

P.E.R.C. NO. 90-109

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WASHINGTON TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-90-26

WASHINGTON TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies a restraint of binding arbitration of a grievance filed by the Washington Township Education Association against the Washington Township Board of Education, except to the extent, if any, the grievance seeks to remove comments on an evaluation form which are unrelated to a letter confiscated by the principal. The Commission finds that the portion of the evaluation report that discussed that letter was a predominantly disciplinary reprimand and could be subject to binding arbitration.

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Appearances:

For the Petitioner, Capehart & Scatchard, attorneys
(Joseph F. Betley, of counsel)

For the Respondent, Eugene J. Sharp, NJEA
Uniserv Representative

DECISION AND ORDER

On November 30, 1989, the Washington Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Washington Township Education Association. The grievance claims that the Board used the evaluation process to discipline a teacher.

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

The Association is the majority representative of the Board's classroom teachers. The parties entered into a collective negotiations agreement effective from July 1, 1988 through June 30, 1991. Its grievance procedure ends in binding arbitration.

The contract also contains the following:

ARTICLE IV-TEACHER RIGHTS

B. Whenever any teacher is required to appear before the Board or any committee or member thereof concerning any matter which could adversely affect the continuation of such personnel in his/her office, position or employment, or the salary, or any increments pertaining thereto, then such personnel shall be given prior written notice of the reasons for such meeting or interview and shall be entitled to have a person of his/her own choosing present to advise or represent him/her during such meeting or interview.

An employee shall be entitled to have a union representative present at an investigatory interview with an administrator or supervisor which she/he reasonably believes might result in disciplinary action. This right shall not extend to post-observation or evaluation conferences.

* * *

D. No teacher shall be disciplined without just cause in areas ruled negotiable.

ARTICLE XIII-TEACHER EVALUATION

A. Evaluation Reports

1. All monitoring or observation of the work performance of a teacher shall be conducted openly and with full knowledge of the teacher.

* * *

3. Observation and evaluation of tenured teaching staff members shall be conducted in compliance with New Jersey Administrative Code Title 6:3-1.21.

This dispute involves a letter written by a teacher containing sexual comments and innuendo about her colleagues. The letter was allegedly written as a spoof of a memorandum from another

teacher to a substitute teacher.^{1/} Based on the parties' submissions, which include transcripts and summaries of meetings between Association and Board representatives, we make these additional findings.

1. This letter was written by a tenured teacher. On March 30, 1989, the principal of the Middle School was waiting in the teacher's classroom when she arrived, a few minutes late, for her sixth period class. Because the bell had already rung, the teacher put her books and pocketbook on her desk and immediately began her class from the front of the room. The principal remained to observe the teacher's lesson.^{2/}

2. While standing near the teacher's desk, the principal noticed and read the letter which was partially visible among the belongings which the teacher had just placed on the desk.

^{1/} Aside from a comment about "a real shitty day," the letter contains no profanities or sexual terms. We have the text of the letter, but not the memorandum which the letter spoofed.

^{2/} The Association asserts that the principal had not intended to observe the teacher when he went to her classroom. It asserts that when the bell rang the principal remained until the teacher arrived and decided to observe her lesson because she arrived late. It is undisputed that the teacher is the only tenured teacher who was observed by the principal during the 1988-1989 school year. The principal, who did evaluate non-tenured staff, asserted that he had randomly decided to observe the teacher before going to her classroom and that he had intended to observe other tenured staff but other demands on his time prevented him from doing so.

3. The principal confiscated the letter without telling the teacher and left near the end of the class period. The teacher noticed the letter's absence when she looked through her things after class.

4. The teacher was summoned over the loudspeaker to meet with the principal at the end of the day. The teacher's immediate supervisor was with the principal when the teacher arrived at his office. The teacher said she had been surprised to find the principal in her classroom. She explained that she had prepared the letter as a joke to show her close faculty friends and that no one other than the principal had seen it. The teacher apologized for the letter and asked for it back. The principal responded that he had decided to retain the letter until the end of the term and would return it if there were no further problems.

5. The principal and the teacher met again the next day with an Association representative present. The representative urged the principal to release the letter after a shorter period of time because the teacher, a diabetic, was physiologically affected by stress and would have problems if she had to worry about the letter.

