P.E.R.C. NO. 2021-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2021-026

CITY ASSOCIATION OF SUPERVISORS
AND ADMINISTRATORS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Newark Board of Education for a restraint of binding arbitration of a grievance filed by the City Association of Supervisors and Administrators (CASA), alleging the Board violated the parties' collective negotiations agreement (CNA) when it designated someone other than the superintendent or assistant superintendent to evaluate the grievant, a school principal, as required by a CNA provision to which the Board previously agreed and enforced; and seeking removal from the grievant's file of evaluative documents prepared by that individual. The Commission finds the Board has a non-negotiable, managerial prerogative to determine who will prepare evaluations of teaching staff members; and CASA concedes the challenged documents are purely evaluative, making no argument that they are disciplinary and therefore arbitrable. The Commission further finds that an enforceable past practice cannot arise from the Board's prior history of agreement to or compliance with such a contract term.

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, Scarinci Hollenbeck, attorneys (Ramon E. Rivera, of counsel; John J.D. Burke, on the brief)

For the Respondent, Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys (Dennis McKeever, of counsel and on the brief; Martin J. Malague, on the brief)

DECISION

On January 13, 2021, the Newark Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of two grievances filed by the City Association of Supervisors and Administrators (CASA). The grievances allege that the Board violated the parties' collective negotiations agreement (CNA) when it designated Maria Ortiz, the Board's Executive Director of Student Life, to evaluate the grievant.

The Board filed briefs, exhibits and the certification of its attorney, John J.D. Burke. CASA filed a brief, exhibits and

the certification of its counsel, Dennis McKeever. These facts appear.

CASA represents all Principals of senior and junior high schools, middle, elementary, and special schools; all Vice Principals; all instructional Directors; all instructional Assistant Directors; all instructional Supervisors and Central Office Coordinators; all Department Chairpersons, Department Chairpersons-Athletics, head Guidance Counselors, and Curriculum Specialists; and all individuals serving in an acting capacity for thirty (30) or more days in any of the above categories. The Board and CASA are parties to a CNA in effect from July 1, 2017 through June 30, 2020, the terms of which are codified in a Memorandum of Agreement dated December 2017. The grievance procedure ends in binding arbitration.

Article XIV of the parties' CNA, entitled "Principals," provides in relevant part:

> Section J - Evaluation
>
> Principals are to be evaluated solely by the Superintendent, or the appropriate Assistant Superintendent.

The grievant is a tenured administrative staff member presently employed by the Board in the capacity of Principal. The grievant has served in the position of Principal for over ten years in various schools and assignments. At the beginning of the 2019-2020 school year, the grievant came to understand that

his supervisor for the 2019-2020 school year would be the Executive Director of Student Life. According to CASA, from the very beginning of the 2019-2020 school year, the Director targeted the grievant for termination. The process began with the issuance of a memorandum on October 11, 2019 that modified the grievant's long-standing work hours, work load and work location.

On November 14, 2019, the Director issued a "Neglect of Duty" memorandum to the grievant, and on December 16, the Director completed a "Midyear Observation" on the grievant.

On January 22, 2020, CASA submitted two grievances, designated #1395 and #1396, on behalf of the grievant. Grievance #1395 demands that the Neglect of Duty memorandum be removed from the grievant's personnel file. Grievance #1396 demands that the MidYear Observation be removed from the grievant's personnel file. The grievances allege substantially similar factual bases. Grievance #1395 alleges:

> The memorandum was evaluative in nature and was a direct result of the increase in [the grievant's] workload which is outlined in depth in grievance 1394.[1/] Director Ortiz

1/ The record does not contain a copy of grievance #1394. We do not address it in this decision, as it is not the subject of the scope of negotiations petition at issue, by which the Board seeks to restrain arbitration of grievances #1395 and #1396. CASA's exhibits also include a Discrimination-Harassment Complaint form dated January 6, 2020, which the grievant filed against the Board. This document alleges (continued...)

