

P.E.R.C. NO. 2004-62

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WASHINGTON TOWNSHIP BOARD  
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2004-32

WASHINGTON TOWNSHIP EDUCATION  
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Washington Township Board of Education for a restraint of binding arbitration of a grievance filed by the Washington Township Education Association. The grievance contests a mid-year formative evaluation of a student assistance counselor. The Commission concludes that a school board has a managerial prerogative to observe and evaluate employees. The Commission holds that this mid-year formative evaluation constitutes an evaluation rather than a reprimand and restrains arbitration of any challenge to the accuracy of the ratings or contents of the evaluation. The Commission does not consider the negotiability of the Association's procedural claims or what relief, if any, would be appropriate if an arbitrator finds that the Board violated a contractual obligation concerning those claims.

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, Capehart & Scatchard, attorneys  
(Joseph F. Betley, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys  
(Keith Waldman, on the brief)

DECISION

On January 5, 2004, 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 contests a mid-year formative evaluation of a student assistance counselor.

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

The Association represents certified staff members and certain other staff. The parties' most recent collective negotiations agreement is effective from July 1, 2000 through

June 30, 2003. The grievance procedure encompasses "administrative conditions affecting terms and conditions of employment" and ends in binding arbitration of grievances alleging "a violation of a term and condition of employment."

In mid-February 2003, the principal of Bunker Hill middle school prepared the mid-year formative evaluation of a tenured Student Assistance Counselor. The evaluation covered the period from September 2002 through February 2003. There are seven primary categories and each one contains various sub-categories for a total of 25 ratings. There are four possible ratings: Outstanding, Satisfactory, Needs Improvement, and Unsatisfactory. The counselor received sixteen Needs Improvement ratings and nine Satisfactory ratings. The principal wrote several recommendations as part of an improvement plan.

The counselor wrote a rebuttal to the ratings and improvement plan. The rebuttal registered his disagreement with the ratings as an accurate assessment of his performance and concluded: "Since the needs improvement are based on invalid assumptions and misinformation, I disclaim them in their entirety."

The principal submitted an addendum to the revised evaluation.

On May 2, 2003, the Association filed a grievance contesting the evaluation. The grievance alleged that the counselor was

being held to a different standard than his colleagues on both evaluation and performance demands in violation of the grievance procedure clause. As relief, the grievance asked that the counselor: (1) be evaluated fairly and objectively, (2) be given prior notice of any changes in job requirements, (3) be given ample opportunity to implement the changes, and (4) not be required to perform duties that his colleagues are not required to do.

The grievance was denied at the first level. The superintendent denied the grievance at level 2, asserting that it involved the managerial prerogative of evaluating teaching staff members and is not subject to the grievance procedure. He also wrote:

Substantively, . . . [the] Principal of Bunker Hill Middle School, had sufficient reason to believe that . . . [the counselor's] performance in certain areas was in need of improvement and, therefore, evaluated him accordingly. Also, . . . [the counselor] was advised in his 2001/02 summative evaluation dated May 23, 2003 . . . that categories in his formatives marked N/A and N/O, specifically (E.) Parent Outreach and (F.) Community Alliance, would be evaluated by the supervisor of the program and appropriate administration. It was also recommended in . . . [the counselor's] formative evaluation dated 5/10/02 that: "A high level of communication should exist between you . . . and the building principal to assure that programs and logistics for assemblies and speakers are prepared. Students, parents, administration, and staff should be advised of all particulars well in advance." In the same evaluation (5/10/02),

it was stated in bold print: "Please note that all areas noted by N/O's notations will be expected as part of the counselor's performance during the next school year, 2002/03". In addition, . . . [the counselor] was advised in a meeting on January 14, 2003 with . . . [the] Director of Student Services, that he would be evaluated based on the job description. These factors discount . . . [the counselor's] claims that he was not informed in a timely manner that he would be evaluated based on the job description.

The Board denied the grievance for the same reasons.

The Association then demanded arbitration. The demand identifies this grievance to be arbitrated: "The District violated the collective bargaining agreement when [it] disciplined . . . [the counselor] without just cause." This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the Board may have.

A school board has a managerial prerogative to observe and evaluate employees. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982). Disciplinary reprimands, however, may be contested through binding arbitration. N.J.S.A. 34:13A-29; N.J.S.A. 34:13A-5.3. In 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), we set forth our approach for determining whether an evaluation or reprimand is at issue:

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.

Applying these standards, we hold that the mid-year formative evaluation constitutes an evaluation rather than a reprimand. The evaluation contains assessments of the employee's performance as a student assistance counselor and does not contain any indicia of discipline. Unsatisfactory evaluation ratings do not transform an evaluation into a reprimand.

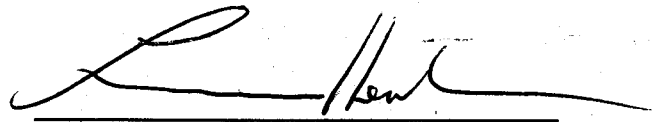
Knowlton Tp. Bd. of Ed., P.E.R.C. No. 2003-47, 29 NJPER 19 (¶5 2003); Neptune Tp. Bd. of Ed., P.E.R.C. No. 88-114, 14 NJPER 349 (¶19134 1988). We will accordingly restrain arbitration of any challenge to the accuracy of the ratings or contents of this evaluation.

The Association's brief recognized the Board's prerogative to evaluate the counselor, but asserted that the request for relief in the grievance raised procedural claims that may be arbitrated. The Board did not file a reply brief contesting that assertion or seeking to block arbitration of the specific claims identified in the request for relief. We therefore do not consider the negotiability of those claims. Nor do we consider what relief, if any, would be appropriate if an arbitrator finds that the Board violated a contractual obligation concerning those claims. Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397 (App. Div. 1991), aff'd per curiam 130 N.J. 312 (1992).

ORDER

The request of the Washington Township Board of Education for a restraint of arbitration over the accuracy of the ratings or contents of the mid-year formative evaluation of a Student Assistance Counselor is granted. The request is otherwise denied.

BY ORDER OF THE COMMISSION

A handwritten signature in black ink, appearing to read 'L Henderson', is written over a horizontal line.

Lawrence Henderson  
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz and Sandman voted in favor of this decision. None opposed. Commissioner Mastriani was not present.

DATED: March 25, 2004  
Trenton, New Jersey  
ISSUED: March 26, 2004