

P.E.R.C. NO. 2016-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-038

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Middletown Township Board of Education's request for a restraint of binding arbitration of a grievance filed by the Middletown Township Education Association. The grievance contests the Board's implementation of a "basement grade" policy for poorly performing students. The Commission holds that because this dispute involves the establishment of and/or adherence to a grading policy, rather than a grade change consultation requirement, it concerns a non-negotiable educational policy.

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, Kenney, Gross, Kovats & Parton,
attorneys (Christopher B. Parton, of counsel and on the
brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys
(Samuel B. Wenocur, of counsel)

DECISION

On December 1, 2014, the Middletown Township Board of Education (Board) petitioned for a scope of negotiations determination. The Board seeks to restrain binding arbitration of a grievance filed by the Middletown Township Education Association (Association). The grievance alleges that the Board violated the parties' collective negotiations agreement (CNA) by adopting or maintaining a policy requiring that teachers assign a "basement grade" of 55 to poorly performing students for the first three (out of four) marking periods of the school year. As we find the grievance concerns the Board's educational policy decision to establish a grading policy, as opposed to a

procedural requirement that a teacher be consulted before an assigned grade is changed, we will restrain arbitration.

The parties have filed briefs and exhibits. The Association has filed the certifications of two teaching staff members who are also Association officers. These facts appear.

The Association represents the Board's professional employees, excluding administrators and supervisors. The Board and the Association are parties to a CNA in effect from July 1, 2011 through June 30, 2014. The grievance procedure ends in binding arbitration. Article 16.4 provides:

No grade shall be changed without prior consultation with the teacher.^{1/}

The district has submitted a seven page document, adopted in 2006 and revised in 2009, designated "Regulation 2624 GRADING SYSTEM." For students in grades three and above, letter grades are based on numerical scores with 64 and below rated "F."

^{1/} Prior to our 1997 decision involving these same parties, Middletown Township Board of Education, P.E.R.C. No. 98-74, 24 NJPER 19 (¶29013 1997), Article 16.4 read:

The teacher shall maintain the exclusive right and responsibility to determine grades within the grading policy of the Middletown Township School District based upon his/her professional judgment of available criteria pertinent to any subject area or activity for which s/he is responsible. No grade shall be changed without prior consultation with the teacher.

We determined that the first sentence was not mandatorily negotiable and it was removed from the parties' CNA. 24 NJPER at 19.

For the 2014-2015 school year, the District required that teachers grade poor performing students no lower than "55" even if their actual work warranted a lower numerical score.^{2/}

On November 12, 2014, e-mails were exchanged among the Association President and members of the administration.

The Association President wrote:

The idea of the basement grade has grown from a suggestion to a mandate. Originally, staff did not have to change the grade to 55. . . Now, staff has been told that the lowest grade a student will receive is a 55.

* * *

Previously, a teacher could leave the 0 because the student had done nothing. As long as you had a reason not to give the student the basement grade, you didn't have to do it.

* * *

This is really a matter of asking staff to falsify assessment grades. It is simply wrong. Article 16.4 states, "No grade shall be changed without prior consultation with the teacher." A mandate is not a consultation. . . .

I have always been opposed to the basement grade, but I do understand about trying to offer hope to a student who blew the marking period. The idea that a student can sit in class, cause massive disruption, do nothing or be absent an inordinate number of days and

^{2/} The Association officers certify that in recent school years the structure of the marking periods has varied and that the "basement grade" policy had not been uniformly used in some schools.

be rewarded with a grade of 55 boggles the mind.

I am asking for this mandate to change grades to a 55 be immediately withdrawn. If a teacher feels a student has really tried, then let [him/her] give a basement grade of 55; otherwise, the teacher should be allowed to give the grade the student has earned.

The Assistant Superintendent responded. Before advising that the "basement grade" policy would be maintained for the first three marking periods she wrote:

The practice of assigning a 55 for basement grades . . . is rooted in research that supports best practices when documenting student progress. A 55 is 10 points below failing. A 10 point spread is in alignment with the spread between the other grades. Any numerical grade below 55 would disproportionately skew the student's marking period average.

* * *

A concern was raised that "a student can sit in class, cause massive disruption, do nothing or be absent an inordinate number of days and be rewarded with a grade of 55." However, a student that is already failing, will still fail the marking period whether the student receives a 55 . . . or a zero, or anything in between.

On November 14, 2014, the Association filed a grievance. It asserts:

Imposing a minimum grade that teachers are allowed to record for a student does not allow the professional to enter the actual grade a student has earned. This violates Article 16.4 . . . [by allowing] administration to decide for the teacher what the grade will be. Furthermore this forces a

teacher to record a grade . . . that may not reflect the student's actual grade.

The grievance seeks that teachers be allowed to decide what grade a student should receive.

The Board denied the grievance 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.

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.

Initially, we disagree with the Association's portrayal of the dispute as involving the obligation of an administrator under Article 16.4 which arguably bars a change in a grade assigned by a teacher without a prior consultation. The District's policy addresses and limits the grades that a teacher may assign in the first instance, and provides that the lowest score a teacher may assign in the first three marking periods is a 55.^{3/} Thus the dispute involves the establishment of and/or adherence to a grading policy, not a grade change consultation requirement.^{4/}

Student grading policies predominantly concern educational policy and are usually not mandatorily negotiable. See, e.g.,

3/ Article 16.4 might be implicated if a teacher assigned:

A. A grade of 60, and an administrator sought to lower it to 55; or

B. A grade of 55, and an administrator sought to raise it to 60.

The grades in examples A and B are within the District's allowable ratings because they do not go below the basement grade of 55.

4/ We decide negotiability issues on the factual context of each dispute rather than the characterization of the issues that the parties may advance. See Troy v. Rutgers, 168 N.J. 354, 384 (2001); Jersey City v. POBA and PSOA, 154 N.J. 555, 574 (1998).

Union Tp. Bd. of Ed., P.E.R.C. No. 2002-34, 28 NJPER 75 (¶33025 2001); West Windsor-Plainsboro Reg. Bd. of Ed., P.E.R.C. No. 97-128, 23 NJPER 305 (¶28140 1997); Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989).

Even assuming that, in prior school years, there was not universal adherence to the basement grade policy and that there were differences in the structure and number of marking periods and other procedures used to evaluate student performance, it is undisputed that the basement grading policy was mandated for the 2014-2015 school year and its adoption was challenged by the Association's grievance which seeks to have it rescinded. We hold the grievance challenges a non-negotiable exercise of an educational policy decision.

ORDER

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision.

ISSUED: August 13, 2015

Trenton, New Jersey