> is not authorized by the CASA contract to evaluate [the grievant]. Furthermore, the memorandum was issued in retaliation for [the grievant's] grieving the increase in his workload and change to his work schedule.

Grievance #1396 alleges:

> The observation was evaluative in nature and was a direct result of the increase in [the grievant's] workload which is outlined in depth in grievance 1394 and 1395. Director Ortiz is not authorized by the CASA contract to evaluate [the grievant]. Furthermore, the observation was issued in retaliation for [the grievant's] grieving the increase in his workload, change to his work schedule and neglect of duty memorandum.

Both documents detail an identical "legal basis" for the grievances:

> CASA/District contract including but not limited to, Article I, Article III, Article XIV, Section J, prior arbitration awards, District policy and past practice.

However in the parties' briefs, the focus of the dispute is on Article XIV, Section J, and the alleged past practice.

1/ (...continued)
discrimination or harassment based on race, age and retaliation, and states, among other things, "The subject of [the] Complaint concerns 3 pending grievances 1394, 1395 and 1396." CASA states in its brief (but not in its certification) that this "hostile workplace complaint" has "not been investigated at this time." The Board's submissions do not address it.

The Board denied both grievances and on February 21, 2020, CASA filed Requests for Submission of a Panel of Arbitrators.[2/] 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

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2/ On June 4, 2020, the Board issued a letter to the grievant indicating that it would be withholding his increment. That matter is currently pending before the Office of Administrative Law.

> 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.
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> [Id. at 404-405.]

The Board argues that arbitration must be restrained, because the designation of who will evaluate teaching staff members is not subject to negotiation. Court and Commission decisions have established it as a non-negotiable managerial prerogative, and both N.J.S.A. 18A:6-121(a) and N.J.A.C. 6A:10-5.4(a) expressly reserve the choice or designation of an evaluator to the Superintendent or the Chief School Administrator.[3/] The Board further argues that the existence of a contract provision governing a non-negotiable term does not render that term negotiable, or enforceable against the Board.

CASA argues that the substance of Article XIV, Section J, of the CNA is not preempted, as the provision merely memorializes

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3/ N.J.S.A. 18A:6-121(a) provides: "In order to ensure the effectiveness of the schools in the district, the superintendent of schools or his designee shall conduct evaluations of each principal employed by the school district, including an annual summative evaluation." N.J.A.C. 6A:10-5.4(a) provides: "A chief school administrator, or his or her designee, shall conduct observations for the evaluation of principals pursuant to N.J.S.A. 18A:6-121."

the responsibility for evaluations as codified by N.J.S.A. 18A:6-121(a); and restricting evaluations of principals to the Superintendent or Assistant Superintendent affects working conditions and does not interfere with any managerial prerogative or government policy. CASA contends that the contractual provision is consistent with the parties' mutual interest in establishing an organizational hierarchy, and it allows the Superintendent or Assistant Superintendent to evaluate principals in the "time and manner" the Board chooses. In that sense, CASA argues, it is less restrictive than proposals that the Commission has found to be negotiable, concerning the timing of evaluations and requiring a board to commit to an evaluator by a specific date. CASA further argues that because the Board itself has previously deemed Article XIV, Section J of the CNA to be negotiable, and has maintained and enforced it through several rounds of negotiations and prior grievances, it has become a term and condition of employment that may not be altered without negotiation. Finally, CASA argues that the Board has voluntarily waived any prerogative it may have through its repeated negotiations on, enforcement of and benefit from Article XIV, Section J of the CNA.

In reply the Board reiterates that, under binding court precedent, the Board lacks the authority to agree to a contractual provision limiting its managerial prerogative.

