

P.E.R.C. NO. 2007-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FREEHOLD REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2006-082

FREEHOLD REGIONAL HIGH SCHOOL
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Freehold Regional High School District Board of Education for a restraint of binding arbitration of a grievance filed by the Freehold Regional High School Education Association. The grievance seeks to challenge a Corrective Action Plan ("CAP") issued to a guidance counselor and the manner in which it was implemented as disciplinary. The Commission concludes that the CAP predominately constitutes an evaluation rather than a reprimand and restrains arbitration over any challenge to the accuracy of the contents or the issuance of the CAP. The Commission finds legally arbitrable the Association's claim that the Board violated the parties' contract by not notifying the employee of parental complaints and affording her an opportunity to respond. That claim is procedural and independent of the merits of the substantive decision to impose a CAP.

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.

P.E.R.C. NO. 2007-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FREEHOLD REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2006-082

FREEHOLD REGIONAL HIGH SCHOOL
EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys (Mark H. Zitomer, on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., attorneys (Richard A. Friedman, on the brief)

DECISION

On April 28, 2006, the Freehold Regional High School District Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Freehold Regional High School Education Association. The grievance seeks to challenge a Corrective Action Plan ("CAP") issued to a guidance counselor and the manner in which it was implemented as disciplinary.

The parties have filed briefs and exhibits. The Board has submitted two certifications of Joan Gagliardi, its guidance

supervisor. The Association has submitted the certifications of guidance counselor Clare Zanfini and Association representative Edward Ollinger. These facts appear.

The Association represents teachers, guidance counselors and other staff. The parties' collective negotiations agreement is effective from July 1, 2005 through June 30, 2008. The grievance procedure ends in binding arbitration. Article XVII is entitled Employee Evaluation. Section C provides:

C. Any complaints regarding an employee made to any member of the Administration by any parent, student, or other person which are used in any manner in evaluating an employee shall be promptly investigated and called to the attention of the employee. The employee shall be given the opportunity to respond to and/or rebut such complaint and shall have the right to be represented by the Association at any meetings or conferences regarding such complaint.

Board Regulation 9130, "Public Complaints and Grievances," requires that complainants deal first with the teaching staff member to resolve the complaint. If not satisfied, they may then bring the matter to the school principal.

Clare Zanfini is tenured. She has been employed by the district for 13 years, the last 11 as a guidance counselor. She is assigned to the Freehold Township High School. She states that she has always received favorable evaluations.

Joan Gagliardi was hired as the guidance supervisor for the 2005-2006 school year. She is responsible for evaluating high

school guidance counselors. According to Department of Education regulations and the parties' contract, guidance counselors are subject to at least one performance evaluation a school year, but the district normally evaluates its tenured employees twice each year.

Zanfini states that she received numerous telephone calls during the first few days of school, many of which were lengthy and filled up her voice mail, and then she listened to all the messages at the end of each day and by September 12 had called every parent who left a message. Gagliardi told Zanfini that several parents could not reach her because her voice mailbox was full. Zanfini was not told what parents had tried to reach her but later learned that a mother involved in a divorce, who could not agree with her husband on an education plan for their child, had contacted the assistant superintendent, claiming that she could not reach Zanfini because her voice mailbox was full. Zanfini believes the parent used that excuse to get the assistant superintendent's help for her demands concerning her daughter's education.

Zanfini states that Gagliardi told her that, after being contacted by the parent, the assistant superintendent instructed Gagliardi to place Zanfini on a 90-day Corrective Action Plan. Gagliardi denies this, but states that she was asked to look into

the matter and take appropriate action. She said she scheduled an observation to get a broader picture of Zanfini's performance.

Association representative Edward Ollinger states that at a meeting, Gagliardi confirmed her intent to place Zanfini on a 90-day improvement plan because Zanfini was not returning parents' calls within a reasonable period of time and because Zanfini had not timely handed her a grade history update, but instead had placed it in her mailbox located on her office door.^{1/} Zanfini states that she was never given an opportunity in any of the meetings to rebut, with her Association representative present, any parental complaints.

1/ On September 21, 2005, Zanfini was injured in a car accident on her way to Back to School Night. She was out of school on September 22 and 23. On September 22, she called the school and spoke to the head guidance secretary about several matters, including a grade history update that was due on September 23. Zanfini says that she spoke briefly to Gagliardi later that day and advised her that she had called the secretary and could be reached at home if Gagliardi had any questions. She did not hear from Gagliardi. On her return to school on Monday, September 26, the secretary told Zanfini that the grade history update had not been completed. Zanfini immediately completed it and put it in the mailbox on Gagliardi's door. Gagliardi told Zanfini that she did not timely hand in the grade history update and that it should have been handed to her directly, not placed in her mailbox on the door because she does not check it on an hourly basis. Gagliardi states that the grade history information was time sensitive because the central office was running class rankings on September 26 and as she was not aware that Zanfini's rankings were late, she was unable to alert the technician to wait for the grades before running the class rankings.

On October 10, 2005, Gagliardi formally observed a parent-student meeting conducted by Zanfini and several faculty members. Zanfini thought it was unusual that an observation was scheduled so early in the school year. The meeting went well and the parent and her son appeared satisfied.