6. On Monday, April 3, another meeting was held. An Association officer joined the discussions.

7. On April 6, the principal signed a six-page evaluation report he had prepared from the observation. The first three pages contained 21 standards to be checked either "Satisfactory" or "Needs

Improvement." The principal rated the teacher "Satisfactory" in fifteen areas, and "Needs Improvement" in the other six. On page four, the principal made positive comments about the lesson taught by the teacher. The last two pages contained five separate paragraphs explaining the "Needs Improvement" ratings. The letter was reproduced on page six with the names of the teachers removed. Among the areas marked "Needs Improvement" were "Attempts to maintain rapport with Students," "Exhibits respect for Students" and "Communications with Students." These ratings were explained by Paragraphs D and E which read: ^{3/}

D. Maintain the highest of professional and ethical standards while on duty with the students of Washington Township Middle School and do not place your rapport with students in jeopardy. Leaving what you described in our post observational conference as a "joke" in full vision of students innocently seeking your assistance during instructional time is professionally irresponsible. For that reason, it was incumbent upon the principal to effectively and assuredly remove this document from the learning environment of the students for whom he is personally sworn to protect. Further, such an irresponsible act may result in unintended communication with students and misrepresentation of the professional standards of Washington Township Middle School.

E. Respect the professional image of colleagues. During our post observational conference you indicated that you had authored this document that is demeaning to colleagues but that they would surely be understanding since

^{3/} The other paragraphs addressed the teacher's late arrival, whether lesson plans should have been used during the lesson, and whether the teacher had failed to follow a directive as to operating a kiln.

they were aware of the joking nature. The information within this document is an insult to professional educators everywhere. Further, since there is clear sexual innuendo throughout the document described, it is disturbing that you would [make an inappropriate] suggestion to a substitute teacher....^{4/}

8. On April 10, 1989, the principal directed the teacher to attend a post-observation conference and told her that she could bring an Association representative to it. When the teacher and her representative arrived, the principal was present along with a representative from the Administrators' Association and the teacher's supervisor. The principal's secretary took minutes. The principal gave the teacher the report and insisted she immediately sign it to indicate receipt. He also distributed numbered copies of the report to the others at the meeting.

9. The teacher prepared a written rebuttal to the "Needs Improvement" ratings. She wrote:

D. My professional and ethical standards while on duty with the students of Washington Township Middle School are well documented in my nine years of classroom observations and summative evaluations. I would never jeopardize my rapport with the students. The personal communication you removed from my desk was in partial view only to someone seated at my desk. It was not in "full vision" of the students. The nature of the subject I teach never requires a student to sit at my desk. Quite often my desk remains unoccupied. It is frequently necessary for me to

^{4/} The "post-observational conference" refers to the March 30, 1989 meeting with the teacher, the principal and the teacher's supervisor.

involve myself with the students in their work area in order to facilitate the lesson effectively. I share your concern about the potential problem that could have resulted from this matter. I have difficulty equating this isolated incident to being "professionally irresponsible." I stand firmly on my past record as a responsible professional. What you found on my desk during this period was the result of human error, which we are all prone to on occasion. I feel certain that there are communications either of us could find embarrassing if overheard by students. We as professionals conscientiously attempt to guard against this happening. (See Addendum)

Fortunately in this situation, although it had "potential," it did not have a detrimental result to my students. Once again, I apologize fully realizing what the outcome could have been and hoping you realize as well that the value I place on my students negates this ever happening again.

E. During my years as an educator I have always held my profession and my colleagues in high esteem. The document you make reference to was the result of a cooperative effort intended to be a spoof among friends. It was slightly altered from the original (see attached). Taking this out of the context of the situation gives it a seriousness and implication that was never intended.

This letter was a private communication with the intention that it would be read by a small group of people. I am now well aware there are some who would not fully understand its intent.

It is most regrettable to me that it has been distorted to the degree that you have made it part of an evaluation of my lesson. It is my hope that in the future, I will be evaluated on my skill and expertise in the classroom.

10. On or about April 10, 1989, the teacher's supervisor observed, at the principal's direction, one of the teacher's classes. The written evaluation rated the teacher satisfactory in all 21 areas.

11. On April 21 and 25, 1989 the principal, the teacher, and the Association representatives conducted a "pre-grievance" conference which was tape-recorded and transcribed. The letter was discussed. The representatives questioned why the principal had mentioned and incorporated it in his written evaluation. The principal defended doing so.

