other unjust and anti-union animus reasons." Paragraph b states, in part, that Story had been disciplined without just cause. The grievance asks for monetary damages and other relief, including the removal of offensive materials from Story's personnel files; a directive to bar the principal from harassing employees; and a letter of reprimand to the principal.

The grievance was denied at all stages of the grievance procedure. At his level, the superintendent, in view of Feldman's April 9 memorandum, directed Feldman to meet with Story to reevaluate her proficiency on the Apple computer. After meeting with Story, Feldman determined that a reevaluation was not necessary.

Arbitration was demanded and a hearing was scheduled. The parties attempted to frame an issue. The Board's representative argued that the grievance was not arbitrable to the extent it challenged Story's evaluation and memoranda regarding her teaching competency. The Board also objected to arbitration of claims that Story's right to a Weingarten representative[2/] was violated or that the Board's actions were motivated by anti-union animus, asserting that such claims could only be heard as unfair practice charges. Both parties agreed to adjourn the arbitration to allow the Board to seek a ruling from us. This petition ensued.

2/ NLRB v. Weingarten, 420 U.S. 251 (1975)

The Board asserts that Feldman's comments on the evaluation form and on the April 9 memorandum are evaluative, rather than disciplinary, and hence, are not subject to binding arbitration; the conferences between Story and Feldman regarding the evaluation are part of that process and are nonarbitrable; the allegations of Weingarten violations and anti-union animus must be contested through unfair practice proceedings; and the allegation of harassment in retaliation for filing a sex discrimination claim must be heard by the Division on Civil Rights. Finally, it asserts that the Association should be ordered to pay the Board's arbitration and litigation costs because we restrained arbitration over Story's evaluation in the prior school year. Manville Bd. of Ed., P.E.R.C. No. 92-51, 17 NJPER 503 (¶22246 1991).

The Association characterizes this dispute as involving discipline of a teacher through a pattern of harassment by an administrator. The Association also notes that the contract provisions cited in the grievance include a discipline for just cause provision, a nondiscrimination clause, and a clause incorporating state law guarantees into the agreement -- all mandatory provisions.

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 contractual merits of this grievance or any contractual defenses the Board may have.

In Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt. No. A-2053-86T8 (10/23/87), we concluded that the discipline amendment to N.J.S.A. 34:13A-5.3 permitted negotiations and arbitration of allegedly unjust discipline, but not binding arbitration of evaluations of teaching performance. We stated, in part:

> We realize that there may not always be a precise demarcation between that which predominantly involves a reprimand and is therefore disciplinary within the amendments to N.J.S.A. 34:13A-5.3 and that which pertains to the Board's managerial prerogative to observe and evaluate teachers and is therefore nonnegotiable. We cannot be blind to the reality that a "reprimand" may involve combinations of an evaluation of teaching performance and a disciplinary sanction; and we recognize that under the circumstances of a particular case what appears on its face to be a reprimand may predominantly be an evaluation and vice-versa. Our task is to give meaning to both legitimate interests. Where there is a dispute we will review the facts of each case to determine, on balance, whether a disciplinary reprimand is at issue or whether the case merely involves an evaluation, observation or other benign form of constructive criticism intended to improve teaching performance. While we will not be bound by the label placed on the action taken, the context is relevant. Therefore, we will presume the substantive comments of an evaluation relating to teaching performance are not disciplinary, but that statements or actions

> which are not designed to enhance teaching performance are disciplinary.

The grievance in part challenges comments on an annual performance evaluation. See Holmdel Tp. Bd. of Ed., P.E.R.C. No. 92-6, 17 NJPER 378 (¶22178 1991); Lower Camden Cty. Reg. H.S. Dist. No. 1, P.E.R.C. No. 90-118, 16 NJPER 427 (¶21181 1990); Ridgefield Park Bd. of Ed., P.E.R.C. No. 90-70, 16 NJPER 139 (¶21054 1990); State of New Jersey, P.E.R.C. No. 89-8, 14 NJPER 512 (¶19216 1988); Neptune Tp. Bd. of Ed., P.E.R.C. No. 88-114, 14 NJPER 349 (¶19134 1988). Although paragraph a does not focus on Story's method of instructing students, its comments relate to her performance as a teacher and are not disciplinary in nature. Given the nature of these comments, the fact that Feldman did not observe Story is of no consequence. See Hoboken Bd. of Ed., P.E.R.C. No. 84-139, 10 NJPER 353 (¶15164 1984). The evaluation does not formally reprimand Story or warn of more severe consequences if she does not promote her department's achievements. Because this paragraph is not predominately disciplinary in nature, we restrain arbitration.