On October 14, 2005, Zanfini met with Gagliardi in a performance evaluation conference. Gagliardi states that this evaluation was precipitated by concerns expressed by students, parents and administrators. Zanfini states that she was startled to discover that Gagliardi had prepared a written interim evaluation report that included subject matter unrelated to the October 10 observation. Gagliardi states that the timing of the observation and evaluation was intended to identify strengths and weaknesses early in the year so that adjustments could increase the likelihood that Zanfini would have a successful year.

The Interim Evaluation Report rated Zanfini as Satisfactory in 33 of 35 categories. She was rated as Unacceptable in "Upholds and enforces Board of Education regulations and policies as well as building procedures" and as "Unsatisfactory/Needs Improvement" in "Demonstrates initiative, independence, and decision-making appropriate for position." Under areas of strength/commendation, Gagliardi wrote:

Ms. Zanfini is a pleasant and positive member of the guidance department. She possesses a wealth of information about this high school and extensive experience in working with

students. Ms. Zanfini readily shares her knowledge with her colleagues and is a valuable contributor to collaborative efforts within the department. On the day of my observation, Mrs. Zanfini facilitated a difficult meeting with a student, parent, and teacher. She was very well prepared and kept the meeting focused in a firm, yet agreeable manner, despite the student's efforts to control the agenda.

Under areas needing improvement/deficiencies, she wrote:

Ms. Zanfini needs to improve her organizational and time management skills. Since the beginning of the school year, there have been several occasions when Ms. Zanfini's voice mail has been full for an extended period of time, thus, parents have been unable to contact her. In addition, Ms. Zanfini has frequently failed to return telephone calls from parents within the time frame established by this district and to respond to written communications in a timely manner. Ms. Zanfini also needs to develop strategies and techniques to resolve parent and student concerns at her level rather than referring the matter to a supervisor or administrator.

Gagliardi states that she recognized that Zanfini's performance could be improved in these areas: (a) organizational and time management skills; (b) returning calls and responding to written communications; (c) clearing voice mail messages so that new messages can be left; and (d) developing strategies and techniques to resolve parent and student concerns at her level rather than referring them to a supervisor or administrator.

Zanfini refused to sign the report because she did not agree with

the content and felt that it was inappropriate to include issues that were not part of the evaluation observation.

Later in the day on October 14, 2005, Gagliardi notified Zanfini that she was going to issue a CAP. Her letter stated:

As I indicated to you in your observation report of October 10, I have ongoing concerns about your ability to make yourself available to students and parents and to address their concerns in a timely manner. During the week of September 19, it came to my attention that the voice mail on your answering machine was full. It was only after my intervention that you cleared messages and returned telephone calls. In the meantime, several parents contacted me and one parent contacted a member of the administration directly because they could not reach you.

On another occasion, you returned to school after a two-day absence to find that a course history update that should have been filed had not been completed. Rather than bring the matter to my attention immediately, you completed your work and left the necessary forms in my mailbox without my knowledge awaiting my signature. Most recently, a note from a parent requesting an ASI appeal dated September 14 was left unresolved until October 3. On each of these occasions, I discussed the matter with you suggesting methods of improvement and the need to pursue your professional duties in a timely and responsible manner.

I believe that these incidents are serious enough to warrant a corrective action plan. Please contact me so that we may set a mutually convenient time to discuss this matter further.

On October 28, 2005, Gagliardi met with Zanfini, an Association representative, and an administration member. The

Association's request that the evaluation/observation be removed from Zanfini's file was rejected. After several meetings and disagreements, a CAP was developed for the period November 28, 2005 through February 28, 2006. The CAP specified:

Target Area of Deficiency: Meeting student and parent needs in a timely and effective manner.

Over the past several weeks, I have identified a number of occasions when the staff member failed to address concerns of students and parents in a timely and effective manner. Early in the year, it came to my attention that parents were unable to contact the staff member by telephone because her voice mail was full. It was only after my intervention on September 19, 2005 that the staff member cleared her voice mail by returning calls. In the meantime, several parents contacted me directly and one parent telephoned a member of the central administration for assistance. On another occasion, the staff member returned from a two-day absence on September 26 to discover that a course history update had not been completed by the district deadline. Rather than bringing the matter to my attention immediately, the staff member completed the update and left the paperwork in my mailbox, without my knowledge, awaiting my signature. Most recently, an ASI appeal, dated September 14, was not resolved by the staff member until October 3. Conferences to assist the staff member on September 19, 2005 and September 26, 2005 have generated inconsistent results in the areas of improved time management and effectiveness in meeting student and parent needs; therefore, the following guidelines have been established to assist in the remediation process.

Goal: The goal of this corrective action plan is to focus on the development of strategies and processes to improve the timeliness and

effectiveness of the staff member's response to student/parent needs and requests.

Staff Member Activities: In order to improve performance, the following items are to be implemented in a 90-day Improvement Plan in effect from November 28, 2005 through February 28, 2006.