12. On May 8, 1989 the Association filed a grievance alleging that the principal had misused the evaluation process. It seeks expungement of the evaluation and a directive to the principal to comply with district standards when evaluating teachers.

13. On June 8, 1989, the superintendent issued a nine-page response to the grievance. The response, labeled "Findings of Fact, Opinion and Decision," lists several contentions made by the Association during the grievance hearing. They include that: the report was a reprimand and not an evaluation; the report should have been limited to comments on the teaching performance; the issuance of the report conflicted with the principal's original response, which was to hold the letter until June; the March 30 conference was not consistent with procedures for a post-observation conference since no written report was available to discuss; the March 30 conference violated the contract because the principal met with the teacher without an Association representative present; and the principal's insistence on having the teacher sign the report on receipt violated N.J.A.C. 6:3-1.21(e)(4) which allows a teacher five days after receipt to sign a written annual performance report.

14. The superintendent's grievance response includes two findings of fact which address the principal's issuing a written evaluation report. They read:

According to...[the principal] upon advice of the attorney and the Principals Association representative...[the principal] committed the observation to writing since [the teacher] and the WTEA representatives resisted his handling of the matter as well as not accepting his resolution.

* * *

[The principal] stated that he included the letter in the observation report because the WTEA and [the teacher] did not accept his action of holding the letter until June. In addition, he felt [the teacher] was not acknowledging the seriousness of penning the letter even though she had apologized on March 31. And finally, because action by the WTEA was being taken against him, he felt it necessary to document the entire incident.

15. The superintendent denied the grievance. The "Opinion" section of his report included these comments:

[The principal] was justified in documenting the observation since the WTEA and [the teacher] would not accept his decision to hold the letter.

The decision to hold the letter was mild considering...[the principal] had the option of recommending withholding of increment or termination as action which is warranted for composing such a letter.

16. On September 25, 1989, the Association filed a demand for arbitration. The demand asserted that the Board "violated the agreement by using the teacher's evaluation process to discipline [the teacher]." The Board then filed this petition.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) stated:

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. [Id. at 154]

We thus do not determine the contractual merits of the grievance or any defenses the employer may have.

The parties agree that the issue to be decided is this: Was the portion of the evaluation report prepared by the principal which discusses the letter predominantly disciplinary or predominantly evaluative? If the answer is predominantly disciplinary, the parties agree that the grievance is legally arbitrable.

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) sets the standard for determining whether a document is predominantly evaluative or disciplinary:

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 non-negotiable. 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. [Id. at 826]

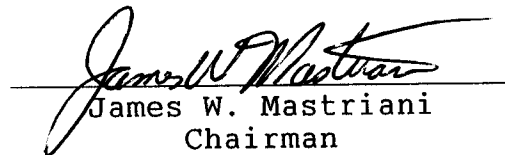
We have reviewed the entire content of the principal's comments. A number of facts are compelling. The collective negotiations agreement provides that the right to union representation does not extend to post-observation or evaluation conferences. Thus the invitation to the teacher to bring an Association representative to the April 10 conference and the presence of additional persons at the meeting suggest that there were disciplinary aspects to the portion of the evaluation in question. Had the teacher and the Association accepted the principal's decision to hold the letter until the end of the year, it would not have been made part of the written performance evaluation. Because the teacher and the Association did not agree, the comments concerning the letter will be maintained in the

teacher's personnel file. Finally, we believe that the incident in question was more a matter of alleged misconduct than alleged poor teaching. Under all these circumstances, we hold that the portion of the evaluation report that discusses the letter was predominantly a disciplinary reprimand.^{5/} Accordingly, an arbitrator may review whether those comments were included in the evaluation form without just cause.

ORDER

The Board's request for a permanent restraint of binding arbitration is denied except to the extent, if any, the grievance seeks to remove comments on the evaluation form which are unrelated to the letter confiscated by the principal.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained from consideration.

DATED: Trenton, New Jersey
May 14, 1990
ISSUED: May 15, 1990

^{5/} The Association has not, based upon this record, overcome the presumption that other comments in the evaluation were predominantly evaluative and cannot be the subject of binding arbitration. Absent any specific arguments that procedural claims should be restrained, those claims may proceed to arbitration.