We decline to restrain arbitration over Feldman's April 6 memorandum stating that Story's refusal to attend a meeting without an Association representative was insubordination. This memorandum reprimands Story for alleged misconduct and is disciplinary. We do not agree that this aspect of the grievance seeks to redress an alleged violation of N.J.S.A. 34:13A-5.4(a)(1). The issue of whether Story had a right to representation based upon the

Employer-Employee Relations Act, education laws,[3/] or the parties' agreement[4/] simply bears upon whether there was just cause to reprimand Story for insubordination.

We restrain arbitration over the claim that the April 9 memorandum constituted discipline without just cause and harassment. The memorandum simply records a question that Feldman had about Story's teaching proficiency. It does not formally reprimand Story or warn of disciplinary consequences. While it may not have been warranted given Story's consistently excellent evaluations and while the memorandum may have been, in part, a sarcastic response in an escalating battle between Story and Feldman, we cannot say that it was disciplinary.

The grievance also challenges the late delivery of the April 9 memorandum to Story. This aspect of the grievance is legally arbitrable as it alleges a violation of evaluation procedures.

The Association also claims that the Superintendent's directive that Story's proficiency on the Apple Computer be reevaluated constituted harassment or discipline without just cause. We restrain arbitration over this claim. The superintendent was not involved in the hallway incident with Story. He received

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3/ See N.J.S.A. 18A:25-7.

4/ See Atlantic Highlands Bd. of Ed., P.E.R.C. No. 93-40, 19 NJPER 7, 8 (¶24005 1992); Edison Tp. Bd. of Ed., P.E.R.C. No. 83-100, 9 NJPER 100, 102 (¶14055 1983)

the April 9 memorandum and Story's denial. He stated that the only way to resolve the matter was to have Story evaluated as to her proficiency on the Apple computer and the related curriculum. Given these facts, an arbitrator cannot second-guess the superintendent's educational decision to ensure that Story was competent in this subject area.

We reject the Board's claim that arbitration of any disputes otherwise within the scope of negotiations is nevertheless preempted given the Association's allegation of anti-union animus. The restraint of arbitration in Jefferson Tp. Bd. of Ed. v. Jefferson Tp. Ed. Ass'n, 188 N.J. Super. 411 (App. Div. 1982), rev'g and remand'g P.E.R.C. No. 82-43, 7 NJPER 614 (¶12274 1981), rests on a determination that anti-union discrimination was the dominant and perhaps sole issue raised in that grievance. We do not make a similar finding on this record. Moreover, when we decided Jefferson, the Act had not yet been amended to allow agreements permitting binding arbitration of disciplinary actions absent an alternate statutory appeal procedure. Thus, the underlying decision was outside the scope of negotiations. Here, the claims we have found legally arbitrable are within the scope of negotiations and an arbitrator's jurisdiction to review the contractual merits of those claims should not be displaced simply because our unfair practice jurisdiction could be invoked to review an aspect of those claims.

Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n., 94 N.J. 9 (1983) also does not bar arbitration. Binding arbitration is barred only where a grievance claims that a managerial decision was tainted

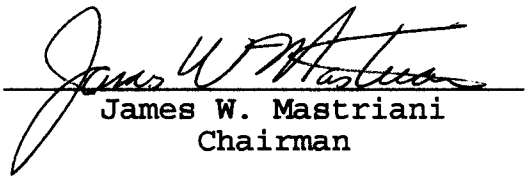
by discrimination. Teaneck itself held that a hiring decision was a matter of managerial prerogative pertaining to governmental policy and was nonarbitrable, regardless of whether it was allegedly discriminatory. Unlike Teaneck, this case involves a term and condition of employment: the ability to have disciplinary reprimands reviewed through binding arbitration absent an alternate statutory appeal procedure. Justice Handler's concurring opinion properly recognizes that disputes over employment conditions are different from disputes over managerial prerogatives. Id. at 21. Arbitrators cannot and do not usurp our jurisdiction when they determine whether a collective negotiations agreement has been violated under all the circumstances of a case. Our decision protects management's right to evaluate Story by insulating the evaluations of teaching performance from review by an arbitrator.

The Board has asked that we award litigation costs. We have no power to do so. See Balsey v. N. Hunterdon Bd. of Ed., 117 N.J. 434, 441-444 (1990).

ORDER

The request of the Manville Board of Education for a restraint of binding arbitration is granted to the extent the grievance challenges Story's performance evaluation, the contents of the April 9 memorandum from Feldman to Story, and the superintendent's directive that Story's proficiency on the Apple computer be reevaluated. The request is otherwise denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners, Goetting, Grandrimo and Smith voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: Trenton, New Jersey
November 15, 1993
ISSUED: November 16, 1993