1. A daily journal must be kept by the staff member. This journal will be used to record all telephone calls and requests for assistance received in writing or as a result of meetings with students and/or parents. The journal must include the data and time telephone calls or requests for assistance are received, the date and time of the initial response to the concern, and the date, time and method by which the issue was resolved. The staff member will design the journal and submit it for supervisor approval by November 22, 2005.
2. The staff member will schedule a daily conference with the supervisor to review the journal.
3. The staff member will seek out at least one staff development activity focusing on time management, receive permission from the supervisor to attend, and share the important concepts of the workshop with the supervisor and department staff prior to February 15, 2006.
4. The staff member will contact a master counselor selected by the supervisor and schedule one day to shadow that individual documenting effective procedures being implemented to meet student and parental needs in a timely and effective manner. The staff member will schedule a meeting with the supervisor to discuss effective procedures and how these procedures can be implemented into her daily activities.

Administration/Supervisor Activities:

1. The supervisor will review the journal with the staff member noting effective processes for handling and resolving concerns as well as methods and strategies for improvement.
2. As progress is observed, the time interval between the meetings may be increased.
3. Supervisor will select one master counselor for the staff member to contact and set up a schedule with and observe for at least one day.

If the plan is not satisfactorily completed, it may affect the terms and conditions of employment including, but not limited to withholding of salary increment or termination.^{2/}

Gagliardi states that this CAP was developed with the tone and tenor of improving Zanfina's performance. She states that if she had wanted to discipline Zanfina she would have issued a letter of reprimand and would not have gone to all the trouble of developing a CAP.

On December 12, 2005, the Association filed a grievance alleging that the CAP and the manner in which it was to be implemented were disciplinary in nature. That same day, the assistant superintendent denied the grievance. He asserted that the CAP was evaluative and that the evaluation process, including

2/ On April 25, 2006, Zanfina's increment was withheld.

the development and implementation of CAPs, is a management right.

On January 9, 2006, the Board denied the grievance. On January 17, the Association demanded arbitration. 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 merits of the grievance or any contractual defenses the employer 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.

The Board argues that the grievance is not arbitrable because a school board has a managerial prerogative to prepare and implement CAPs for employees. The Board also argues that N.J.A.C. 6A:32-4.4 preempts arbitration because it requires the preparation of an individual improvement plan as part of the tenured teaching staff member evaluation process.

The Association argues that although there is a presumption that the substantive comments of an evaluation relating to job performance are not disciplinary, any such presumption is overcome where the facts clearly demonstrate that those comments -- and the action taken in connection with those comments -- arose as a punishment for events unrelated to the performance observation that ostensibly served as the basis for the evaluation. The Association asserts that the CAP was triggered by the incidents involving the parent who claimed that Zanfini's voice mailbox was full and the allegedly late submission of grade reports, not an observation of Zanfini's job performance. It also asserts that the decision to impose a CAP violated the parties' contractual evaluation procedures.

We agree with the Association that the two incidents played a major role in triggering the CAP. Gagliardi's October 14 letter to Zanfini cites these incidents as well as allegations that other parents had not been able to contact her and that she had not timely answered a parent's request for an ASI appeal. But whether or not the Board's concerns about Zanfini's performance were prompted by one or more parental complaints does not change the nature of the concerns or the Board's right to address them with an improvement plan. The plan addresses Zanfini's allegedly inconsistent performance in responding to student and parent needs in a timely and effective manner and

cites the alleged problems in returning calls to parents, submitting grade reports, and resolving an appeal.

Dissatisfaction with employee performance does not transform an evaluative document 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). Applying the Holland standards, we hold that the CAP predominately constitutes an evaluation rather than a reprimand. We will accordingly restrain arbitration of any challenge to the accuracy of the contents or issuance of the CAP.^{3/}

However, we find legally arbitrable the Association's claim that the Board violated Article XVII(C) by not notifying Zanfini of parental complaints and affording her an opportunity to respond. See Manasquan Bd. of Ed., P.E.R.C. No. 2000-96, 26 NJPER 283 (¶31112 2000) (provisions guaranteeing that teachers be informed of specifics of complaints and have opportunity to respond was mandatorily negotiable and arbitrable). See also Tinton Falls Bd. of Ed., P.E.R.C. No. 94-74, 20 NJPER 66 (¶25028 1994). That claim is procedural and independent of the merits of the substantive decision to impose a CAP.^{4/} We will not

^{3/} We make no judgment about the merits of any of the Board's concerns.

^{4/} Whether a grievance was properly presented in the earlier stages of a grievance procedure is a question for an arbitrator.

speculate on what remedy an arbitrator may award if a violation is found. Washington Tp. Bd. of Ed., P.E.R.C. No. 2007-14, 32 NJPER 315 (¶131 2006).

ORDER

The request of the Freehold Regional High School District Board of Education is granted to the extent the grievance challenges the Board's substantive right to issue the November 23, 2005 Corrective Action Plan to Clare Zanfini. The request is denied to the extent the grievance claims a violation of Article XVII(C).

BY ORDER OF THE COMMISSION

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

ISSUED: November 21, 2006

Trenton, New Jersey