Therefore Article XIV, Section J is invalid and may not be enforced against the Board in any arbitration proceeding. The Board adds that the Commission, in applying that precedent, has held that an alleged past practice cannot transform a non-negotiable managerial prerogative into a negotiable issue. The Board argues that Commission decisions relied upon by CASA, which found waivers through past practices, are distinguishable, because those addressed mandatorily negotiable issues, not a non-negotiable managerial prerogative.

We emphasize at the start of our analysis that, in this case, we are not called upon to exercise our jurisdiction under N.J.S.A. 34:13A-5.3 and N.J.S.A. 34:13A-29 to determine whether documents placed within the grievant's personnel file were predominantly evaluative, or predominantly disciplinary in nature. If the issue in dispute was whether the documents were disciplinary versus evaluative, removal of them from the personnel file would be arbitrable if they were predominately disciplinary. See, e.g., Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd, NJPER Supp.2d 183 (¶161 App. Div. 1987)(distinguishing between evaluations of teaching performance, which are subject to review by the Commissioner of Education, and disciplinary reprimands, which are arbitrable under our Act); Pleasantville Bd. of Ed., P.E.R.C. No. 2019-34, 45 NJPER 313 (¶83 2019)(declining to restrain arbitration of

grievances over letters issued to school administrators and made part of their personnel files, finding they were predominately disciplinary because they contained statements that were not neutral in tone, did not contain a corrective action plan, and were issued outside regular evaluation process). Here, however, CASA concedes the documents are evaluative and makes no argument about them being disciplinary and therefore arbitrable. The grievances at issue assert that both documents are "evaluative in nature," and that "Director Ortiz is not authorized by the CASA contract to evaluate [the grievant]." In its brief, CASA states that the Neglect of Duty memorandum was "unmistakably evaluative in nature" (CASA's Br. at 3), and does not argue otherwise with respect to the Midyear Observation. Nor does CASA claim that the Board failed to follow evaluation procedures[4/] with respect to either the memorandum or the Midyear Observation.

Based upon the parties' submissions, this dispute is solely about whether the Board's designation of the person who evaluates the job performance of its school principals including the grievant, in particular, is legally arbitrable; even if that designee is not the Superintendent or Assistant Superintendent,

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4/ Procedural aspects of teaching staff member evaluations are generally mandatorily negotiable unless otherwise specified by statute or regulation. See Linden Bd. of Ed. and Linden Ed. Ass'n, P.E.R.C. No. 80-6, 5 NJPER 298 (¶10160 1979), aff'd 177 N.J. Super. 479 (App. Div. 1981), aff'd, 91 N.J. 38 (1982).

as required by a CNA provision to which the Board previously agreed and enforced. We grant the Board's request for a restraint of arbitration on the narrow issue presented.

School boards have a non-negotiable, managerial prerogative to determine who will prepare evaluations of teaching staff members. This has been upheld in numerous Commission and court decisions, including with respect to disputes over grievances challenging that prerogative, as in the instant case, and in disputes over contract proposals on the subject. Rutgers, State University v. Rutgers Council of AAUP Chapters, 256 N.J. Super. 104, 121-22 (App. Div. 1992), aff'd, 131 N.J. 118 (1993)("designation of who performs an evaluation, and the role of such evaluator within the process itself has consistently been held non-negotiable over claims that such provisions are merely procedural"), citing, e.g., Bethlehem Tp. Bd. of Ed., P.E.R.C. No. 80-5, 5 NJPER 290 (¶10159 1979)(holding non-negotiable a proposal to restrict evaluators to full-time district employees certificated in instructional area being evaluated), aff'd 177 N.J. Super. 479 (App. Div. 1981), aff'd 91 N.J. 38 (1982); Tenafly Bd. of Ed., P.E.R.C. No. 83-51, 8 NJPER 621 (¶13297 1982). See also, Middletown Tp. Bd. of Ed., P.E.R.C. No. 97-70, 23 NJPER 49 (¶28033 1996)(restraining arbitration of grievance challenging, among other things, board's "prerogative to decide which supervisory employees will evaluate particular employees");

