

P.E.R.C. NO. 2015-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET HILLS BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2014-070

SOMERSET HILLS EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Somerset Hills Board of Education for a restraint of binding arbitration of a grievance filed by the Somerset Hills Education Association. The grievance asserts that the Board violated the parties' collective negotiations agreement by denying the Association the opportunity to appoint members to a committee tasked with making recommendations to change the teacher evaluation process. The Commission finds that the grieved contract article concerns the mandatorily negotiable subject of evaluation procedures and does not impinge on the Board's prerogative to set evaluation criteria.

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, Adams Gutierrez & Lattiboudere,
LLC, attorneys (Derlys M. Gutierrez, of counsel)

For the Respondent, Oxfeld Cohen, P.C., attorneys
(William P. Hannon, of counsel)

DECISION

On March 14, 2014, the Somerset Hills Board of Education filed scope of negotiations petitions seeking restraint of binding arbitration of a grievance filed by the Somerset Hills Education Association. The grievance asserts that the Board violated the parties' collective negotiations agreement (CNA) when it failed to give the Association the opportunity to appoint members to a committee tasked with making recommendations to change the teacher evaluation process.

The Board has filed exhibits, briefs and two certifications of assistant superintendent Jennifer Shouffler. The Association has filed a brief and the certification of its president, Joseph A. Foglia. These facts appear.

The Association represents a broad-based negotiations unit of certificated staff, support staff and technology technicians. The Board and Association are parties to a CNA effective from July 1, 2011 through June 30, 2014. The grievance procedure ends in binding arbitration.

Article X, Section B., ¶2 of the CNA provides:

A joint committee shall be formulated to review observation/evaluation procedures. The committee shall be comprised of three teachers appointed by the Association, three individuals appointed by the Board, the Superintendent of Schools and the Association President. The committee shall have the authority to make recommendations subject to the approval of the Association and the Board.

In August 2012, P.L. 2012, c.26, known as the "TEACH NJ" act, took effect. Among the main goals of the law was the adoption of improved "evaluation rubrics" to be selected by school districts, by the end of 2012, subject to the annual approval of the Commissioner of Education.^{1/} The approved programs were to be implemented beginning with the 2013-2014 school year.^{2/} In general, TEACH NJ and its implementing regulations, that are pertinent to this case, define requirements for educator evaluation systems, and other professional growth

1/ The Commissioner was also given authority to adopt model evaluation rubrics that school districts could use.
N.J.S.A. 18A:6-123f.

2/ N.J.S.A. 18A:6-123e.

and development systems.^{3/} Department of Education regulations contemplate input from committees. N.J.A.C. 6A:10-2.2(a)(1) provides that a Board shall:

Establish a District Evaluation Advisory Committee [DEAC] to oversee and guide the planning and implementation of the school district board of education's evaluation policies and procedures . . .^{4/}

TEACH NJ also addresses collective negotiations and the impact of existing CNAs:

N.J.S.A. 18A:6-125 Evaluation rubric not subject to collective negotiations.

A school district's evaluation rubric approved by the commissioner pursuant to section 16 of P.L.2012, c.25 (C.18A:6-122) shall not be subject to collective negotiations.

N.J.S.A. 18A:6-126 Conflicts with collective bargaining agreements.

No collective bargaining agreement or other contract entered into by a school district after July 1, 2013 shall conflict with the educator evaluation system established pursuant to P.L.2012, c.26 (C.18A:6-117 et al.). A district with an existing collective bargaining agreement on July 1, 2013 which conflicts in whole or in part with the educator evaluation system established pursuant to that act, shall implement in accordance with that act those provisions not

^{3/} For example, for all teaching staff members, evaluation rubrics must include four annual rating categories: Highly Effective, Effective, Partially Effective, and Ineffective.

^{4/} The DEAC shall include teachers, administrators and supervisors. N.J.A.C. 6A:10-2.3(a).

in conflict with the collective bargaining agreement.

Notwithstanding the provisions of this act, aspects of evaluation not superseded by statute or regulation shall continue to be mandatory subjects of collective negotiations.

According to the certification (§5) of the Assistant Superintendent, a joint committee as contemplated by Article X.B.¶2 was not convened to address changes in the evaluation process for the 2013-2014 school year because the changes were mandated by the TEACH NJ law.^{5/} She relates that in May 2012, 16 individuals, including administrators, supervisors, parents and teachers, including the Association president were invited to serve on the District's DEAC.

The DEAC met on June 14 and October 16, 2012. At the second meeting the DEAC was informed that the Board had decided to adopt the "Charlotte Danielson" model for teacher evaluation, which was one of the systems that the Commissioner of Education had endorsed. The Board formally adopted the Danielson system at its December 12 meeting.