East Orange Bd. of Ed., P.E.R.C. No. 80-154, 6 NJPER 331 (¶11164 1980)(restraining arbitration of grievance alleging board violated CNA by ordering "Supervisors" to evaluate classroom teachers, finding "identity of the person responsible for conducting substantive evaluations of tenured as well as non-tenured teaching personnel is not negotiable"); Matawan Regional Bd. of Ed., P.E.R.C. No. 80-153, 6 NJPER 325 (¶11161 1980)("provision which delineates restrictions on who will be responsible for conducting substantive evaluations of teaching personnel is not negotiable"); Newark Bd. of Ed., P.E.R.C. No. 80-2, 5 NJPER 283 (¶10156 1979)("Board cannot be required to negotiate the composition of a body it may choose to create to assist the Executive Superintendent in making promotional recommendations to the Board").

CASA's reliance on Bethlehem, supra, is misplaced. There the court affirmed, among other things, the Commission's holding in P.E.R.C. No. 80-5, 5 NJPER 290, that a proposal that teachers be notified by September 1 of each year of who will evaluate them is a negotiable term and condition of employment which relates to evaluation procedures. 91 N.J. at 51. Negotiation over such a notice provision does not significantly interfere with a board's exercise of its managerial prerogative to choose the evaluators, in the first instance. Here, Article XIV, Section J of the parties' CNA dictates the Board's choice of evaluator, a subject

whose grievability, in the abstract, we have determined is not within the scope of collective negotiations. Ridgefield Park, supra, 78 N.J. at 154. As such, it is not merely a negotiable procedural aspect of the evaluation process. The Board's control of the "time and manner" of evaluations, as CASA argues, does not change that result.

We also reject CASA's arguments that the Board waived its right to choose evaluators, or should be estopped from exercising it now, based upon the Board's history of agreeing to the CNA provision in successive contracts, and enforcing it in the past. In Ridgefield Park, supra, the Supreme Court of New Jersey found unenforceable an existing contract term that limited a board's non-negotiable managerial prerogative:

> Since the subject of teacher transfers is not within the scope of mandatory negotiability, the Board acted in excess of its authority in agreeing to a provision of its collective agreement with the Association which would limit its managerial prerogatives on the subject.
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> [Ridgefield Park, 78 N.J. at 162.]

We have since applied Ridgefield Park to mean that an enforceable past practice cannot arise from an employer's prior history of agreement to or compliance with such contract terms. See, Secaucus Municipal Utilities Authority, P.E.R.C. No. 2018-24, 44 NJPER 285 (¶79 2017)("a valid past practice cannot flow from an issue that is a managerial prerogative and in conflict with that

prerogative"); Atlantic Cty. Sheriff's Office, P.E.R.C. No. 2017-36, 43 NJPER 243 (¶75 2016)("it follows [from Ridgefield Park] that an alleged past practice cannot transform a non-negotiable managerial prerogative into a negotiable issue").

In this matter CASA seeks to restrict the Board's choice of evaluators by enforcing existing contractual language through grievance arbitration. We have determined that arbitration of such grievances interferes with a non-negotiable, managerial prerogative. Middletown Tp. Bd. of Ed., supra; East Orange Bd. of Ed., supra. Therefore, under Ridgefield Park, the presence of that language in the CNA, and the Board's past compliance with it, does not make it negotiable or enforceable through binding arbitration. Id. CASA's argument for removing evaluative documents from the grievant's personnel file is inextricably tied to its claim that they were produced by an individual who was unauthorized to conduct evaluations. Since the Board's choice of evaluators is not mandatorily negotiable, neither is the request for removal.

ORDER

The request of the Newark Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Papero and Voos voted in favor of this decision. Commissioner Jones voted against this against this decision. Commissioner Bonanni was not present.

ISSUED: May 27, 2021

Trenton, New Jersey