Sessions to train the teaching staff on the Danielson system were held on February 15 and November 25, 2013. At the latter meeting it was explained that, in order to earn the highest

^{5/} Shouffler's certification (§4) implies that if the impetus for the changes came from the Board, rather than a statutory mandate, than the joint committee requirement would apply.

rating (Distinguished) in Domain 4f "Showing Professionalism," a teacher's participation in student and community activities in a voluntary capacity would be considered.

Association President Foglia certifies (§12) that adherence to the standard articulated at the meeting would mean that teachers seeking to earn the highest rating would be required to volunteer their time during non-school hours and non-school settings, thus affecting their terms and conditions of employment. He states that, on November 26, 2013, he filed the grievance with the purpose of having a joint committee formed to review and discuss the evaluation process.

The grievance was denied at all steps of the grievance procedure and 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, 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.^{6/}

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (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 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.

An otherwise negotiable term and condition of employment only is preempted when a statute or administrative regulation does so, expressly, specifically and comprehensively. Bethlehem Township Bd. of Education v. Bethlehem Township Education Association, 91 N.J. 38, 44 (1982).

^{6/} Whether the grievance is untimely, as the Board argues, is an issue for the arbitrator and is not within our jurisdiction. See Board of Educ. of Borough of Alpha, v. Alpha Educ. Assoc., 190 N.J. 34, 43 (2006); Board of Education of the Buena Regional School District v. Buena Regional Education Ass'n, 300 N.J. Super. 415, 424 (App Div.), certif. denied, 151 N.J. 466 (1997) (arbitrator had jurisdiction to determine if grievance was timely filed).

The Board argues that arbitration of the grievance is preempted because the TEACH NJ law mandates that a Board of Education adopt one of the approved evaluation systems and implement the other mandates set forth in the statutes and the implementing administrative regulations, thus leaving the Board without discretion to deviate from those requirements. The Board also points to N.J.S.A. 18A:6-125 providing that a district's evaluation rubric is not subject to collective bargaining.

The Association responds that the Board omits mention of N.J.S.A. 18A:6-126 which provides that, where a CNA is in effect on July 1, 2013, any provision of TEACH NJ that conflicts with an existing agreement will not take effect until the CNA expires.

Initially, we agree with the Association that because the current CNA was in effect on July 1, 2013, Article X.B.¶2's joint committee procedure, if applicable, remained in effect and was not preempted by TEACH NJ. In a recent case between these same parties, Somerset Hills Board of Education, P.E.R.C. No. 2015-34, we noted that the department of education had adopted a regulation, N.J.A.C. 6A:10-1.3, providing that administrative rules adopted to implement TEACH NJ: "[S]hall not override any conflicting provision(s) of collective bargaining agreements or other employment contracts entered into by a school district in effect on July 1, 2013." P.E.R.C. No. 2015-34 at 7, n.1.

Thus, any sections of TEACH NJ that may conflict with the joint committee clause, did not preempt that language until after the current CNA expired on June 30, 2014.^{7/} As this dispute arose prior to the expiration of the CNA, Article X.B.¶2, is not preempted and can be enforced through binding arbitration if mandatorily negotiable.

Applying the distinction made in Bethlehem between mandatorily negotiable evaluation procedures and non-negotiable criteria, we conclude that, as written, Article X.B.¶2 addresses mandatorily negotiable evaluation procedures, enforceable through binding grievance arbitration. We have held that a joint committee charged with reviewing evaluation procedures is mandatorily negotiable to the extent it does not impinge on an employer's prerogative to set evaluation criteria. See Paterson State Operated School District, P.E.R.C. No. 2009-58, 35 NJPER 136, 138 (¶49 2009).

The certifications submitted to us and arguments made in the parties' briefs address the criteria necessary to achieve a "Distinguished" rating on one of six components of the "Somerset Hills Domain Four Rubric," and the impact, if any, of that performance standard on working conditions. However, those

^{7/} Accordingly, in future disputes, where there is a conflict between the parties' CNA and specific provisions of the TEACH NJ act and its implementing regulations, the contract language will be preempted.

issues are not before us. The Commission will not rule on matters that are not identified in a grievance and/or a demand for arbitration. See No. Hunterdon Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 86-55, 11 NJPER 707, 709 n.4 (¶16245 1985). The only dispute specified in those documents and on the scope of negotiations petition, is the alleged contractual obligation to convene a joint committee to review evaluation procedures.^{8/}

ORDER

The request of the Somerset Hills Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioner Wall was not present.

ISSUED: December 18, 2014

Trenton, New Jersey

^{8/} As these parties have seven cases pending before or recently decided by the Commission we remind them of the Supreme Court's advice that maintaining and using lines of communication can avoid formal litigation over labor-management disputes. See Hunterdon Cty. and CWA, 116 N.J. 322, 338-339 (1989).